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Sent: Thursday, August 31, 2023 11:13:53 AM

Subject: IMAI Submission on TRAI Consultation Paper "Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services"

To,

Shri Akhilesh Kumar Trivedi
Advisor (Network, Spectrum & Licensing)
Telecom Regulatory Authority of India

Subject: IMAI Submission on TRAI Consultation Paper "Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services"

Dear Shri Akhilesh Kumar Trivedi,

The Internet and Mobile Association of India (IAMAI) is a not-for-profit industry body and we play a key role in ensuring the growth and sustainability of the digital industry.

We would like to thank you for giving us the opportunity to provide suggestions on TRAI's consultation paper "Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services". We have taken feedback from several segments of our membership and formulated a submission on the consultation paper. Please find attached IMAI's submission.

We extend all cooperation from our end to support informed policymaking.

Warm regards,

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IAMAI Submission on TRAI CP on Regulatory Mechanism for OTT Communication Services, and Selective Banning of OTT Services

Established in 2004, the Internet and Mobile Association of India (IAMAI) is a not-for-profit industry body representing the digital services industry with over 500 Indian and multinational corporations as its members, which include established companies in diverse sectors of the digital ecosystem as well as start-ups. We firmly believe that India’s digital industry is going to be a major driving force in the economic and social development of the country which includes job creation, innovation, contribution to the GDP, inclusion and empowerment of our citizens, etc.

On 7 July 2023, the Telecom Regulatory Authority of India (TRAI) released a consultation paper on “Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services” (Consultation Paper).

The Consultation Paper seeks suggestions on how OTT services should be defined and how they can be selectively banned. The paper also cites examples of proposed cost-sharing mechanisms between TSPs and OTTs from various foreign jurisdictions and seeks suggestions on a “collaborative framework” between ‘OTT communication service providers’ and licensed telecommunication service providers. In formulating this submission, we have collected feedback from our diverse membership. However, our members Airtel and Reliance Jio have divergent views from those expressed in this document.

IAMAI Submission

This is not the first time TRAI has mooted the idea of regulating OTT services. In another consultation paper released earlier this year, on regulating converged digital technologies and services, TRAI stated that the existing regulatory oversight framework for content regulation is “patchy and inadequate at its best” and “may need a complete overhaul in a converged era in line with many other nations, where a converged regulator regulates carriage and content.”¹ Another TRAI consultation paper from 2018 on regulating OTT communication services asks “...how OTT service providers may participate in infusing investment in the telecom networks?”²

Parallel to this, the Draft Indian Telecommunication Bill 2022 released last year included a broad definition of “telecommunication services” that effectively included a wide range of OTT services under its ambit, potentially subjecting them to the licensing and administrative requirements, as the case may be, typically reserved for spectrum-controlling entities.

The present Consultation Paper also comes at a time when certain industry associations have been seeking additional regulation of OTT services, and the introduction of revenue share mechanisms between OTTs and telecom service providers (TSPs). Their contention is that “OTT players consume humongous amounts of bandwidth, which puts tremendous pressure on the network infrastructure established by the TSPs. At the same time, OTT players gain massive direct/indirect benefits without

¹ <https://www.trai.gov.in/consultation-paper-regulating-converged-digital-technologies-and-services-enabling-convergence>

² https://www.trai.gov.in/sites/default/files/CPOTT12112018_0.pdf

incurring any additional costs. Thus, it would be all the more fitting that they contribute towards the cost of this infrastructure development, which is presently borne by the TSPs alone.”³

This argument disregards that it is not OTT players that “consume humongous amounts of bandwidth”, but consumers themselves who independently transact and purchase data from TSPs. Therefore, in any scenario the amount of data that is consumed – or the bandwidth used – is directly dependent on the amount of data sold by telecom companies to consumers. Nonetheless, repeated demands for revenue sharing arrangements between TSPs and OTT applications persist and largely stem from the fallacious notion that OTTs supposedly ‘free-ride’ and make use of the services offered by the TSPs, while TSPs have to pay infrastructure and license costs. Such propositions also seem to ignore that OTTs have their own associated costs such as costs associated with content delivery networks and other forms of infrastructure, and users of OTT platforms already separately pay TSPs to use their network. Notably, as highlighted by TRAI itself in the Consultation Paper, the contribution of data usage in the revenue for telecom companies from mobile subscribers has grown to more than 10 times from 8.10% in the quarter ending (QE) June 2013 to 85.1% in the QE December 2022.

Worryingly, the Consultation Paper floats the idea of a “collaborative framework” between ‘OTT communication service providers’ and licensed telecommunication service providers – seemingly giving substance to the aforementioned ill-conceived cost-sharing demands made by certain industry associations. It is important to note that such cost-sharing demands are often articulated through a model where the sending party network pays (SPNP) the network operator. The SPNP system for internet interconnection towards the cost of infrastructure development, would essentially mean charging twice for the same service as consumers already pay TSPs for the data they consume.

Implementing the SPNP model will disincentivise growth of digital businesses since a volume based revenue share model would hamper continued growth. It would also mean adding a cost to accessing free or cheap content, a part of which will eventually be passed on to consumers, thus raising the cost of internet usage. It also goes against the net neutrality framework notified by the Ministry of Communications in 2018, which states “The network should be neutral to all the information being transmitted through it. All communication passing through a network should be treated equally i.e., independent of its content, application, service, device, sender or recipient address.”⁴

In a previous consultation paper, TRAI highlighted that “If TSPs are allowed to charge content providers for reaching their users it could lead to them exercising a gatekeeping function. In such a situation, TSPs might find it attractive to restrict access of some content providers as a way to earn more from other content providers that may have a higher willingness to pay.”⁵ Such a construct would be detrimental to the growth of digital businesses in India and ultimately hurt consumer interests.

Q1: What should be the definition of over-the-top (OTT) services? Kindly provide a detailed response with justification.

IAMAI Response

³ <https://www.thehindu.com/business/coai-for-bringing-all-ott-players-under-regulation/article66053659.ece>

⁴ https://dot.gov.in/sites/default/files/DoT%20Letter%20on%20Net%20Neutrality%20Regulatory%20Framework%20dated%2031%2007%202018_0.pdf?download=1

⁵ https://traai.gov.in/sites/default/files/CP_NetNeutrality2017_01_04.pdf

“Over-the-top (OTT) services” is a term that should not be used in the context of India’s regulatory framework. As TRAI has previously in its 2018 consultation paper “Regulatory Framework for Over-The-Top (OTT) communication Services” stated that “...there is no globally accepted definition of OTT services”.⁶ The term can mean different things to many different people, resulting in uncertainty for entities potentially subject to regulation. Nonetheless, in the Consultation Paper, TRAI has cited various definitions of OTT services that rightly outline the fundamental traits of such services. In particular, the following phrases used in these definitions accurately capture the technical nature of such services:

- Organisation for Economic Co-operation and Development describes OTT services as being provided “*over the Internet*”.⁷
- Office of Communications, United Kingdom describes OTT services as functioning ““*over the top*” of an existing data network connection”.⁸
- Body of European Regulators for Electronic Communications (BEREC), as well as the Commonwealth Telecommunication Organisation describe OTT services as being offered “*over the Internet*”.⁹ The Commonwealth Telecommunication Organisation uses the same terminology.¹⁰

Not only do these definitions listed above capture the technical nature of OTT services, they also highlight their differences vis-à-vis TSPs. To elaborate, TSPs operate on the underlying network infrastructure that essentially enables the functioning of the internet, while OTT service providers operate on the application layer which functions on top of the network layer. Therefore, there is a clear distinction in the operational and technical and nature of OTT service providers and TSPs. Notably, TRAI has previously recognised this distinction in its ‘Recommendations on Regulatory Framework for Internet Telephony’ (2017) with respect to internet telephony services.¹¹

Having delineated the distinctions between OTT service providers and TSPs, we recommend TRAI adopt the following definition of OTT services: An OTT service is any online service that is provided to a user over the top of the internet.

Lastly, we note that rigidly defining concepts based on their current understanding can fix their meaning to the milieu within which the definition is made. Such a definition typically does not and in fact cannot account for any changes in how technology and services are used.

Q2: What could be the reasonable classification of OTT services based on an intelligible differentia? Please provide a list of the categories of OTT services based on such classification. Kindly provide a detailed response with justification.

IAMAI Response

⁶ www.trai.gov.in/sites/default/files/CPOTT12112018.pdf

⁷ https://www.potraz.gov.zw/wp-content/uploads/2016/01/Consultation_OTT.pdf

⁸ https://www.ofcom.org.uk/_data/assets/pdf_file/0025/74257/annex_15_glossary.pdf

⁹ https://www.berec.europa.eu/sites/default/files/files/document_register_store/2016/2/BoR_%2816%29_35_Report_on_OTT_services.pdf

¹⁰ <https://cto.int/wp-content/uploads/2020/05/CTO-OTT-REPORT-2020.pdf>

¹¹ TRAI Recommendations on Regulatory Framework for Internet Telephony dated October 24, 2017, stated: “*The separation of network and service layers of telecom service offerings is the natural progression of the technological changes in this domain. It is now possible to separate provision of service contents, configuration and modification of service attributes regardless of the network catering to such service.*”

Digital service providers, referred to as “over-the-top” (i.e., OTT) applications in this Consultation Paper, provide different services with diverse functionalities that do not merely replicate legacy telecom services. The use of the term “OTT” tries to equate the services while differentiating the mode of their accessibility. However, the services provided by digital service providers in the areas of communication, e-commerce, news, social media, enterprise-level digital services etc., are not, per se, substitutable services. Moreover, to reiterate, online digital applications and telecom services operate in different layers of the architecture of the internet – the latter operate over the application layer, while the former operate in the network layer. It is also crucial to acknowledge that traditional telecom service providers possess exclusive rights to utilise public resources like spectrum and operate network infrastructure – a privilege that online digital applications do not possess. Further, we note that digital markets are characterised by low entry barriers and hyper-competition, in contrast to the telecommunications sector. In order to account for the innovation and diversity displayed by such online digital applications, and their technological and functional differences from traditional telecom services, we, at the outset, request such services be recognised as independent consumer and enterprise businesses rather than merely “over-the-top” services.

Furthermore, it is possible for various functionalities of a given digital or OTT service to overlap. For instance, an e-commerce application might provide users with the ability to share images and reviews of their purchased products. Similarly, a social media platform could offer features like reading news or online shopping. Defining a definitive criterion to distinguish between the main and ancillary features of an OTT service and to establish clear categories is challenging. Consequently, we believe that delving into sub-categories of OTT services is not required. Therefore, our responses to the questions presented in the Consultation Paper are framed to address the broader perspective of OTT services as a whole.

Q3: What should be the definition of OTT communication services? Please provide a list of features which may comprehensively characterize OTT communication services. Kindly provide a detailed response with justification.

IAMAI Response

We believe it is not essential to delve into sub-categories of OTT services. Therefore, we have refrained from providing our inputs on this question. Nevertheless, we wish to underscore key distinctions that exist between OTT services and telecommunications services. To elaborate, there are critical differences between OTT services and TSPs, and the services they offer. Further, TSPs furnish internet access, whereas OTT services channel their services to end users over the internet. In simpler terms, devoid of internet access (as facilitated by TSPs), OTT services would be rendered incapable of dispensing their services (which extend beyond mere messaging and calling) to end users. Thus, it is improbable for users to perceive TSPs and OTT service providers as offering the same or similar services. As such, the services provided by TSPs and OTT service providers are not substitutable at a functional level.

Moreover, even operationally, as noted above, OTT services hinge on the offerings of TSPs. Hence, minus the involvement of TSPs, OTT service providers cannot disseminate their content or applications, and users cannot access OTT services. As OTT services are entirely dependent on the network operated by TSPs, they cannot be considered as substitutes of each other.

TSPs, by virtue of their underlying network infrastructure, exercise control over the right to monetise and use important resources upon which the application layer of the internet is dependent. Beyond

control over the underlying infrastructure, TSPs can acquire spectrum, interconnect with the Public Switched Telephone Network (PSTN), exercise their ‘right of way’, etc. In contrast, OTT service providers are completely subject to the choices made by TSPs regarding the provision of their network infrastructure.

Q4: What could be the reasonable classification of OTT communication services based on an intelligible differentia? Please provide a list of the categories of OTT communication services based on such classification. Kindly provide a detailed response with justification.

IAMAI Response

It is important to highlight that, on a prima facie basis, the distinction between ‘OTT communication services’ and ‘non-communication’ OTT providers is flawed, since today’s applications can hardly be compartmentalised in such clear-cut categories. OTT services by their very nature involve an element of interactivity and communication. For example, nowadays even gaming, health, e-commerce, mobility, enterprise, digital news, online search, online navigation, etc., applications provide integrated communication channels to a certain degree. In most cases, such apps are already regulated by relevant legislations. Creating an artificial distinction between the ambit of services within an app would fragment the internet and create regulatory arbitrage. Given the fact, that the same platform/app provides multiple services, disaggregating relevant services for the purpose of regulation and otherwise, is not desirable.

Hence, an attempt at defining OTT services and sub-categories like ‘OTT Communication Services’ will invariably bring rigidity and serve to curtail innovation which ultimately harms consumer welfare.

Therefore, we have limited our responses to the broader category of OTT services (as defined in Question 1 above) for the purpose of providing our responses to the questions raised in the Consultation Paper.

Q5. Please provide your views on the following aspects of OTT communication services vis-à-vis licensed telecommunication services in India:

- (a) regulatory aspects;**
- (b) economic aspects;**
- (c) security aspects;**
- (d) privacy aspects;**
- (e) safety aspects;**
- (f) quality of service aspects;**
- (g) consumer grievance redressal aspects; and**
- (h) any other aspects (please specify).**

Kindly provide a detailed response with justification.

IAMAI Response

In India, robust regulatory frameworks for digital service providers already exist. Notably, such services are already regulated under the Information Technology Act, 2000 (IT Act) and the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 (IT Rules) and the Digital Personal Data Protection Act, 2023 (DPDP Act). They are also variously required to comply

with the Consumer Protection Act and Rules for consumer welfare, and the Competition Act for economic regulation.

Under the IT Rules, digital service providers / OTT service providers are subject to dedicated compliance and reporting requirements. The introduction of a telecom regulatory regime would undoubtedly qualify as an act of over-regulation on such service providers and not only increase compliance but introduce a crippling financial burden. This could hamper innovation and consumer choice, and create uncertainty for business and affect the ease of doing business. This will have a ripple effect across the digital economy, with regulations being unpredictable and onerous. Furthermore, any move to introduce a separate licensing regime for digital service providers / OTT service providers would also effectively pre-empt the Ministry of Electronics and Information Technology's (MeitY) legislative space and efforts to update the IT Act with the proposed Digital India Act (DIA) and the DPDP Act.

With this background, we have provided responses for each of the aspects mentioned above (if applicable) vis-à-vis OTT services in particular.

(a) Regulatory aspects

TSPs have been vying to create a 'level playing field' by relying on the 'same service, same rules' principles, and arguing that OTT services should be regulated under telecom laws.¹² However, given the fundamental differences between TSPs and OTT service providers (as highlighted in Question 3 above) these two services should not be regulated under the same laws.

While TSPs operate on the network layer to provide internet, OTT providers operate on the application layer and use the internet to offer their services. It is important to understand that TSPs operate in a market with a select few players that enjoy certain rights like using and monetising the critical resources on which the application layer is built, control the underlying infrastructure, lease spectrum, interconnect with the PSTN, build infrastructure, etc. By virtue of enjoying these rights, TSPs are subject to a regulatory and licensing regime that OTT service providers are not, and ideally should never be subject to.

OTT service providers are regulated under laws such as the IT Act and the rules and regulations issued thereunder. These include:

- The 'Directions under sub-section (6) of Section 70B of the Information Technology Act, 2000 relating to information security practices, procedure, prevention, response and reporting of cyber incidents for Safe & Trusted Internet' (CERT-In Directions), and The Information Technology (the Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013 (CERT-In Rules);
- The IT Rules; The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (SPDI Rules); The Information Technology (Procedure and Safeguard for Interception, Monitoring and Decryption of Information) Rules, 2009 (Interception Rules); and The Information Technology (Procedure

¹² <https://theprint.in/business/same-service-same-rules-why-telcos-want-regulation-for-ott-players-like-whatsapp-telegram/1381020/> and <https://www.outlookindia.com/business/coai-roots-for-same-service-same-rules-for-parity-with-ott-communication-services-news-232550>

and Safeguards for Blocking for Access of Information by Public) Rules, 2009 (Blocking Rules);

There are also other statutes such as the DPDPA Act that will regulate OTT services, once the provisions are notified. Moreover, the Government has made public statements alluding to the regulation of OTT services under the Digital India Act¹³. Regulating OTT services above and beyond these existing and upcoming laws is likely to increase the cost of compliances and impact the ease of doing business. Therefore, the same should be avoided.

(b) Economic aspects

TSPs argue that while they have to pay infrastructure and license costs, OTTs supposedly ‘free-ride’ and make use of the services offered by the TSPs – and therefore the TSPs should be compensated for use of this infrastructure.

This argument is rationalised basis the expenses incurred on the infrastructure that OTT services use, supposedly without any cost.¹⁴ However, it is fallacious to state that OTT providers “free ride” in any manner, as they are greatly driving the revenues generated by TSPs. It is the demand for online content and applications provided by OTT providers that is driving an increase in the demand for internet access, that is supplied to consumers by TSPs.

The Consultation Paper rightly recognises the contribution of OTT service providers to the growth in revenue of TSPs. The following statistics highlight the revenue growth of TSP:

- From 2019 to 2022, the monthly average revenue per user for wireless services in India grew by nearly 90% from INR 74.38¹⁵ to INR 141.14¹⁶;
- From 2014 to 2022 the volume of monthly wireless data usage increased by about 156 times from 92.4 million GB to 14.4 trillion GB; and
- From 2014 to 2022 the average revenue from data usage per wireless subscriber per month increased around 5.6 times from Rs. 22.19 (for GSM service in the QE December 2014) to Rs. 125.05 (for wireless service in the QE December 2022).

Therefore, it is clear that OTT services have a positive effect on the revenue growth of TSPs, and on the Indian economy as well.

(c) Security aspects

The IT Act provides several safety and security procedures for OTT services to follow in order to protect users. Thus, no further regulation is required in that regard.

For example, both the CERT-In Rules and the CERT-In Directions require OTT service providers to report any cyber-security incidents that occur, as well as designate a point of contact for coordinating with the CERT-In.

¹³ https://www.meity.gov.in/writereaddata/files/DIA_Presentation%2009.03.2023%20Final.pdf

¹⁴ <https://www.financialexpress.com/industry/network-usage-charge-on-otts-fair-coai/2994496/>; https://www.business-standard.com/article/current-affairs/ott-players-are-free-riding-on-telecom-service-providers-networks-coai-122120200288_1.html.

¹⁵ https://traai.gov.in/sites/default/files/PIR_08012020_0.pdf

¹⁶ https://traai.gov.in/sites/default/files/QPIR_31052023_0.pdf

Further, Section 43A of the IT Act pertains to the handling of sensitive personal data or information (SPDI). The SPDI Rules provide for entities to compensate affected persons should they fail to implement reasonable security practices, and thereby causing wrongful loss /gain to any person. The SPDI Rules also elaborate on the specifics of reasonable security practices and procedures, along with other compliance requirements related to personal information and sensitive personal data or information.

Therefore, all OTT services that handle personal information or sensitive personal data or information will have to comply with these obligations. Moreover, once the provisions are notified, the DPDP Act will extensively cover aspects relating to the security-related aspects of processing personal data. The DPDP Act imposes further obligations on OTT service providers: (i) to implement reasonable security procedures to prevent personal data breach and (ii) implement appropriate technical and organisational measures to comply with the DPDP Act. The DPDP Act also allows for the Government, in the interest of the general public, to direct any intermediary to block public access to any information.

Additionally, the IT Act also has broad provisions that enable the State to take measures in the interest of national security, public order, etc., as well as cyber-security. For instance:

- Allowing for the Government and its agencies to issue directions to intercept, monitor, and decrypt information on computer resources to intermediaries or persons in charge of computer resources (Section 69);
- Empowering the Government and its agencies to issue blocking orders to intermediaries pertaining to unlawful content generated, transmitted, received, or stored on any computer resource (Section 69A);
- Issuing directions to monitor and collect traffic data or information on computer resources for cyber-security purposes can be issued to intermediaries of persons in charge of computer resources (Section 69B).

(d) Privacy aspects

As previously mentioned, OTT service providers are already bound by privacy-related provisions outlined in the SPDI Rules and the DPDP Act. These encompass obligations such as presenting a transparent, easily understandable, and readily accessible privacy policy for managing personally information and sensitive personal data and information, designating a grievance officer responsible for timely user grievance resolution, and adhering to stipulations concerning data disclosure and transfer.

Once the provisions of the Digital Personal Data Protection Act, 2023 (DPDP Act) are notified, it will institute a comprehensive data privacy regime. Any further or independent regulation of OTTs on this basis under telecommunication laws will result in dual regulation that, as such, falls outside the primary scope and intent of telecommunication laws, if the same is enacted.

(e) Safety aspects

The CERT-In Rules, IT Rules, SPDI Rules and the DPDP Act also require OTT services to take steps to ensure user safety.

(f) Quality of service aspects

OTT services are incentivised to maintain a high quality of service and be competitive in the market in order to remain relevant in an ecosystem. This is because any drop in quality of services in a particular OTT service is likely to make users switch to a competing OTT service. The ease with which users can switch from one service to another exacerbates this feature of digital markets, as consumers can easily download, delete, and move to another application that offers a similar service.

It is also pertinent to note that several aspects of quality of service for OTT depends on the underlying network, over which OTT service providers do not exercise control. Therefore, imposing any regulatory obligations on OTT service providers will be pointless as they would not be able to control, support or ensure such quality of service in the absence of their ability to manage the last mile access to the users which is controlled by the TSPs

(g) Consumer grievance redressal aspects

As already stated, the OTT service industry is a highly competitive industry with many players and therefore consumers have many options to choose from. Given the potential for high consumer attrition and ease of shifting from one service provider to another, OTT service providers have to ensure that they have dedicated procedures and personnel towards consumer grievance redressal. As an industry practice, OTT service providers, typically provide users features such as ‘support chat’ which enable users to directly communicate with a member of the grievance redressal team in real time and have their grievance addressed (whether by call or text).

Present regulations like the Consumer Protection Act, 2019, coupled with guidelines like the Consumer Protection (E-Commerce) Rules, 2020, and the IT Act in conjunction with the IT Rules, impose various obligations for addressing user grievances. For instance, Rule 3(2) of the IT Rules mandate intermediaries to establish a mechanism for redressing grievances, make the grievance officer's contact information publicly available, and promptly address complaints within designated timeframes.

Q6. Whether there is a need to bring OTT communication services under any licensing/regulatory framework to promote a competitive landscape for the benefit of consumers and service innovation? Kindly provide a detailed response with justification.

IAMAI Response

There is no need to bring digital service providers – including OTT service providers – under any licensing/regulatory framework other than those that they are already regulated under. The premise for licensing TSPs is that they are spectrum controlling entities, with spectrum being a valuable natural resource.

As already noted in our responses above, TSPs enjoy a special and exclusive position in the telecommunication industry by virtue of having exclusive rights to commercialise a public resource, i.e., spectrum. The licensing regime for TSPs is therefore crucial to ensure that this valuable public resource is distributed and used efficiently and in an appropriate manner. On the other hand, digital service providers, such as OTT service providers, do not have any control over critical national resources such as spectrum as they merely provide their services on the application layer. Therefore, the time-tested distinction between spectrum-controlling entities (TSPs) and spectrum-using companies (digital platforms) should be maintained.

Moreover, as stated in our earlier responses in this document, digital service providers, such as OTT service providers, do not offer the same or similar services nor utilise similar technologies as traditional telecom service providers and consequently, should not be captured under the same definition or regulated at par under the same framework. There are also significant functional and business differences between digital service providers and TSPs.

It is also important to reiterate the fact that TSPs earn revenue from all digital services provided on their networks in the form of data and internet charges. From a technical perspective, it is important to reiterate that TSPs operate on the network layer (i.e., the layer connecting different networks and driving the operation of the internet) while digital service providers operate on the application layer (i.e., the layer which rests above the layers responsible for complex network interactions and utilise such underlying network layer to transfer data). Even as late as September 2020, TRAI had also recognised such a separation of layers in its recommendations with respect to digital services. With respect to the relevant markets for such entities, TSPs operate in the market to provide internet access while digital service providers operate in the market to facilitate the exchange of content over the internet. Hence, TSPs and digital service providers cannot be said to offer substitutable services to users. This distinction between the network layer, provided by TSPs, and the application layer, provided by digital service providers has been historically recognised – while the former is under the jurisdiction of the Ministry of Communications, the latter is under the Ministry of Electronics and Information Technology.

As detailed earlier, any new licensing framework for technology application providers is likely to significantly impact the ease of doing business. A new licensing framework is likely to create legal uncertainty for application providers by creating parallel streams of regulations and increasing their compliance burden.

A potential license or regulatory framework for services like OTT applications may act as an entry barrier, increase compliance burdens, and adversely impact India's startup ecosystem by decelerating India's internet growth, disincentivising the entry of new entrants (especially smaller local entrants), new offerings, and innovation. This, in turn, could affect the ease of doing business in India, and force OTT services to reconsider investing in digital technology and innovation, while also passing on costs to the user. It would go against the government's vision of Ease of Doing Business, Digital India, and Maximum Governance, Minimum Government. It also goes against the position in the National Digital Communications Policy 2018 when the DoT committed to "remove regulatory barriers and reduce regulatory burden that hampers investments, innovation and consumer interest...".¹⁷

Furthermore, we note that existing regulatory conditions have enabled the market to grow organically and provide consumers with choice of application. Low switching costs and high availability of alternatives give consumers agency to download and use multiple OTT services and to migrate between them easily.

The TSP market is an example of how burdensome regulation could result in limited consumer choice, with only two or three alternative service providers. Therefore, OTT services should not be subject to any new licensing or regulatory framework.

Q7. In case it is decided to bring OTT communication services under a licensing/ regulatory framework, what licensing/ regulatory framework(s) would be appropriate for the various classes

¹⁷ https://dot.gov.in/sites/default/files/2018_10_29%20NDPCP%202018_0.pdf

of OTT communication services as envisaged in the question number 4 above? Specifically, what should be the provisions in the licensing/ regulatory framework(s) for OTT Communication services in respect of the following aspects:

- (a) lawful interception;
- (b) privacy and security;
- (c) emergency services;
- (d) unsolicited commercial communication;
- (e) customer verification;
- (f) quality of service;
- (g) consumer grievance redressal;
- (h) eligibility conditions;
- (i) financial conditions (such as application processing fee, entry fee, license fee, bank guarantees etc.); and
- (j) any other aspects (please specify).

Kindly provide a detailed response in respect of each class of OTT communication services with justification.

IAMAI Response

No additional licensing or regulatory framework is required for OTT services. Please see our response to Question 6 above for further details.

However, we have outlined (and in some places, reiterated) different laws and regulations currently governing OTT services, and believe are adequate.

(a) Lawful interception

As mentioned in our response to Question 5, the IT Act deals with different powers of the Government and its agencies to, under specified grounds, intercept, monitor and decrypt information in a computer resource; block public access to information in any computer resource; and monitor and collect traffic data or information in any computer resource. Therefore, no separate interception regime is required.

(b) Privacy and security

As mentioned in our response to Question 5, the CERT-In framework and the SPDI Rules already impose numerous obligations on OTT service providers pertaining to cyber-security incidents and protecting the privacy of individuals' personal information and sensitive personal data or information. In addition, OTT services generally allow for (a) reporting or blocking senders of UCC; and / or (b) opting out or unsubscribing from such services, instead of blocking.

(c) Emergency services

The Consultation Paper delves into the reason behind requiring TSPs to provide emergency services like toll free calling during emergencies.

OTT service providers may not be able to provide emergency services as the provision of emergency services is dependent on underlying networks, which OTT services do not have control over.

(d) Unsolicited commercial communication

Few OTT services that allow for commercial communication to take place on their platforms have introduced features that allow users to block unsolicited messages and calls. In any case, such UCC will also be further mitigated once the provisions of the DPDP Act are in effect.

(e) Customer verification

OTT services typically require users signing up for their services to undergo a verification process, either through One Time Passwords (OTPs) received on their phone number or their email, or to use their existing email accounts (for which they have already undergone verification).

(f) Quality of service

Kindly see response to Question 5 above on ‘quality of service aspects’.

(g) Consumer grievance redressal

Kindly see response to Question 5 above on ‘consumer grievance redressal aspects’.

(h) Eligibility conditions

AND

(i) Financial conditions

Discussing the aspects of ‘eligibility conditions’ and ‘financial conditions’ is not necessary as we believe there is no need for a new licensing or regulatory framework for OTT service providers. In any case, the imposition of any eligibility and financial conditions, besides being unwarranted and unjustified, would also create an immense entry barrier.

Q8. Whether there is a need for a collaborative framework between OTT communication service providers and the licensed telecommunication service providers? If yes, what should be the provisions of such a collaborative framework? Kindly provide a detailed response with justification.

IAMAI Response

Existing market practices already promote collaboration between OTT service providers and TSPs. There is, as such, no need to introduce any specific collaborative framework between these two entities.

The Consultation Paper references ITU's suggestions for a collaborative framework for OTT services. The framework aims to enhance competition, safeguard consumers, encourage innovation, stimulate investment, and facilitate infrastructure development, etc. vis-à-vis the complementary growth of telecom and OTT services. These aspects have already been fostered within the existing economic landscape of India. A clear instance of this can be seen in the investments made by OTT service providers in passive telecommunications infrastructure, aimed at enhancing network speed and elevate service quality for users. Notably, several of these investments are conducted in collaboration with TSPs.

Q9. What could be the potential challenges arising out of the collaborative framework between OTT communication service providers and the licensed telecommunication service providers? How will it impact the aspects of net neutrality, consumer access and consumer choice etc.? What

measures can be taken to address such challenges? Kindly provide a detailed response with justification.

IAMAI Response

Any collaboration between digital service providers (such as OTT service providers) and TSPs should be market-driven and voluntary. Mandating collaborations through regulations will distort markets and effectively lead to rent-seeking by TSPs. It is important to remember that such collaborations can potentially turn into collusion, as evidenced by the much criticised “Free Basics” proposal touted by certain telecom service providers and tech companies in 2016. A collaborative framework may encourage TSPs to charge different rates to different OTT services, based on several factors, including but not limited to, existing relationship with the OTT service provider, popularity, size and volume, target audience etc. This will have a severe effect on net neutrality and disproportionately affect smaller companies and startups in India.

Market-driven collaborations between TSPs and digital service providers already exist. Some digital service providers have bundling agreements with telecom companies to help attract and retain customers, thereby creating value for both parties. Digital service providers have also invested heavily in content delivery networks (CDN) for ensuring better delivery of content to end users in association with TSPs.

Moreover, the idea of a “collaborative framework” between ‘OTT communication service providers’ and licensed telecommunication service providers seemingly gives substance to ill-conceived revenue-sharing demands made by certain industry associations.

Further, a revenue sharing model may violate the principles of net neutrality if TSPs resort to charging different rates to different OTT services (depending on their nature, size and so on). Notably, South Korea’s ‘Sending Party Network Pays’ regime is said to be failing because it has led to poor quality of content and network services, increase in prices for users, decline in the type of online content, and has also imposed entry barriers in the OTT services sector.¹⁸ India’s policy makers can learn from the South Korean experience and recognise that interjecting in voluntary negotiations between networks, where there is no evidence of market failure, can have negative consequences for both businesses and consumers.

Introducing the concept of revenue sharing should be avoided as revenue sharing between OTT service providers and TSPs may allow the latter to behave in an exploitative manner, negatively impacting India’s digital economy. The increased costs of operation for OTTs as a consequence of revenue sharing arrangements with TSPs would likely need to be offset by passing on costs to users. This will result in consumers having to pay higher costs, adversely impacting consumer welfare.

Furthermore, the imposition of network usage fees may also result in smaller players being forced out of the market, foreclosing competition and eroding freedom of choice for consumers.

Q11. Whether there is a need to put in place a regulatory framework for selective banning of OTT services under the Temporary Suspension of Telecom Services (Public Emergency or Public

¹⁸https://www.bundesnetzagentur.de/EN/Areas/Telecommunications/Companies/Digitisation/Peering/download.pdf?__blob=publicationFile&v=1

Safety) Rules, 2017 or any other law, in force? Please provide a detailed response with justification.

The Consultation Paper's recognition of the negative consequences of internet shutdowns is appreciated. That said, digital service providers, including OTT service providers, are regulated under IT Act and the IT Rules. These legislations sufficiently cover security-related issues pertaining to digital services. To elaborate, Section 69A of the IT Act read along with the Blocking Rules can be used by the Government to block an entire platform or a specific URL on the grounds of sovereignty and integrity of India, national security, public order, etc., including based on emergency grounds. The Government has, in the past, relied on this provision to carry out blocking. Additionally, Section 79 of the IT Act read with the IT Rules also contain provisions that pertain to blocking access to online content under specified grounds. Therefore, there is no need for additional regulations governing selective banning of OTT services under the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 or otherwise. The current regulatory framework is sufficient.

Q10. What are the technical challenges in selective banning of specific OTT services and websites in specific regions of the country for a specific period? Please elaborate your response and suggest technical solutions to mitigate the challenges.

AND

Q12. In case it is decided to put in place a regulatory framework for selective banning of OTT services in the country, -

- (a) Which class(es) of OTT services should be covered under selective banning of OTT services? Please provide a detailed response with justification and illustrations.**
- (b) What should be the provisions and mechanism for such a regulatory framework? Kindly provide a detailed response with justification.**

AND

Q13. Whether there is a need to selectively ban specific websites apart from OTT services to meet the purposes? If yes, which class(es) of websites should be included for this purpose? Kindly provide a detailed response with justification.

AND

Q14. Are there any other relevant issues or suggestions related to regulatory mechanism for OTT communication services, and selective banning of OTT services? Please provide a detailed explanation and justification for any such concerns or suggestions.

IAMAI Response

We have not answered these questions since we believe that there is no need to implement additional regulations governing OTT services, or even a regulatory framework on selective banning of OTT services (as elaborated in our responses to the questions above).