

MEMORANDUM

From: J. Sagar Associates, advocates & solicitors

Re: Comments on the ‘TRAI Consultation Paper on Regulatory Framework for Over-The-Top (OTT) communication Services’ dated November 12, 2018

Date: December 6, 2018

Summary:

We, J. Sagar Associates, advocates & solicitors, have consolidated our inputs (as below) to the specific queries raised in the ‘TRAI Consultation Paper on Regulatory Framework for Over-The-Top (OTT) communication Services’ dated November 12, 2018. Being a leading full service corporate law firm, which handles a large amount of telecom regulatory and litigation matters, we have put together these inputs based on our advocacy and transactional experience as well as the views we have received from our counterpart international law firms and the clients we work with globally. Based on the comments provided below, we would be happy to participate and contribute in the policy making process along with the relevant authorities.

Abbreviations used:

- OTT – Over The Top
- PSTN – Public Switched Telephone Networks.
- QoS – Quality of Service
- TRAI – Telecom Regulatory Authority of India
- TSP – Telecom Service Provider
- VoIP – Voice over Internet Protocol

Comments:

Q.1 *Which service(s) when provided by the OTT service provider(s) should be regarded as the same or similar to service(s) being provided by the TSPs. Please list all such OTT services with descriptions comparing it with services being provided by TSPs.*

OTT communication services (VoIP) which provide real-time person to person telecommunication services (voice calling and video chatting services) using the network infrastructure of TSPs, can be regarded as services which are similar to what is offered by

TSPs. VoIP services offered by OTT service providers can compete with the traditional voice services offered by TSPs, thus establishing a non-level playing field for the players in terms of the various compliances and restrictions that apply to TSPs under the current licensing regime. VoIP services can be offered either as (i) peer to peer services where calls are made and received over internet alone; or (ii) services where users are enabled to make calls to the PSTN. Both these functionalities could be considered as competition for traditional voice calling services offered by TSPs.

Having said so, OTT service providers offering VoIP services cannot be placed at par with TSPs, in so far as licensing requirements are concerned. A light touch regulatory approach should be adopted towards VoIP services, with focus on critical aspects alone such as national security, data privacy, QoS, etc. Further, TSPs should also derive some form of revenue benefits from the OTT service providers, since the TSPs network infrastructure would be in play for offering such services to end customers. The current model of charging only for data transfer may not be suitable in the context of OTT services. A new arrangement should be designed and implemented such that different elements of OTT services (voice and data) are charged for by the TSPs. Such a revenue sharing model will ensure that both TSPs and OTT service providers benefit from such services.

Q.2 *Should substitutability be treated as the primary criterion for comparison of regulatory or licensing norms applicable to TSPs and OTT service providers? Please suggest factors or aspects, with justification, which should be considered to identify and discover the extent of substitutability.*

Substitutability should not be treated as the primary criterion for comparison of regulatory or licensing norms applicable to TSPs and OTT service providers. Any evaluation on the basis of substitutability will not be appropriate and efficient, since every form of service or network element or technology, at some point, would see an exchange. With that rationale, no technological progress would be acceptable since that could result in some form of substitution.

The appropriate rationale to be applied for determining regulatory requirement, would be the element of competition. That is, whether the new service competes with the traditional service or not, and whether such competition has the potential to substantially displace the latter and cause adverse effects on the business of the service providers offering the same. Based on such assessment, appropriate regulatory checks and balances could be put in place, in order to ensure that all the market players are offered a level playing field to operate.

Q.3 *Whether regulatory or licensing imbalance is impacting infusion of investments in the telecom networks especially required from time to time for network capacity expansions and technology upgradations? If yes, how OTT service providers may participate in infusing investment in the telecom networks? Please justify your answer with reasons.*

To a certain extent, it is true that lack of any regulatory requirement impacts infusion of investments in the telecom networks by TSPs. While TSPs do gain revenue by charging for data transfer, however, this is not comparable to the benefit that OTT service providers derive out of utilising TSP's network.

As indicated above, there should be a revenue sharing arrangement, whereby TSPs receive revenue over and above the regular data charges for usage of network. That way, TSPs will be incentivised to increase network capacity and invest more into network infrastructure, thereby propelling increased and more efficient usage of network capacity by OTT service providers.

Q.4 *Would inter-operability among OTT services and also inter-operability of their services with TSPs services promote competition and benefit the users? What measures may be taken, if any, to promote such competition? Please justify your answer with reasons.*

Yes, inter-operability will promote competition, and with competition the services offered to users would become more efficient given the focus on delivery. This would also turn out to be lucrative for the TSPs given that currently they have minimal revenues from OTT services.

Measures will have to be taken with a strong focus on QoS and the way such OTT services are rendered to the end customers. A good check mechanism by the regulator would ensure that the services are delivered in the right manner and there is appropriate control on the pricing and other operational aspects pertinent to these services.

Q.5 *Are there issues related to lawful interception of OTT communication that are required to be resolved in the interest of national security or any other safeguards that need to be instituted? Should the responsibilities of OTT service providers and TSPs be separated? Please provide suggestions with justifications.*

Regulations in this space should not be restrictive in nature and should not hamper the growth of business in India. Several OTT service providers who operate from outside India should see more potential in the Indian market to augment their operations, and any

regulations should be implemented in such a way that a cohesive environment for growth is established. Therefore, rather than enforcing generic regulatory requirements, focus should only be on critical aspects such as national security, lawful interception, investigative purpose, grievance redressal, data privacy, QoS, etc. Obligations in this regard should be placed on the OTT service providers as well, and the same should be separate from that of a TSP's obligations. Flexibility of the regulations is of key importance, as this sector is growing at a very fast pace, and it is crucial that the rules and regulations keep pace with such growth.

Q.6 *Should there be provisions for emergency services to be made accessible via OTT platforms at par with the requirements prescribed for telecom service providers? Please provide suggestions with justification.*

While it would be beneficial to have such functionality in OTT services, whether this should be a mandatory prerequisite or not, is a matter for consideration. The assessment here should be whether the current obligations on intermediaries under the Information Technology Act, 2000 to allow Indian government intercept data is sufficient enough to cover OTT service providers as well. Any requirement which is at par with TSP's licensing requirements could be an overburden on OTT service providers, thus hampering their business operations. In any event, TSPs already have specific obligation relating to provision of emergency services, and OTT services will only be offered where telecom network/connectivity is available. Therefore, it may not be necessary to have emergency services to be made accessible via OTT platforms.

Q.7 *Is there an issue of non-level playing field between OTT providers and TSPs providing same or similar services? In case the answer is yes, should any regulatory or licensing norms be made applicable to OTT service providers to make it a level playing field? List all such regulation(s) and license(s), with justifications.*

We do not perceive an issue of non-level playing field between traditional TSPs and OTT service providers as they do not provide similar kind of services. In our previous responses, we have brought out the essence of common and distinct aspects of services offered by TSPs and OTT service providers, and the overlap is minimal. As far as TSPs are concerned, they have complete ownership and control over the network infrastructure and all ancillary elements, while OTT service providers only provide certain services over such network. Adequate checks and balances can be placed in order to control the operations of the OTT service providers, in so far as security and other major issues are concerned.

Q.8 *In case, any regulation or licensing condition is suggested to made applicable to OTT service providers in response to Q.7 then whether such regulations or licensing conditions are required to be reviewed or redefined in context of OTT services or these may be applicable in the present form itself? If review or redefinition is suggested then propose or suggest the changes needed with justifications.*

The current regulations that apply to TSPs cannot be made applicable in the present form to OTT service providers. Regulations must be contextualised in terms of the nature of services provided by OTT service providers. This cannot be at par with the licensing and regulatory requirements that are applicable to TSPs. As indicated earlier, critical aspects such as national security, lawful interception, investigative purpose, grievance redressal, data privacy, QoS, etc., should be addressed.

Q.9 *Are there any other issues that you would like to bring to the attention of the Authority?*

The following are certain key points that may considered in the context of framing of regulations for OTT services:

- Internet penetration – While internet has become accessible to a large population of the country, we are still grappling with access speed and/ or coverage issues. The focus has largely remained on the urban sector, and private TSPs are yet to reach out to rural areas, as also expand their network coverage to cater to the needs of increasing number of users. There is still a lot of dependency on traditional voice and messaging services. Moreover, network infrastructure is still at an early phase of development.
- Growing market – Economy is reliant on the internet to a great extent. Connectivity is the lifeline for almost all business models in India. Regulating OTT services at par with traditional telecom services in such a situation may impact the growth of Indian economy since OTT services would not then prefer to operate in India.
- Regulations – In the event OTT services are highly regulated, it might get increasingly challenging for the authorities to monitor services rendered by TSPs, since the regulations would potentially grant more freedom and control to the TSPs. In the current market scenario, there is a possibility that TSPs would be in a position to incentivise their own services. At present, what would suit the Indian market best is, least intrusive and minimal regulatory framework. TSPs should look to create better

infrastructure and ensure greater accessibility in order to reach out to the large populace and augment faster growth of the sector.

- QoS – The telecom access networks must provide acceptable QoS to all its customers and equal treatment to all services that depend upon it. Theoretically, therefore, they are mandated to invest in their own expansion, even when such expansion benefits OTT services that directly compete with telecom networks offerings to its customers, e.g. voice calls and text messaging.
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