



AMERICAN CHAMBER OF COMMERCE IN INDIA

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AMCHAM comments on 'Consultation paper on Regulatory Framework for Over The Top (OTT) Communication Services'

With wide variety of applications and content consumers can access over the internet and communicate, brings healthy competition which fosters growth and improves people's lives. As it brings benefits for consumers, however, Internet-based competition is presenting an interesting scenario for regulators. Many of the current telecommunications regulation and best practices around the world were designed for traditional telephone network services and not for the dynamic communication services available today. Regulations that are appropriate for monopoly offerings or markets characterized by high barriers to entry are frequently an inadequate fit for the Internet space. The intense competition that prevails on the Internet means that the marketplace's forces alone can satisfactorily discipline providers.

The Telecom Regulatory Authority of India's consultation paper on Over The Top (OTT) services is a welcoming way to take stakeholder's viewpoints on how it would be necessary to bring these services under a regulatory regime. The paper is aimed to look into the current regulatory framework to govern these entities.

The paper focuses on regulatory and economic concerns pertaining to the OTT services that are similar to the service provided by Telecom Services providers (TSP).

AMCHAM's submission of its view points looks at the scope of the consultation, definition of OTT services, economic and competition perspectives regarding regulation of OTT services. Certain issues under licensing and regulatory obligations on TSPs and OTTs.

Applying telecommunications-specific regulatory obligations onto Internet-enabled services would increase their providers' costs (thereby impacting prices and availability for consumers) and could even eliminate service models, such as free and "freemium" services, that have delivered tremendous benefits for consumers and largely contributed to universalize information, products and services. Regulators should keep these costs in mind and impose additional regulation only where needed to address material public interest concerns.

At the same time, it is important to recognize the substantial existing lapses of Internet applications and content. A host of laws of general applicability, including those governing tax, competition, privacy, and consumer protection, already apply to Internet applications and content today. Thus, the choice is not between telecommunications-style regulation and no regulation, but between more flexible and less onerous regulatory frameworks. More specific thoughts in this regard, within the context of the questions framed by TRAI, can be found below.

Specific Feedback based on Issues Highlighted by TRAI

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.

AMCHAM suggests that referring OTT services and conventional telecom operators as ‘*same or similar service(s)*’ is erroneous. Communications apps are inherently different from TSP services in a variety of ways, including technical, qualitative, and consumer-oriented differences. Due to these fundamental differences, most services provided by OTT providers cannot be regarded as (hereinafter referred to as ‘OTTs’) can be regarded as identical or similar to the services provided by TSPs, from a regulatory framework perspective. Consequently, treating these two kinds of services as similar, or as substitutes for each other, and subjecting them to similar regulatory frameworks will be harmful for consumers, impractical and arbitrary.

It is important to note, that only licensees covered under the Unified Access Service License (UASL) ie. TSPs are allowed to interconnect with PSTN networks. In contrast, licensees under the Internet Service Provider (ISP) license are permitted to provide only one-way PC to phone interconnection for international long-distance outgoing calls only on PSTN to such countries where termination of such calls is permitted.¹ Importantly, ISPs are not allowed interconnect with PSTN networks in India.²

Therefore, we submit that number-independent communication services which rely on broadband infrastructure provided by TSPs cannot be regarded as services which are similar to TSPs. However, TRAI has already issued recommendations on regulatory framework for such number-dependent services.

Furthermore, OTT services such as Whatsapp, Skype, Telegram, JioChat Messenger and Hike Messenger create dynamic ecosystems that enable user interaction in ways that are not possible through traditional telecom services.³ For instance, unlike telecom services, OTT services facilitate group chats, payments, and sharing of high-definition photos and videos.⁴ Similarly, there are also OTT services that may be used for specific purposes, including for “business interaction”.⁵ For example, Flock⁶ and Slack⁷ are business focused applications, to allow employees and teams to communicate and collaborate with each other on a single platform. This integration of various functions on a single platform allows OTT

¹ <http://dot.gov.in/sites/default/files/internet%20telephony%20CMTS%20amendment.pdf?download=1>

² https://traigov.in/sites/default/files/Recommendations_24_10_2017_0.pdf

³ In fact, some authors have increasingly moved away from the term “OTT” as well, in favour of nomenclature such as “Rich Interaction Applications” that more accurately captures the wide suite of functions that such internet applications perform. See, the Economic and Societal Value of Rich Interaction Applications in India, Page 6. -- <https://www.broadbandindiaforum.com/files/reports-and-publications/THE%20ECONOMIC%20AND%20SOCIAL%20VALUE%20OF%20RICH%20INTERACTION%20APPLICATIONS%20IN%20INDIA.pdf>

⁴ The Economic and Societal Value of Rich Interaction Applications in India, Page 6.

⁵ The Economic and Societal Value of Rich Interaction Applications in India, Page 5.

⁶ <https://flock.com/in/>

⁷ <https://slack.com/>

services to offer a one-stop solution to users' communication needs and creates added value by reducing the time and money they spend on transactions, searches and information gathering.⁸

It is also important to highlight that, on a prima facie basis, the distinction between communication OTT providers and non-communication OTT providers is artificial and flawed, since today's applications can hardly be compartmentalized in such clear-cut categories. For example, most gaming, health and e-commerce applications provide integrated communication channels. Creating such an artificial distinction would fragment the Internet into two categories - one that requires a license or additional regulation and a second that doesn't require any regulations. Given the fact, that same platform/app provides multiple services, disaggregating relevant services for the purpose of regulation and otherwise, is not desirable.

Attempting to regulate selectively the millions of applications on the internet would further be practically extremely difficult. This arbitrage in regulatory obligations would give a reason to circumvent and fragment the internet across types of services. It would also stifle the development of OTT providers that provide integrated service offerings driven by consumer demand. Such services are however the principal drivers of data consumption by the consumers and of rapidly increasing revenues of the TSPs, thereby making them a beneficial proposition for all. Therefore, OTT services should not be segmented and their development should be left to the market forces. This will encourage all the players in the telecommunications sector to innovate, diversify and grow, which in turn will benefit consumers and the economy as a whole.

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.

TSPs and OTT services cannot be considered as similar nor as potential substitutes due to their fundamentally different natures. Substitutability should therefore not be considered as a criterion for making TSPs regulatory or licensing norms applicable to OTT service providers, not only because the scope of the services undertaken by the two players are radically distinct but also because different set of regulations are already applicable to these two kinds of services. Therefore, we have addressed the issue of substitutability in two parts:

(a) Demand-side substitutability (from functionality standpoint), and (b) Supply-side substitutability (from network standpoint).

(a) Demand-side substitutability:

While considering an end-user's experience, OTT services and TSP services do not easily overlap or are considered substitutable. In this context, it is imperative to bear in mind some of the key distinctions/differences between OTT communication services and TSPs.

Firstly, as noted by TRAI, provisioning of communication services on OTT services require a connection to the Internet, while transmission of traditional voice and SMS do not. It is worth noting that as of June

⁸ The Economic and Societal Value of Rich Interaction Applications in India, Page 13.

2018 only 39.32 per cent of the total population has access to internet.⁹ Since Internet access is technically necessary to enable the use of OTT services, many consumers would have an additional burden (internet access) to be able to use the OTT service.

Secondly, accessing OTT services require newer, and technically demanding equipment such as smartphones and tablets, as compared to traditional voice and SMS services which only require a compatible feature phone.

Thirdly, OTT services often provide numerous additional functionalities such as video calls, recorded video or audio messages, file sharing, or group calls/chats, while traditional telecom services normally do not offer such additional possibilities. Further, several OTT players also allow the easy creation of chat groups enabling groups of users to exchange messages with each other. This is a functionality that is more difficult to use or entirely inexistent via SMS.

Therefore, we submit that besides considering functionality, TRAI should also be cognisant of other factors such as accessibility, and convenience to determine substitutability between OTT players and TSPs.

(b) Supply-side substitutability:

On supply-side, OTT communication services rely on the underlying broadband access infrastructure, which is controlled by TSPs, which are the gatekeepers to broadband internet access. As noted above, a consumer cannot access OTT services without first purchasing internet access service from a network operator. It is also worth noting that TSPs enjoy several exclusive rights conferred on them through their licenses that are not enjoyed by OTT services. These include (i) the right to acquire spectrum – a scarce public resource, (ii) the right to obtain numbering resources, (iii) the right to interconnect with the PSTN, and (iv) the right of way to set up physical infrastructure.

OTT services and services provided by TSPs are not substitutable, which is why they are universally regulated by different legal frameworks that are adapted to their respective natures and confers them different rights and obligations. The question of treating substitutability as the primary criterion for the comparison of regulatory and licensing norms applicable to TSPs and OTT providers therefore should not arise.

Applying legacy telecom norms to OTT providers will create new barriers to entry for both new apps and services by raising the cost of service provision. It is also key to being out the distinction between the network layer and the content layer, with TSPs having the right to operate in both the network and application layer whereas OTT providers are restricted to the application layer alone and cannot enter the network layer. Low barriers to entry, the open nature of the Internet, and the rich interactions and experiences that OTT application and content services enable are key to the continued growth of the digital economy. TRAI should consequently abstain from invoking the test of “substantive functionality” to compare OTT and TSP services.

- 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.**

⁹ Telecom Regulatory Authority of India, The Indian Telecom Services Performance Indicators, April – June, 2018; available at <https://www.trai.gov.in/sites/default/files/PIRJune03102018.pdf>

The perception that OTT services providers do not participate in infusing investment in telecom network is based on an outdated conception of the network infrastructure. It is imperative that TRAI adopts a holistic approach, and take into account the overall socio-economic benefits derived from both communication, and non-communication OTT players. Illustratively, the recently notified National Digital Communications Policy, 2018 highlights that a 10% increase in broadband penetration in a country could potentially lead to upwards of 1% increase in GDP. The Policy underlines that the impact of broad penetration on GDP could be significantly higher for India, given the increased productivity and efficiency gains that are likely to accrue to the economy. It is important to remember that besides communication (OTT) services, increase in online video traffic also contributes substantially to the revenue streams for TSPs.¹⁰

It is worth noticing that the huge amount of revenue that OTT providers invest as a proportion of their revenue is high. These OTT providers have a positive indirect impact on investments in telecom networks which has fuelled demands for underlying telecommunication services. A further regulatory trend is towards simplification – the maxim of regulation is that it should only be applied where necessary, and as the markets develop this is less often the case.

TRAI should hold that internet applications, content and Internet access are complementary & symbiotic services. Just as network operators benefit from new revenues by making digital content and services available to Internet users, providers of applications and content benefit from an accessible, fast, efficient and reliable Internet. Therefore, there is no need to impose additional regulation to compel investments in infrastructure that are spontaneously driven by market forces., as many OTT providers already invest heavily in various parts of the network infrastructure.

Subjecting OTT services to the same regulatory framework as that applied to TSP services, or imposing new regulations for artificially stimulate investments in network infrastructures will distort the market and only serve to limit the potential of the OTT ecosystem, hamper innovation in the country and impact consumers in a negative manner.

4. Would interoperability among OTT services and also interoperability 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.

Competition is always to the benefit of businesses as well as consumers if it is fostered in a conducive and balanced environment. Most importantly a competitive environment also causes lowering of prices for both data and traditional services and consumers can avail of better data connectivity at a lower price. The rationale for requiring TSPs to interconnect and interoperate does not apply to OTT communications services.

It is better that concerns towards anti-trust violation are dealt via a well-established competition law ie. Indian Competition Act, 2002. Here it is worth revisiting that the issue of jurisdictional overlap between TRAI and the Competition Commission of India is presently being examined by the Supreme

¹⁰ TRAI Consultation Paper on 'Regulatory framework for OTT services', Para 3.3.2

Court¹¹, following from the telecom regulator's attempt to deal with anti-competitive practices in the telecom sector¹².

Even if TRAI's proposal to impose interoperability requirements on OTT players is conceivable in principle, technological feasibility of the same remains questionable. Notably, from a software design and product planning perspective, it remains unclear whether accommodating interoperability with an unknown amount of other services and software, all with their own systems and purposes, is technologically feasible. Additionally, it is important that aspects such as cross-border standards are first developed given the nature of the open internet.

Another aspect to note is the in contrast to TSPs, interoperability between OTT services may not be such an important feature, since users'/consumers' can easily download and access services provided by multiple OTT players at the same.

Furthermore, it must be noted that, in most cases OTT services are characterised with strong product differentiation. In contrast, services such as voice, and SMS, offered by traditional telecom operators are characterised by high degree of product homogeneity. The presence of product differentiation among OTT players essentially drives competition, which in turn facilitates innovation. Therefore, introducing interoperability requirement via regulatory obligations, could perhaps lead to adverse effect on incentives to differentiate products thereby hampering competition.

Therefore, we submit that TRAI should adopt a cautious approach with regard to the imposition of interoperability obligations. Additionally, with respect to technological feasibility of interoperability among OTT players, it is advisable that TRAI floats a distinct consultation paper on the issue.

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.**

Safeguarding India's national security interests and maintaining law and order is imperative. Consequently, the lawful interception of communication, in the interests of national security and law and order, is an essential prerogative of the government.

In our view, current Indian law more than adequately addresses all concerns on the lawful interception of OTT communication.¹³ Further, there are strong issues of privacy, ensuring trust in end users and enforcement (due to the large number of players) that would make looking at interception for OTT providers alone a difficult task. As such, there are no further issues that need to be discussed, nor do additional safeguards need to be instituted. Should such issues however arise, they should not be

¹¹ <https://blog.sconline.com/post/2018/08/14/trai-v-cci-whose-jurisdiction-is-it-anyway/>

¹² Telecom Regulatory Authority of India, Consultation Paper on Regulatory Principles of Tariff Assessment, dated February 17, 2017; available at https://trai.gov.in/sites/default/files/Consultation_paper_03_17_feb_17_0.pdf

¹³Response to TRAI Consultation Paper on Regulatory Framework for Over-the-top (OTT) Services. Available at: https://cis-india.org/internet-governance/resources/net-neutrality/2015-03-27_cis_trai-submission_regulation-OTTs

looked at only in the context of ‘TSP-like’ OTT services but holistically, for the Internet in India as a whole.

Technical infeasibility: Lawful interception provisions directly flowing from the licensing conditions applicable to TSPs currently require specific arrangements to be made on their telecom equipment which allow interception and monitoring from a centralised location. OTT services rely on the infrastructure of the TSPs, and do not entail ownership or control over telecom equipment such as fibre. The technical design of several OTT services that focus on user privacy does not permit interception of content data, though metadata (including the identity of those contacted and time stamps) is made available as per law enforcement requests made lawfully by the appropriate government authority. Any alterations to this design directly impede against the privacy and security guarantees, as well as OTT service providers’ human rights and contractual obligations towards its customers.

Information privacy concerns: The Supreme Court judgment in *KS Puttaswamy* has specifically enumerated that state restrictions to the fundamental right of privacy must be prescribed by law, necessary and proportionate. Lawful interception provisions create specific privacy harms, owing to which the UN Special Rapporteur on Privacy has called for nuanced legal requirements with respect to government interception of user information. India’s current interception practices have also been noted by the UN Special Rapporteur for their unauthorised nature.¹⁴

Information-security concerns: TSPs are further subject to a maximum encryption length of 40 bits; higher encryption standards may be employed upon prior approval from the Department of Telecommunications (DoT). This is in direct contrast with information security best-practices followed across the world. For instance, the US National Institute of Standards and Technology (NIST) does not permit encryption standards below 80 bits.

Telecommunication networks form part of critical national infrastructure, any compromise of which holds wide national security implications. The prescription of low encryption standards is one solution to accessing user communication data for law enforcement purposes. However, regulatory best practices across the world tend towards alternative solutions such as creating state capacity to develop improved intercept technologies to be deployed on a case basis. Illustratively, German authorities have chosen not to limit the free availability of encryption products in the interests of promoting the development of indigenous IT security technology and help secure users against rising hacker attacks.¹⁵

Where extant prescriptions for TSPs provide privacy and security protections to extent restricted by applicable conditions, OTT service providers can serve to complement these by enabling user choice vis-à-vis opting for higher information security protections. Furthermore, it has been found that mass surveillance, where constant monitoring and access to content data is available, has not been effective in identifying national security threats.¹⁶ Additionally, the UN Special Rapporteur on Freedom of Expression has specifically noted the obligations of corporations, especially messaging apps, in providing adequate anonymity and encryption to users to protect their free speech and expression rights.¹⁷ *It is submitted, therefore, that parity between TSPs and OTT service providers on these counts can be detrimental to information security and privacy interests of Indian consumers, and serve against India’s national security interests.*

¹⁴ <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=24201>

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https://www.bundesnetzagentur.de/DE/Allgemeines/DieBundesnetzagentur/WAR/Stellungnahmen/Stellungnahmen_OTT_EN.pdf?__blob=publicationFile&v=2

¹⁶ <https://mediacompolicy.univie.ac.at/wp-content/uploads/2016/07/Council-of-Europe-Report-on-MassSurveillance.pdf>

¹⁷ <https://www.ohchr.org/Documents/Issues/Opinion/EncryptionAnonymityFollowUpReport.pdf>

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.

No such additional provisions are required as OTT providers do not offer any 'telecom services' and OTT services are highly dependent on the level/QoS of internet access to the end user which is controlled and managed by TSPs. The last mile (broadband, wireless or fixed line) access to user is enabler for any emergency services which can be offered by the TSP only as they provide & control the last mile. Any such obligation for OTT providers will be meaningless as they would not be in a position to support the very purpose of emergency services in the absence of their ability to manage the last mile access to the users.

For emergency services, regulators in other jurisdictions have drawn a critical distinction between services for which consumers expect emergency services access, and those for which there is no such expectation. Ofcom in the United Kingdom and the Federal Communications Commission in the United States,¹⁸ for example, have acted to ensure that the public receives emergency calling and other regulatory protections when purchasing "mainstream" services that are likely to be used as a consumer's primary form of two-way, real-time voice communication.¹⁹ This approach ensures that customer expectations about the capabilities of their services are met, while innovative offerings that do not have attached legacy expectations are not unnecessarily burdened or discouraged.

Indeed, imposing emergency obligations on new services that differ from traditional circuit-switched voice calling may have unintended and undesirable consequences. Introducing new options may cause confusion, as customers may not understand which services can connect them to emergency help and which cannot. Moreover, when callers reach emergency services using traditional platforms, those calls are delivered using proven methods. Services that do not provide emergency calling maybe likewise clearly disclose their limitations, including reminding consumers to retain and use their existing mobile or landline services to make emergency calls.

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.

"Levelling the playing field" does not emerge as a good premise in the analysis of extending specific legacy regulatory requirements to online service providers. Rather, the appropriate regulatory goal should be to make regulatory burdens on all providers as light as possible while still achieving critical policy objectives. Some obligations may not apply to particular providers including OTT providers, eg

¹⁸ The U.S. regulator has imposed obligations on "interconnected VoIP" because they allow users to both make calls to the public switched telephone network ("PSTN") and receive calls from the PSTN. See 47 C.F.R. § 9.3 (interconnected VoIP service, among other things, "permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.").

¹⁹ See Ofcom, *Ofcom says VoIP providers must offer access to 999*, July 26, 2007, <http://media.ofcom.org.uk/news/2007/ofcom-says-voip-providers-must-offer-access-to-999/> (discussing imposition of emergency calling on "mainstream" VoIP services); 47 C.F.R. § 9.5 (imposing 911 calling obligations on interconnected VoIP providers).

spectrum licensing; while other obligations may be too costly and technically difficult to implement for a particular service. For emergency calling, for example, the cost of extending it for most online services, and the risk of consumer confusion and therefore harm, raise serious challenges.²⁰

Policy makers should take an innovation-first approach: Identify the rules that are barriers to innovation; clarify the original public interest values served by legacy policies to determine which values remain relevant; leverage technology to help address today's concerns.²¹

As we have stated above, TSPs and OTT providers are not comparable as they do not provide similar services. TSPs utilise public goods that are scarce while OTT providers are built on the internet, which is inclusive and accessible to all.²² As a result, the question of a level playing field for the two service providers does not arise, as telecom services and OTT services operate in different fields. In fact, levelling the playing field between OTT providers and TSPs through regulatory or licensing norms may not even be possible in most cases. For instance, regulations that govern the spectrum licensing requirements for TSPs will not apply to OTT providers since only TSPs are allowed to directly use spectrum.²³

- 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.**

It is pertinent to note that establishing a regulatory level playing field should not be an end in itself, but should rather represent a specific criterion to evaluate whether regulatory change is needed. In this context, TRAI should be cognisant of following aspects:

Firstly, it is important to remember that regulations applicable to telecom operators are meant to facilitate fair access to scarce telecommunications resources (e.g. spectrum allocation), and along with granting rights for selected licensees to exploit a scarce resource, are bound to impose corresponding obligations on licensees and regulated entities to ensure the best possible uses of such scarce resources (and prevent interference with other service providers that are granted similar rights, which could undermine the benefit of the spectrum). By contrast, OTT services are fundamentally different, because they do not depend on a scarce resource like spectrum, are not subject to the same constraints. With this in mind, OTT regulations need not focus on limiting the ecosystem of service providers to a chosen few in order to maximise the use of a scarce resource, or on enforce limitations around the use of a scarce resource (e.g. via a closely controlled licensing regime).

Secondly, imposing licensing norms on OTT services could potential adversely impact the OTT ecosystem, particularly digital start-ups by – inhibiting their ability to unlock innovation, due to

²⁰ Communications Chambers:2016

²¹ Tennenhouse and Gillet What About Innovation? Intermedia vol 42(1), Spring 2014

²² Access Now position paper: Protecting digital rights in the “OTT” debate, available at <https://www.accessnow.org/access-now-position-paper-protecting-digital-rights-ott-debate/>, last accessed on 28 November 2018.

²³ #NetNeutrality: Issues with the TRAI's consultation paper on Internet Services Licensing, available at <https://www.medianama.com/2018/11/223-net-neutrality-trai-consultation-ott-internet-licensing/>, last accessed on 28 November 2018.

increased compliance burdens or costs; and limiting competition among OTT service providers by creating entry barriers by virtue of licensing/regulatory obligations.

Much of the indigenous digital start-ups rely on such platforms to build their products. If the platforms are restricted by stifling regulations, the development of the start-ups based on these platforms in turn will be adversely affected. This in turn will lead to less investment in India and fewer innovative online services being offered to consumers in India relative to the rest of the world

In addition to the issues with inferring perfect demand and supply side substitutability highlighted in this response it is also costlier for consumers to switch between TSPs. Consequently, many regulatory/licensing obligations on TSPs are necessary to prevent telecom operators from their control over the underlying network infrastructure do not adversely impact consumers, and other service providers. In contrast, OTT services operate in a highly competitive global market with low barriers to entry.

Therefore, we submit that new regulations or the application of legacy regulations on new services provided OTT should be avoided except where rooted in legitimate and specifically identifiable and articulated public policy objectives. It would be premature to apply new regulations in the absence of an evidence-based assessment that existing regulation is insufficient to achieve a government's public policy goals.

Rather than seeking to incorporate OTTs into a legacy regulatory framework, TRAI should explore ways to reduce the number and impact of legacy regulations which may have been relevant in the past but no longer have efficacy in an era of expanding mobile and digital communications. By alleviating at least some of the regulatory pressure on service providers, the cost savings could be significant, providing TSPs with capital to expand their offerings in ways that enable them to partner with OTTs.

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

Need for regulation:

A foremost understanding of regulatory governance marks the aim of regulatory intervention as geared towards tackling market failure, and its concomitant impact on consumers. In line with this Committee on Digital Payments constituted by Ministry of Finance under the chairmanship of Ratan P. Watal also highlighted that the fundamental tenet of a market economy is that markets work. They promote efficiency by allocating resources to their highest value users.²⁴ In contrast, introducing burdensome regulations during the initial phases of market or ecosystem development can negatively impact the market, consequently adversely affecting consumers. Another widely followed principle for good regulation is the test of '*proportionality*' – to ensure that cost of regulation on market players and consumers are proportionate to the benefits derived from regulations.²⁵ Towards this, it is important that a regulator first undertake a comprehensive 'regulatory impact assessment' to identify the specific

²⁴ Committee on Digital Payments, Medium Recommendations to Strengthen Digital Payment Ecosystem; available at http://finance.du.ac.in/du-finance/uploads/pdf/Reports/watal_report271216.pdf

²⁵ See FCA, Principles of good regulations; available at <https://www.fca.org.uk/about/principles-good-regulation>. Also see European Commission, Better regulation in commission, available at <https://www.fca.org.uk/about/principles-good-regulation>; and OECD, Strategies and Policies for better regulations, available at <https://www.oecd.org/gov/regulatory-policy/44912041.pdf>

cost and benefits of introducing new regulations, and how such regulatory actions can be best designed to achieve the desired public policy objectives.

As noted above, presently, OTT services provide their offerings in a highly competitive global market. Presence of global competition further encourages market players to continuously allocate resources to innovate. However, in the consultation paper TRAI's intention appears to address the (temporary) revenue loss to TSPs, by introducing similar regulations on OTT services. In pursuance of the recently notified 'National Digital Communications Policy' – which calls for promoting innovation in OTT communication services – we submit that TRAI should take care to consider the achievement of those goals across the entire digital services ecosystem and not just telecom networks and services.

Therefore, it is imperative that TRAI broaden its efforts to understand and analyse OTT offerings to ensure that they are considered by all relevant agencies, so that the study can include a broader lens into the digital ecosystem, instead of considering from the limited standpoint of revenue loss to TSPs.

Lack of TRAI's jurisdiction:

At the outset it must be stated that OTT players operate only on the application layer of the public internet, while TSPs operate on both the application, and network layer of the public internet. Against this backdrop, it is important to revisit the regulatory architecture governing the network, and application layer of the public internet, which includes – The Indian Telegraph Act, 1885; The Telecom Regulatory Authority of India Act, 1997 (Act); and the Allocation of Business Rules, 1961 (as amended upto November 2, 2018).

Firstly, as per the Allocation of Business Rules, 1961 – the Department of Telecommunications which administers the TRAI Act, has jurisdiction over *“Policy, Licensing and Coordination matters relating to telegraphs, telephones, wireless, data, facsimile and telematic services and other like forms of communications”*.

The term telegraph defined under the Indian Telegraph Act, 1885 is understood mean *‘any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electro-magnetic emissions, radio waves or Hertzian waves, galvanic, electric or magnetic means.’*

Furthermore, the TRAI Act delineates the regulatory jurisdiction of the telecom regulator. Specifically, section 11 (a) of the Act provides that the regulator can issue recommendation on issues including - need and timing for introduction of new service provider; terms and conditions of license to a service provider; revocation of license; technological improvement in the services provided by the service; and efficient management of available spectrum.

Notably, under section 2(j) of the TRAI Act 'service provider' is understood to mean services provided under a license issued by the Government.

Conversely, under the Allocation of Business Rules, 1961 the Ministry of Electronics and Information Technology (MeitY) is empowered to design policy framework on matters related to information technology, electronics, and internet (all matters other than licensing of Internet Service Providers). Additionally, MeitY administers the Information Technology Act, 2008 – legislation which governs OTT services in India.

Therefore, based on the aforesaid-legal provision, it is clear that the regulatory architecture in the creates distinction between 'network' layer and 'application' layer of the internet – with DOT/TRAI entrusted with designing regulations for the former; and MeitY empowered to issue norms for the

latter. Importantly, it is a well settled principle of law that *“the power to issue regulations cannot be used to subvert the provisions of the said Act and to assume powers and functions not conferred by the said Act”* (MTNL v. TRAI AIR 2000 Delhi 208).

We submit that issuing recommendation/regulation on ‘application’ layer (OTT services) is outside the jurisdictional remit of the TRAI.