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Cc: LWade@actonline.org
Sent: Friday, August 4, 2023 9:38:50 AM
Subject: Comments of ACT | The App Association re: Consultation Paper No.10/2023 (Consultation Paper on Regulatory Mechanism for OTT Communication Services, and Selective Banning of OTT Services)

Please find attached comments of ACT | The App Association (www.actonline.org) in response to TRAI's Consultation Paper No.10/2023 (Consultation Paper on Regulatory Mechanism for OTT Communication Services, and Selective Banning of OTT Services).

We welcome the opportunity to meet with you, at your convenience, to discuss our views and how the App Association may be of help to TRAI and the GoI moving forward. If you have any ideal times to speak, please let us know.

Best regards,

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August 4, 2023

Submitted via Electronic Mail to advqos@trai.gov.in

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RE: Comments of ACT | The App Association on the Telecom Regulatory Authority of India's Consultation Paper on a Regulatory Framework for Over-The-Top (OTT) Communication Services and Selective Banning of OTT Services

I. Introduction and Statement of Interest

ACT | The App Association hereby submits comments in response to the Consultation Paper on a Regulatory Framework for Over-The-Top (OTT) communication Services by the Telecom Regulatory Authority of India (TRAI).[1]

The App Association represents thousands of small business software application (app) development companies and technology firms that create the software apps used on mobile devices and in enterprise systems around the globe, including many innovators in India such as iCoderz Solutions Pvt. Ltd. of Gujarat and Exousia Tech of Chandigarh. Today, the ecosystem the App Association represents—which we call the app economy—is valued at approximately $950 billion and is responsible for millions of Indian jobs. Alongside the world's rapid embrace of mobile technology (including the mobile technology at issue), our members create innovative solutions that power the internet of things (IoT) across many modalities and segments of the economy. Small companies and startups represent 82 percent of the top app makers and technology developers, dominate revenue rankings, and drive innovation in the mobile economy.

Today, billions of people around the world—and hundreds of millions of Indians—use internet-enabled apps for business, education, and social connection. The free flow of information across borders is crucial to the economy by providing access to international markets, decreasing operational costs through the use of global computing

[1] https://www.trai.gov.in/notifications/press-release/trai-releases-consultation-paper-regulatory-mechanism-over-top-ott

resources like cloud-based services, and enabling a diversity of novel and inventive business models.

II. General Comments of ACT | The App Association on the Benefits of OTTs to Indian Consumers and Businesses, and the Impact of New OTT-Specific Regulatory Proposals

Consumers benefit from over-the-top (OTT) services—applications and services that are accessible over the internet and are accessed via telecommunications network operators' networks—in a variety of ways. OTT applications and services provide consumers with access to personalized and customizable services at lower costs and higher efficiency, driven by enhanced competition that allows new innovations across the array of use cases that consumers rely on for internet connectivity. Further, OTT services reduce consumer costs by stimulating telecommunications network growth by increasing demand for bandwidth, driving further investment in infrastructure, and facilitating innovation. These benefits are already seen today across numerous sectors of the global economy, such as communications, transport, retail, and entertainment. In addition, this trend will likely continue. The demand for OTT services continues to grow and is expected to provide $129 billion of value annual by 2023.[2] We urge the TRAI to avoid approaching OTT as its own standalone sector or market segment.

In addition, OTT applications and services are key enablers of the digital economy and the internet of things (IoT), powering a future where an increasing number of everyday products use the internet to communicate data collected through sensors, inform decisions through data analytics, and ensure efficiencies in processes, products, and services across every sector. The global digital economy is projected to reach a value of $23 trillion by 2025.[3]

Apps are the interface for technological progression. The app industry that the App Association represents—one that is primarily OTT—has been in existence for approximately a decade and has experienced incredible growth. Apps revolutionized the software industry, touching every sector of the economy that is led by startups and small businesses, many of which are in India. While OTT applications and services can help meet nearly every need in a consumer's life, the app on an internet-enabled mobile device (smartphone, tablet, etc.) is likely to remain the interface for communicating with these devices. And in the enterprise context, OTTs offer the ability to realize greater efficiencies and improvements across verticals, from health to industrial control to manufacturing and other sectors. The continued rise of innovative OTT services will hinge on the app economy's continued innovation, investment, and growth; and we urge TRAI to affirm that it shares the goal of advancing the development and uptake of innovative OTTs in India.

[2] https://www.multichannel.com/news/u-s-ott-revenue-will-spike-26-to-28-8b-in-2018-report-says.

[3] https://talkiot.co.za/2018/05/29/digital-economy-to-be-worth-23-trillion-by-2025/.

Based on the above, we strongly discourage TRAI from creating a new regulation for OTT applications and services at large. Such regulation is, practically, a suggestion that the method of delivering the service (OTT) alone presents some additional risk to consumers. We completely reject this presumption, which has not been demonstrated by an evidence base. Further, the scope of such a regulation would stretch to cover the entire digital economy, which is not feasible.

The impact of such a new regulation on OTT provision, deployment, and uptake would be significant and damaging. OTT-specific regulations pose a serious threat of creating an overly burdensome regulatory environment that will hamper economic growth not only for a locality that puts such regulations in place but also for the mobile app developer business community in that locality. The application of an OTT-specific regulatory framework in a local jurisdiction would be detrimental to the growth of OTT applications and services and to the availability of these OTT applications and services to consumers in that jurisdiction. We strongly urge TRAI to acknowledge that these OTT application and service providers already go to great lengths to comply with general consumer protection laws in the jurisdictions they do business. Further, TRAI should avoid applying legacy Telecommunications Service Provider (TSP) regulatory requirements to OTTs; such attempts often have the effect of “locking in” older technology and stagnating innovation, harming the quality and reliability of consumer service.

OTTs also already pay local, regional/provincial, and national taxes. The imposition of further OTT-specific fees, levies, or taxes will have a negative impact on the provision of OTT services in India. Additionally, these fees, levies, and taxes will be diverted from OTT application and service providers’ resources which are available to invest in both the innovation in services themselves and the means of delivery in which they already invest. Particularly, for small businesses, these fees, levies, and taxes can represent insurmountable barriers to market entry. In order for these OTT application and service providers to grow and create jobs, they must look to expand to new customers across the global digital economy. Targeted fees, levies, or taxes in a locality (along with other trade barriers) present the possibility of different legal liability concerns depending on the jurisdiction, degrading the ability to more quickly reach a global scale.

We note that OTTs provide different services from TSPs, which focus on providing the capacity to end users. It is important that TRAI understand and acknowledge that OTT service providers already bear costs to ensure content delivery networks can provide their application or service to stay competitive and a part of the virtuous cycle of innovation that includes OTT application and service providers, telecommunications network operators, and consumers. OTT services reduce consumer costs by stimulating telecommunications network growth which in turn increases demand for uptake of data and the need for more bandwidth. This drives further investment in infrastructure by the TSP. Customer service issues and quality assurance concerns for OTTs are best addressed through free market competition; in the hyper-competitive OTT application and service provider world, customer service and/or quality assurance are key market differentiators. Failure to innovate in either area will quickly drive customers to a competing OTT application or service provider because of very low switching costs. These are also assured through compliance with general consumer protection laws in place around the world today.

Further, we note our opposition to proposals that would require OTT service providers to contribute to universal service funds used for network roll-out in unserved and underserved areas. Such proposals present the danger of combining a telecommunications network operator with an OTT application or service provider. Telecommunications network operators and OTT application and service providers are fundamentally different; OTT application and service providers do not primarily engage in the business of providing broadband connectivity to an end-user (instead, they offer applications or services over that broadband pipe). Further, OTT application and service providers are significantly contributing to global investment in telecommunications infrastructure (data centers, etc.).

Finally, new OTT regulations would damage the Indian startup ecosystem by imposing new market entry costs and barriers to innovation. Ultimately, such regulations would suppress innovation by small businesses in India that would otherwise grow and create new jobs in India.

III. Specific Input of ACT | The App Association Raised in the TRAI Consultation Paper

Consistent with our general views above, we provide specific input regarding issues raised by TRAI in the Consultation Paper:

With respect to defining OTT services, OTT services provide audio, video, and other media over an IP network in real time. As discussed above, generally, OTT services are not similar or the same to TSP services, save for OTT communications services that have the primary purpose of providing real-time person-to-person telecommunication voice services using the network infrastructure (e.g., utilizing a telephone number) of a TSP. Any other OTT services should not be considered the same or similar to TSP services for the reasons provided above in our general comments above.

Substitutability may be used in comparing regulatory or licensing norms applicable to TSPs and OTT service providers based on the primary purpose of a service, as consideration of any ancillary purposes would, in practice, have OTTs unduly determined to be substitutable for TSP services when additional (even minor) features in OTT services are considered. More specifically, a “primary purpose” test should be utilized to OTT communications services that provide real-time person to person telecommunication voice services using the network infrastructure (e.g., utilizing a telephone number) of a TSP.

Further, as discussed above, providing the capacity for services as opposed to providing services that are available over the top of the networks providing such capacity. As noted above in our general comments, TSP and OTT services are not similar or the same and are fundamentally different. This difference further is illustrated through the relations between TSP and OTT service providers: OTT services reduce consumer costs by stimulating telecommunications network growth which in turn increases demand for uptake of data and the need for more bandwidth, driving further investment in infrastructure (which OTTs, by definition, cannot provide) by the telecommunications network operator.

The App Association does not believe that a regulatory or licensing imbalance is affecting infusion of investments in the telecom networks required from time to time for network capacity expansions and technology upgradations. As we have discussed above, OTTs do not maintain or provide network infrastructure services and are generally different from TSP services. We strongly urge TRAI to acknowledge that OTT service providers already go to great lengths to comply with general consumer protection laws in the jurisdictions in which they do business. OTTs also already pay relevant local, regional/provincial, and national taxes as applicable. Further, applying TSP regulatory requirements to OTTs would have the effect of “locking in” older technology and stagnating innovation, harming the quality and reliability of consumer service.

OTT service providers already bear costs to ensure content delivery networks can provide their application or service to stay competitive and a part of the virtuous cycle of innovation that includes OTT application and service providers, telecommunications network operators, and consumers. OTT services reduce consumer costs by stimulating telecommunications network growth which in turn increases demand for uptake of data and the need for more bandwidth. This drives further revenue and investment in infrastructure by the TSP. Customer service issues and quality assurance concerns for OTTs are best addressed through free market competition; in the hyper-competitive OTT application and service provider world, customer service and/or quality assurance are key market differentiators. Failure to innovate in either area will quickly drive customers to a competing OTT application or service provider because of low switching costs. These are also assured through compliance with general consumer protection laws in place around the world today.

While we do not agree that there is a regulatory or licensing imbalance affecting infusion of investments in the telecom networks, we underscore that requiring OTT service providers, who are already significantly contributing to global investment in telecommunications infrastructure (data centers, etc.), to new regulations (e.g., to attain special licenses and/or to contribute to universal service funds used for network infrastructure buildouts) would cause damage to the entire digital ecosystem in a variety of ways:

- Such a requirement would effectively, and inappropriately, combine a TSP with an OTT service provider. Telecommunications network operators and OTT application and service providers are fundamentally different; OTT application and service providers do not primarily engage in the business of providing broadband connectivity to an end-user (instead, they offer applications or services over that broadband pipe).

- The imposition of further OTT-specific fees, levies, or taxes will have a negative effect on the provision of OTT services in India as such fees, levies, and taxes will be diverted from OTT application and service providers' resources which are available to invest in both the innovation in services themselves, the means of delivery in which they already invest, and hiring new talent. Particularly, for small businesses, these fees, levies, and taxes can represent insurmountable barriers to market entry. In order for these OTT application and service providers to grow and create jobs, they must look to expand to new customers across the global digital economy.
- Creating such a requirement in India would present barriers to the free flow of data and would create significant barriers to the international digital economy by presenting different legal liability in India not present in other jurisdictions, degrading the ability to more quickly reach a global scale. Further, such a requirement would run afoul of the WTO commitment not to levy tariffs on e-commerce.

We note that TRAI has previously proposed, as one option, avoiding specific regulatory intervention and permitting market forces to force TSPs to correct their business models. The App Association believes that, given there is no demonstrated market failure present (and specifically that none has been demonstrated by TRAI), such an approach is the most appropriate.

The App Association agrees with TRAI that interoperability between and among TSP and OTT services promotes competition and benefits end users. To date, widely-used standardized approaches (e.g., Internet Protocol) provide such interoperability. Further solutions are being developed through a variety of leading standardization bodies today and uptake of their solutions will be dictated by market forces. We note that TRAI has not sufficiently demonstrated in its Consultation Paper that interoperability issues are damaging competition or Indian consumers. Therefore, there is not a need for TRAI to take measures to address interoperability.

Due to the global nature of the digital economy, both for India-based OTTs as well as OTTs based elsewhere, the App Association strongly urges for TRAI's approach to lawful interception of OTT communications be taken through bilateral or multilateral agreements with foreign governments for cross-border data requests (e.g., a bilateral arrangement with the U.S. government per the CLOUD Act[4]).

We strongly discourage against the use of data localization requirements, which seriously hinder imports and exports, reduce an economy's international competitiveness, and undermine domestic economic diversification. OTT innovators do not have the resources to build or maintain unique infrastructure in every country in

[4] https://www.justice.gov/criminal-oia/page/file/1153466/download.

which they do business, and these requirements effectively exclude them from commerce. The App Association does not believe that such requirements should be applied to TSPs nor OTTs.

We also strongly encourage TRAI to preserve the ability of OTTs to utilize strong encryption techniques to protect end user security and privacy. Global digital trade depends on the use of strong encryption techniques to keep users safe from harms like identity theft. However, some governments continue to demand that "backdoors" be built into encryption keys for the purpose of government access. These policies jeopardize the safety and security of data, as well as the trust of end users, by creating known vulnerabilities that unauthorized parties can exploit. From a privacy and security standpoint, the viability of an OTT service provider's product depends on the trust of its end users.

We reiterate our view that OTTs which have the primary purpose of providing real-time person-to-person telecommunication voice services using the network infrastructure (utilizing a telephone number) of a TSP should be required to provide emergency services connection capabilities to align with reasonable consumer expectations. Expanding such obligations to OTTs past this category would not align with consumer expectations and would impose unreasonably high costs to OTTs, discouraging innovation and investment.

With respect to discussion in the Consultation Paper on the selective banning of OTT services, should such a mechanism be created for OTTs in India, we strongly urge for selective bans to be limited in scope to the mitigation of well-demonstrated harms under Indian law, and that due process be afforded to OTTs subject to a proposed selective ban (including but not limited to timely notice of a proposed selective ban, providing an opportunity to respond for a reasonable period, the ability to appeal a selective ban to the court system for judicial review).

As we discuss above at length, there is not an unfair playing field between OTT providers and TSPs; rather, they operate on different playing fields that inter-relate and complement one another. Save for OTTs that have the primary purpose of providing real-time person-to-person telecommunication voice services using the network infrastructure (e.g., utilizing a telephone number) of a TSP regarding emergency services, there is no justification for extending TSP obligations to OTTs, nor is there a justification for creating a new regulatory regime for OTTs in the Indian market. Should TRAI pursue either regulatory route despite there being no demonstrable reasons for doing so, it would be detrimental to OTT service providers and startups across India and around the world. Generally, we agree with TRAI's suggestions preceding its Consultation to allow for market forces to address the dynamic TSP/OTT ecosystem at this time.

The App Association appreciates the opportunity to provide its views to TRAI and offers to provide any further information needed that would assist TRAI moving forward.

Sincerely,

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