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To: "Akhilesh Kumar Trivedi" <advmn@traigov.in>
Sent: Friday, September 1, 2023 1:07:36 PM
Subject: Times Network Comments on CP on Regulatory Mechanism for OTT...

Dear Sir,

This is in reference to the Consultation Paper floated by TRAI on Regulatory Mechanism for OTT Communication Services, and Selective Banning of OTT Services dated 07.07.2023. We are hereby submitting our Comments on the above CP.

Kindly take the same on record and oblige.

Thanking you,

Sanjay Agarwal
Times Network

**TIMES NETWORK'S COMMENTS
ON
TRAI CONSULATION PAPER
ON
REGULATORY MECHANISM FOR OVER-THE-
TOP(OTT) COMMUNICATION SERVICES, AND
SELECTIVE BANNING OF OTT SERVICES**



DATE OF ISSUE: 07.07.2023

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Overview

The present Consultation Paper by TRAI on “***Regulatory Mechanism for Over-the-Top (OTT) Communication Services and Selective Banning of OTT Services***” is a surprising move. Having satisfactorily responded / addressed to the concerns raised by “DoT back reference dated 7th September 2022”, the cause, reason, and rationale for still putting up the issue out for consultation or very need to have any policy turnaround (in less than 2 years) from the earlier position / recommendation of TRAI dated 14th September 2020, is inexplicable and incomprehensible.

Also, TRAI in its one of its earlier recommendations on a regulatory framework for OTT communication services, while responding to a DoT reference dated 3rd March 2016 advocated against any regulatory intervention and suggested that the matter may be relooked afresh when more clarity emerged in international jurisdictions.

Further, certain grounds on which the consultation is floated like “*vast growth of OTT services*” using telecom resources during the last 2 years is unsubstantiated, contradicts the earlier position and stand of TRAI of being an “opportune moment”. Also, if the intent and objective were to regulate “OTT communication services”, the decision to extend the scope to general OTT services for ‘selective banning’ let alone attempting to define them, defies reason, rationale, and logic.

The earlier TRAI Recommendations dated 14th September 2020 are reproduced below:

“3.1 *The Authority recommends that:*

- i. *Market forces may be allowed to respond to the situation without prescribing any regulatory intervention. However, developments shall be monitored and intervention as felt necessary shall be done at appropriate time.*
- ii. *No regulatory interventions are required in respect of issues related with Privacy and security of OTT services at the moment.*
- iii. *It is not an opportune moment to recommend a comprehensive regulatory framework for various aspects of services referred to as OTT services, beyond the extant laws and regulations prescribed presently. The matter may be looked into afresh when more clarity emerges in international jurisdictions particularly the study undertaken by ITU.”*

Neither the market forces in the last two years had stopped responding to the situation and neither was there any urgency or an opportune moment / or a need to look at the issue afresh for floating the proposed questions in consultation. TRAI always had a choice to “stop” by having responded to DoT’s back reference (as it rightly did) instead of taking up all the questions/issues for consultation, which is like to reinvent the wheel or build a ladder to the moon.

With so many other developments already taking place (most of them in midway) as would be detailed in later part to the response like Telecommunication Bill, Digital India Act and Personal Digital Data Protection Bill 2023 getting discussed or in the course of being promulgated, to proceed ahead with the kind of questions which have been raised, would:

- only be premature,

- without having the benefit of substantive legislation, regulatory clarity and certainty in place.

It is better that TRAI awaits the outcome of all these Bills and its own consultation process on various related subjects and to have all facts in place before recommending or taking any decision on the various questions posed in this consultation paper. Any comments given at this point in time would also be incomplete, insufficient, and half-baked and is only basis the facts as it exists today on the date of filing of response. Such an exercise as being carried out would not really address the problem (if any) and would only be complicating the matter further.

The questions that are formulated in the present consultation are also like the questions posted and answered earlier which also formed the basis of earlier recommendations and now the effort, endeavor and attempt of the TRAI looks to be to:

- Define and classify “OTTs”.
- Define and classify “OTT communication services”.
- Draw comparison between “licensed telecom services” and “OTT communication services” touching upon various aspects of regulatory, economic, security, privacy, safety, QoS, consumer grievance redressal, etc.
- Need to bring OTT communication services under licensing/regulatory framework and whether the same would promote competitive landscape and benefit consumers and service innovation.
- Incase OTTs are brought under licensing & regulatory framework, then what should be the provision of the same covering aspects of lawful interception, privacy & security, emergency services, UCC, customer verification, QoS, grievance redressal, eligibility/financial conditions, etc.
- Need for a collaborative framework between OTTs and licensed telecom providers and the potential challenges that can arise impacting “Net Neutrality”, consumer access/choice, etc.
- Technical challenges that would be faced in selective banning of OTT services and the need to put in place a regulatory framework.
- If regulated, then the types of OTTs to be covered under “selective banning” and the provisions and mechanism for such a regulatory framework.
- Whether websites to be brought under the purview of selective ban like OTTs and other relevant and related issues.

The mode and way the consultation has been drafted and worded and questions are structured and formulated appears to have expanded the scope from OTT communication services to OTT services in general. The same appears to be done by way of abundant caution, cast in a state/spell of self-doubt, suspecting non-existing worst-case scenarios, or may be seeking a validation from the stakeholders on the earlier recommendations on the subject by TRAI.

To demonstrate for instance, while the consultation has titled Chapter 2 as “*Examination of the Issues related to Regulatory Mechanisms for OTT communication services*” however, at Page 22 it is attempting to classify all OTT services. Similarly, in the chapter relating to “*Selective Banning of OTT services*” and the questions formulated for consultation i.e., to define & classify “*OTT services*” and questions related to technical challenges faced in “*selective banning of OTT services*” and a need to put a regulatory framework clearly leaves open the scope and ambit having been expanded to all types of OTT services. Thus, the Consultation Paper prima facie going by the title appears to be related to OTTs which are substitutable for voice & messaging communication services or being substitutable to telecommunication services. The fear of OTTs in general gets intensified when the questions

are formulated by attempting to define OTT services in general. It is apprehended that such an approach at this point of time would lead to treating OTT content services or the ones which are into the business of news, articles, stills, audio, AVs, or is called as OTT content services, OTT news platforms, OTT education services, OTT broadcast & syndication services etc., also automatically getting covered or may be subjected to regulations and licensing on identical misconceived and misguided principles or regulating them in identical or similar manner like telcos (the unintended recipient's). The present consultation also seems to have been floated on an incorrect assumption of regulatory and license imbalance for all OTT services. The TRAI must therefore expunge all questions that are related to defining or classifying OTTs in general. The Consultation exercise on these issues must therefore forthwith be paused.

It must be appreciated that OTT services have democratized innovation and promoted competition. It is available to the people in the most democratic manner and to the people of all strata of society irrespective of their socio-cultural, economic background and their ability to access the same. It has resulted in a plethora of services being offered that were previously unimaginable. Any attempt to regulate these services akin to telecom services would stifle this innovation, reduce consumer choice and quality of services. The stated aim of the government is ease of doing business wherein the government should govern more and control less. The government should move towards lesser regulation. Even internationally, OTTs have been understood to be fundamentally different from traditional telecom services and instead of regulating them, the focus has been on "Net Neutrality" and "Fair Competition". Any progress made / any decision made at this point of time would not only be premature leading to unrealistic, undesirable, and counterproductive consequences but would also be detrimental to the "Digital India" vision.

Our preliminary submissions on the consultation are as under:

I. Difference between "OTT service" and "Telecommunication service":

<u>Sr. No.</u>	<u>Aspect of difference / distinction</u>	<u>Telcos</u>	<u>OTTs</u>
1.	Stakeholders involved	Airtel, Jio, Vodafone Idea. BSNL & MTNL.	<p>E-commerce apps like Flipkart, Amazon, Myntra, Ajo.</p> <p>Content apps like Amazon Prime Video, Netflix, Disney+ Hotstar, Zee5, SonyLIV, AltBalaji, MX Player, Hoichoi, Shemaroo, Jio Cinema.</p> <p>Food delivery apps like Zomato, Swiggy; Blinkit, Big Basket.</p> <p>E-Medicine apps like Pharmeasy, Netmeds.</p>

			<p>Edu-tech apps like Byjus, Unacademy.</p> <p>Digital news & news aggregator apps like ET, ToI, Inshorts, Dailyhunt.</p> <p>Banking/Fin-tech Apps like HDFC, ICICI, Paytm, PhonePe, Freecharge.</p> <p>Other services like BookMyShow, MMT.</p> <p>Social media apps like Facebook, Instagram, X, WhatsApp.</p>
2.	Carriage vs Content	Telecom networks are the carriage conduits which permit data/voice/traffic/bytes to go from one machine to another.	Whereas OTTs carry “content” & services” is what rides on a telecom network.
3.	License	The telecom services are enabled by grant of telecom license under the Indian Telegraph Act 1885 which otherwise would have been within the exclusive domain/privilege of the Govt. and the same gets done on quid pro quo basis for a valuable consideration in the form of license fee, spectrum charges and other terms & conditions & obligations as the Govt. deems fit.	Both ‘OTT Services’ and ‘OTT communication’ service providers are not at par with ‘traditional’ TSPs like Airtel, Vodafone-Idea, etc. and should not be subject to a licensing regime like the telcos as they do not own any infrastructure neither can be subject to grant of a license to establish, operate and maintain telegraph.
4.	Different markets	It would also be fallacious to assume OTTs riding over a telecom network as a telecom service or even comparable to them since it is the consumer who uses telecom network for accessing apps offering content, education, and other services and/or other internet platforms. The said consumers have contractual arrangements with telecom operators and the bandwidth so used gets paid & compensated by profits that solely	‘OTT Services’ and ‘OTT communication services’ are dependent on TSPs to make their services available to consumers viz internet through mobile data or broadband. TSPs and OTT Services’ and ‘OTT communication services’, offer divergent services and operate in different markets, and therefore cannot be regarded as competitors.

		go into the pockets of telecom operators.	The OTT services cannot be offered directly to consumers without the internet provided by telcos and are dependent on consumers accessing the telecom network as a pre-condition. The said consumers also consume data and bandwidth and the benefit of such revenue again as already stated solely vest with the telcos.
5.	Infrastructure/ Architecture/ Technology	<p>Traditionally, the telecom services were offered using wires, cables and exchanges and the modern mobile telephony takes place with the help of user device, cell towers, Base Station Controllers (BSC), Mobile Switching Centers (MSC), etc. and wherein the voice gets converted into electronic signals and are being compressed as a radio wave/signal which are picked by the nearest cell tower and then taken to BSCs which act as a switch between Mobile Station and the MSC (the bigger exchange) and after choosing the best route it offers uninterrupted quality call services. Similarly, for data services, instead of voice data being sent, it is text or internet data.</p> <p>Thus, there is a distinction in the physicality of the delivery whereby the telecom operators enjoy the privilege of infrastructure and radio frequency.</p> <p>..</p>	<p>With the advent of technology like 4G/5G etc., internet data using broadband is also capable of offering services of voice and text. It may however be noted that the voice/text so transmitted is delivered in the form of data packets based on best effort delivery model with no dedicated end-to-end channel being established for the duration of communication. This architecture is completely different from those offered by telecom operators with a circuit switched PSTN architecture where dedicated channels of communication are established for the duration of communication. Thus, OTT communications are not comparable to telecom services as OTT services do not connect to the PSTN network.</p> <p>The OTTs offer their services in a virtual format over the internet. There are no exclusive privileges enjoyed unlike telcos and they operate in a highly competitive online marketplace.</p>
6.	Purpose	The telecom services are purely meant for provision of telecom services by way of voice & text and with the advent of broadband the provision of internet services.	The OTT services is essentially a service which is offered with the use of broadband. As a result, there is sharing of content, audio/video, stills, snaps,

			photographs, offering fintech, e-medicine, food delivery, e-commerce services etc. and the provision of voice & text is ancillary to the primary purpose of sharing of content.
7	Diversification	TSP's can enter into OTT business without any regulatory requirements.	OTT service providers do not have the liberty to enter into the business provided by TSP's due to the licensing requirements.

Thus what transpires from the above is that:-

- OTTs and telecom operators operate in fundamentally distinct and separate markets and to compare them/treat them similar or substitutable would be a mischaracterization or a misguided attempt to draw similarities and/or equivalencies, which does not exist.
- Apps and telcos have fundamentally different technical and economic characteristics. Apps typically provide a wider set of features than traditional telecom services and are accessible only in an internet capable device and thus operate in a different layer.
- ‘OTT Services’ and ‘OTT communication services’ are not only totally distinct from telecommunication services but are also totally different sectors of the broadcast/digital media in themselves.
- OTT service providers do not own or control critical infrastructure – and they merely offer services by relying on such infrastructure provided by TSPs. Further, unlike TSPs that operate in a market with high entry barriers and limited competition, OTT service providers operate in a market with low entry barriers and unlimited competition. OTT products have a different lifecycle, and a licensing regime or regulatory intervention may impact their ability to innovate. OTT services are dynamic and need to constantly innovate to keep pace with evolving and emerging technologies. This is also a function of the fact that OTT services operate in a highly competitive market, where they may be easily superseded by other innovative and futuristic services. While a licensing regime (that typically extends to 20 years) may be appropriate for TSPs given that their services take a prolonged duration to develop and stabilize, the same cannot be extrapolated to OTT service providers. Doing so may prevent them from innovating and changing on account of restrictive or onerous compliances.
- The prima-facie similarity/commonality in the services of voice and text offered, does not make them comparable or substitutable and the same exists only as a supplement. There is no uniquely attributed mobile number, and the consumers cannot switch to these OTT services as a full and effective replacement to traditional mobile services.
- OTTs also offer diverse functionalities like gaming, photo editing, etc. which may also help users to communicate like messaging/calls in Paytm, gaming apps (Call of Duty), rental apps, Airbnb, Zomato, etc. It would be highly incorrect if these apps are regulated as telcos merely because of the commonality in the functions with voice and text services offered by telcos. The OTTs thus provide expansive experiences to consumers that go beyond conventional messaging and communication options provided by telco.
- Clearly there is a distinction both technologically and functionally, and thus instead of drawing a regulatory parity, it would be better to regard them as belonging to different layers with

different market business models, inputs, entry barriers and costs. Further, regulatory barriers to innovation in the internet sector may detract from its benefits to the Indian GDP and overall economy.¹ It may deter OTT service providers from investing in the development of passive internet infrastructure (such as data centres,² and submarine cables³). It may also impinge on OTT service providers' ability to contribute to revenues generated by TSPs by driving the broadband demand amongst the general public.

II. **OTT services have only benefitted “Telecom Operators” (also referred interchangeably as “telcos”) / Consumers and act as important “Drivers of Growth” for the economy:**

- There is a symbiotic relationship that exists between telcos and OTTs. While telcos supply transmission capacity, OTTs offer content to stipulate consumer demands for this capacity. Building transmission pipes without any content would be unviable for telcos and thus their success is heavily dependent on the availability of the content on OTTs and as demanded by the audience, generating demand for transmission capacity. This has been identified in the BEREC Report (*October 2022*) that OTT apps help telecom operators and success of OTT services is core to the surge in demand for broadband access. The absence of engaging online content applications would bring down the value of internet access.

➤ **Data, Facts and Figures to show how telcos have benefitted in terms of data consumption and revenues and also having the ability to give bundled offers:**

- **Smartphone penetration:** In 2014 it was around INR 15.6Cr whereas in India during mid 2020-23 the same is around INR 65Cr.
- The surge in **data consumption** has created lucrative opportunities for telecom operators [*S. Barik, Why Airtel's tariff hike is significant and what it means for the sector? Indian Express (Nov'22)*].
- For instance, **tariffs have jumped** as much as 57% in certain telecom circles in response to increased data usage. In Haryana and Odisha, the Airtel lowest price plan is INR 155/- per GB for 24 days. Earlier it was INR 99/- for 200MB of mobile data for 28 days. Such tariff adjustments have contributed to an estimated 20%-25% increase of revenues of major telcos like VI, Airtel, Jio.
- Airtel reported 27% increase in mobile revenue in first quarter of FY 2023 attributing to growing consumption of mobile data [*Bharati Airtel Q1 2023 Highlights – India, Quarterly highlights, M Kalawatia Why OTTs, telcos must not lock horns over infra cost sharing, the Print (August 2022)*].
- Similarly, Reliance Jio achieved its best ever quarterly revenues at INR 27,527 Cr in June 2022 with total data traffic in the quarter growing by 27.2%. [*Reliance Industries Limited Consolidated Results for Quarter ended 30th Jun 2022 – Media release July 2022*].

¹It may be noted that as per [Indian Brand Equity Foundation](#), out of the internet sector's 16% contribution to India's GDP in 2020, applications / OTT services contributed 8% of this.

²It may be noted that tech companies like [Amazon](#) and [Microsoft](#) have leased land to make investments in the development of data centres.

³Similarly, as per [news reports](#), Google, Microsoft and Meta have all made investments in relation to the development of undersea cables.

- The ARPU is also growing for telcos and Morgan Stanley expects it to increase by 50% in the next 4-5 years. [*ET Telecom Revenue of big three telcos may grow robustly by 20%-25% in fiscal 2023 – CRISIL – Economic Times (May 2022)*].
- Bundling Benefits: Telecom service providers are also benefiting from bundling their content with subscription packs. A Study by OVUM states that bundles increase customer loyalty and spending on mobile broadband data services. The study found that 44% of respondents had spent more on their carrier plan because they were subscribed to OTT media bundle. [*Ovum and Amdocs – OTT media services – consumer survey – An OTT – TSP Partnership Study 2019 – Amdocs Consumer Survey with 2102 respondents in India*]. 47% said that they were more likely to continue with their telecom provider due to bundled services. Only 5% of the consumers said that bundling had no effect on their loyalty or spending. [*T. Ramchandran – OTTs are telecom growth drivers – Hindu Business Line – October 2022*].
- **Telecos charge OTT as well while bundling (along with consumer): To put it in simple words, the bundling of OTT and telecom services is done by Telco by charging a fee to OTTs (a percentage of their subscription otherwise) and making them reach to a larger audience. In this manner, they also make consumers spend more by giving/offering them to upgrade subscription for premium packs.**
- OTTs are vital growth drivers for telcos and a large portion of its revenue is built on availability of OTT content to attract users and increase data usage. The telecom operators' partner with OTT to offer bundled services that attract the subscribers, build customer loyalty and increase user spends.
- Impact of OTT expands beyond telecom sector. A research [*WIK Consulting – The Abecassis, M. Kende and G. Kama – IP Interconnection on internet – a European perspective for 2022 – Analysys Mason (September 2022)*] shows that increased use of OTT apps can boost global GDP. A 10% increase in OTT app results in USD 1Bn in global GDP on average.
- The data prices have only come down (if so) with an intent to promote maximum data consumption and thereby to benefit telcos only. Needless to mention, telecom operators at no point in time and even today had any restraints or restrictions which could have stopped them from charging more under the forbearance regime of TRAI. It must be appreciated that significant internet penetration over the last several years has led to higher data consumption by consumers and which has phenomenally benefited the telecom operators. The growth has also been triggered because of “forbearance policy” adopted by the TRAI over last so many years.
- Consumer Benefit: OTT services as an alternative to voice and text services have in fact hugely benefitted the consumers wherein instead of being dependent or being charged for calls and messages, it can avail the same service using broadband/internet/ bandwidth. Had these technologies not evolved, the telecom operators under the “forbearance regime” of TRAI would have continued to squeeze the consumers by charging them for both calls and messages as they did in the past.

III. **OTTs as also the Consumer make substantial investments in network infrastructure:**

- Apart from investments made to deliver certain specific service needs like content, music, food delivery apps, e-commerce, e-medicine, e-education, etc., even OTTs make substantial investments in network infrastructure such as Content Delivery Network (CDNs), under-sea cables, data centers, data cache servers and more. These investments help optimize delivery of

content through telecom networks, enabling cost savings and enhanced QoS for telcos and its users. CDNs consist of distributed servers strategically placed around the globe to bring content closer to end users. The CDN Network is called POP (Point of Presence) or a Net Server and in which content is stored and served at interconnection points between CDNs and Telcos or inside the telco networks through embedded or on-net caches. Thus, data intensive content like videos only needs to be sent once to each server from point of origin and can be repeatedly served to end users. When a user visits a website, CDNs forward request from original server to the nearest server (end server). The content is delivered faster as it traverses the shorter distance. CDNs facilitate faster page loads, reduce latency, and lower bandwidth cost. Thus, OTTs have made investments on CDNs, data centers (Amazon having 38 worldwide and 2 in India & 5 upcoming facilities). [M. Tejaswi – AWS make fresh investments of 12.7 Bn in India by 2030] [WIK Consulting – The Abecassis, M. Kende and S. Osman, R. Spence, and N. Choi – The impact of tech companies network investments on broadband of ISPs – a European perspective for 2022 – Analysys Mason (September 2022)].

- OTTs thus actively invest in infrastructure improving QoS and reducing cost for telcos and consumers. From 2011-2022, OTTs have invested approximately USD 900Bn into network infrastructure with an average spend of USD 120Bn per year from 2018-2021. [ET Bureau – BIF Counters – Telecom industry demands over usage of network infrastructure – Economic Times – November 2022].
- The Consumer also buys an expensive smartphone as against the normal mobile phone in order to meet and avail the benefits of content and other services as against being limited to voice and text messages. Thus, consumers, apart from paying the data charges, are also investing in the hardware which is directly borne at the consumer's end. It would thus not be wrong to say that all the stakeholders in the value chain i.e., the network operator like telcos, the OTTs as also the Consumers, are making adequate investments to bring value to the entire set of offerings. The need & demand to have landline phones have also seen a negative trend and the overall demand for fixed telephone service has also declined, partly also due to the non-availability of such services on fixed telephones.

IV. **Telcos should not be given the advantage to double dip or to create market distortions/restrictions:**

- As established hereinbefore with facts, data and figures, the telecom operators benefit from the demand of data which the OTT services drive. If “Network Neutrality” principles are to be upheld, then there cannot be any double dipping into the OTT space by Telcos.
- The challenges faced by telecom operators in realizing revenues (if any), should not be done at the cost of OTT platforms and the same can be done by streamlining their regulatory environment.
- Without OTT services, the need for networks to interconnect with internet would be diminished and thus any attempt to “double dip” from both users and OTTs for using internet or enter OTT layer, which would result telcos prioritizing their own offerings over other competitors in the OTT space.
- Telecom operators in India are also arguing for introduction of a Network Usage Fee (NUF) for OTT applications (compensation for use of bandwidth consumed by OTTs on telcos network for funding development, maintenance, and upgradation of network infrastructure). It is contended that there is a structural imbalance as OTT platforms benefit from telecom

operator funded networks, but it is vice versa since due to OTT Services consumption of internet has phenomenally increased which has substantially benefitted the TSP's in the form of revenues. The submissions made hereinbefore clearly establish to the contrary and negate such assertions made by telcos.

V. **Consumers drive traffic and not OTTs:**

- The demand for data intensive activities stems from consumer choice as OTTs operate on a pull basis, meaning that consumers choose, download, and consume content based on their preferences. When users choose to watch content through a device, they send a playback request to the streaming OTT which in turn delivers the OTT the requested content over an internet connection that the consumer has already paid for. Attempting to place burden on OTTs to cover network costs or to regulate or control them would be ignoring the fact that consumer pays for internet connectivity and determine traffic volumes. It is the consumers and not the OTT providers who drive the data traffic.
- Further, the network-related costs have remained stable despite traffic growth. In spite of increase in global network traffic, operator cost has only seen a minimal increase. Thus, mandating any fee or regulations on OTTs would adversely affect digital ecosystem and consumers, which would restrict choice, increase prices, erode quality of services, foreclose competition, and violate "Net Neutrality". As per Analysys Report, the annual spend of telecom operators remained stable despite a substantial increase in global internet traffic. While global traffic increased by 160% between 2018-2021, network related cost increased by only 3%.

VI. **The Indian market scenario/policy developments and whether regulating OTT would be the right thing to do?**

➤ **Data, Facts and Figures to show consumer behavior, data traffic and impact that could result if OTTs were to be regulated:**

- In a recent ITU-D Study (2019-20) on economic impact of OTT on national telecommunication / ITC markets found that 69% of YouTube users expressed willingness to upgrade their broadband connections if their app would work faster.
- An average Indian user spend approximately 70 minutes a day on OTT platforms with each session lasting 40 minutes (Nokia – India Mobile Broadband Index 2020).
- India also has the highest data traffic per smartphone worldwide which is projected to grow from 25GB per month in 2022 to 54GB per month in 2028 (CAGR of 14% - Ericsson Mobility Report November 2022).
- Introduction of licensing framework in the OTT space would result in a steep decline in innovation and would dissuade investments in development of newer platforms and application in turn halting India's digital success story before it could fructify or reach its pinnacle. Most VPN service providers have already exited the Indian market leaving Indians with almost no choice. This was a result of government insisting on VPN service providers having their servers in India. This requirement stemmed purely from the Indian government requiring access to data flowing through these servers giving the government unfettered access to individual data flows.

- Any policy framework must serve as a foundation for a rapidly evolving digital economy, online environment and digital communication infrastructure and services ecosystem. It must be in tune with the impact of digitization across various sectors and in line with the present market reality.
- The telecom market also needs to be understood which has almost become an oligopolistic market where there are only a few large players and the PSU Telecom players like MTNL & BSNL have significantly been marginalized and have lost their significance. In this background, if the OTT services in any manner or form get regulated or if there is any imposition of licensing regime or regulation upon them, the same would pose a great risk to the market conditions. Further for the telcos, there is complete freedom of pricing with only 3-4 telecom players in the Indian context. There is another angle of vertical integration of some of these telecom players in the “content OTT space” whereby the content gets monetized by use of bandwidth. Thus, telecom operators have a different methodology of earning revenue by monetizing data consumption i.e., by maximizing consumption of data while not charging for content at all. For e.g., premium sporting content like IPL streamed for free by the telecom operators, however the same content will have to be offered by a linear platform (standalone content provider with no vertical integration or association with any distribution platform or telecom operator) only upon charging a subscription fee.

VII. Replicating telecom license conditions to OTT:

- ‘OTT Services’ and ‘OTT communication services’ face stiff competition in the market and have to constantly innovate in order to keep pace with future technological developments. Therefore, subjecting ‘OTT Services’ and ‘OTT communication’ service providers to the same terms and conditions as TSPs and consequently to licensing obligations would be detrimental to their business, as it would slow their growth and result in increased operational costs which would ultimately be borne by consumers. Imposing identical/similar licensing obligation on OTT Services’ and ‘OTT communication’ services would be counterproductive, in view of their contribution to the socio-economic growth, which is enormous, particularly when it relates to the digital economy of the country.
- The telecom license conditions as have been proposed in the consultation could hinder innovation in the OTT segment and would make it harder for new companies to enter the market and existing ones to introduce new features and services. This would result in limiting consumer choices as well.
- Regulators in EU and Australia have determined that non-interconnected OTTs are not equivalent to or perfect substitutes to telecom services and a cautious approach needs to be adopted before extending existing telecom regulations to OTT applications. Further the so-called substitutability would be highly misleading since it is not an option for many users who still do not have access to smart devices.
- The Licensing framework runs the risk of creating artificial distinction between similar functionalities of otherwise highly differentiated offering which would result in distorting the overall ecosystem.
- Also, the OTTs operate in multiple jurisdictions and thus applying regulations/licensing terms of one country may not turn out to be feasible. The OTTs have no control over the quality of service as traditional telecoms do and they are dependent on the infrastructure provided by ISPs.

- If substitutability / “same service same rules” is to be the criteria, then cars, bicycles, airways and railways will all have a common regulatory framework.
- At the alternative governments should intervene in the market by supporting traditional telecom operators, rather than banning OTT services. This could involve providing subsidies or tax breaks to these operators or investing in infrastructure to make their services more competitive. By doing so, governments can level the playing field and ensure that all players in the market have a fair chance to succeed.

VIII. OTTs are already sufficiently regulated:

- In any event, OTT Services’ and ‘OTT communication’ service providers’ are already adequately regulated by MEITY as well as by the MIB under the Information Technology Act, 2000 and the Information Technology (Guidelines and Digital Media Ethics Code) Rules, 2021. Further, OTT Services’ and ‘OTT communication’ are also regulated by a robust self-regulatory mechanism, which addresses any complaint in respect to content.
- Without Prejudice to the pending challenges, the recent amendments to IT Act 2000 by way of amendments introduced in 2021 onwards and the content regulations that exist under the Cable TV Act 1995 and various other legislations, including the self-regulatory mechanism that exist in the form of NBDSA Guidelines, BCCC, ASCI Guidelines, etc. adequately address the aspect of content, OTT, digital news, social media intermediaries, gaming intermediaries and so on. Any further attempt to selectively ban the “content OTT applications” would constitute as unreasonable restrictions to the fundamental right of speech and expression.
- In any event, OTTs are adequately regulated especially w.r.t. lawful interception (governed by IT Act + IT (Procedural and Safeguards for Interception, Monitoring and Decryption of Information) Rules 2009 + IT Intermediary Guidelines Rules 2011).
- Similarly for privacy and security, OTTs are governed by IT Act + IT (Reasonable Security Practices and Procedures and Sensitive Personal Data) Rules 2011.
- Further licensing compliances, coupled with financial obligations (such as payment of entry charges, license fees, etc.) are likely to hinder start-ups and new entrants from entering the OTT sector. This goes against the principle of the internet being free and open for all – and may impact the ability of the sector to create jobs. It may also result in a scenario where OTT service providers start charging users for their services (which have, so far, been free / minimally priced) in order to offset their financial burdens. This may force users who are unable to afford paid services to drop out of using them – thus widening the digital divide in India.

IX. Waiting for the Opportune Moment and avoid Consulting during a barrage of Relevant Legislation being discussed / debated and permitting the Dust to Settle for a clear picture to emerge

- The Consultation process must also take into account the recent developments wherein it is reported that the Govt. is all set to remove OTT players such as WhatsApp, Telegram, etc., from the definition of ‘telecommunication service’ under the Telecommunications Bill. In such a situation, the present exercise may be futile, unwarranted, and completely infructuous. In the event the Telecommunications Bill does not contemplate any intent to include communication-based OTT services or any other OTT services, the entire foundation of the DoT falls and thus there is no need to debate or consult or deliberate to formulate a regulatory mechanism for OTT

communication services / OTT services. It is a different matter that in some other press reports some contrary observations were also made. The exact position would only emerge once the Telecommunication Bill is made publicly available. In any event, the argument and rationale to hold back this consultation unless and until there is complete clarity on the Telecommunication Bill, becomes more persuasive and convincing.

- The policy of forbearance on regulation of OTT should be continued to avoid hurting growth and to ensure that access to any content/innovative features offered through OTTs does not get blocked, degraded, or discriminated. The digital applications/OTTs are fully dependent and have no control over the internet access points/the physical infrastructure deployed by the telecom service providers. The said right is only and solely available with telcos.
- The recent relaxation of spectrum trading norms by DoT which would help telcos to lease spectrum, and similar such steps which can upgrade the regulation of telcos, would increase investment in network infrastructure and any attempts to regulate/license OTTs would not be the right thing to do. The problem of telcos can be further addressed by addressing their financial burden because of high spectrum pricing, excessive spectrum usage charges, high license fee burdens. Again, some of them have been addressed recently by DoT by modifying the definition of AGR i.e., AGR only on core activities (Adjusted Gross Revenue). DoT recently had clarified that License Fee will be payable on core activities and non-core activities like insurance claim, capital gains on mergers, revenue earned from MIB licenses, dividend income, mutual fund gains, foreign exchange fluctuations, credit provided by OpEx-CapEx vendors, interest on direct-indirect tax or refunds made, would not be included. The sale of CPE/Handset is however still covered. Similarly, revenue earned from data service still gets covered in License Fee. Such steps and measures should be the focus area of consultation instead of getting into the regulation of OTT.
- Further amendments are also expected with the promulgation of Digital India Act, Telecommunication Bill and the Digital Data Protection Bill 2023. There would thus be an overcrowded legislation regulating the OTTs and thus there is no requirement to bring them under the License Raj.

X. Selective banning of OTT services:

- The shutdown of internet and telecom services has been a matter of cause and concern since it impacts and affects the people in many ways. It is thus important that essential sectors such as content, news, finance, health, education, remain in operation to minimize inconvenience and suffering as well as to curb misinformation during unrest.
- While services hosted on cloud are difficult to ban selectively since they operate from multiple locations from multiple countries and continuously shift from one service to another. However, websites operating through fixed URLs can be blocked.
- Even today, there are sufficient provisions under the Indian Telegraph Act 1885 which provides blocking of transmission/interception/detention in case of public emergencies, and public safety [Section 5(2)].
- Sec 7 of the Indian Telegraph Act allows Govt. to make rules and in accordance therewith the *Temporary Suspension of Telecom Services (Public Emergency & Public Safety) Rules 2017* was notified. These Rules empower to issue directions to suspend telecom services subject to compliance of conditions like order made by Secretary MHA / Home Department in case of

State. In certain cases, Jt. Secy can also issue orders and he has to be duly authorized by the Union/State Home Secy.

- Similarly, Sec 69A of the IT Act 2000 empowers for issuance of directions for blocking of public access of any information through any computer resource in the interest of sovereignty, integrity, defense, security, public order, friendly relations with foreign states and for preventing incitement to any cognizable offence. Similarly, the *IT Procedure and Safeguards for Blocking for Access of Information by Public) Rules 2009* also provide detailed procedures to be followed and safeguards for blocking access of information by the public. Clause 5 'Direction by a Designated Office' by a Designated office wherein the Designated Officer on information from the Nodal Officer of an organization or a competent Court, by order direct any agency of Govt. or intermediary to block for access by the public any information or part thereof, generated, transmitted, received, stored or hosted in any computer resource for any of the reasons specified in Sec 69A of the IT Act.
- The discussion on questions posed for consultation relating to selective banning of OTT services in the context of technical challenges faced and also the need to put in place a regulatory framework should be put to hold since these issues would also be further discussed / are getting discussed in the recent proposed legislations of the Telecommunications Bill and the Digital India Act which would also replace the Indian Telegraph Act and IT Act 2000 respectively. The consultation on this subject would therefore be a parallel exercise being agnostic and ignorant of those discussions and thus would also be pre-mature and the Authority must therefore wait and watch for these developments to fructify.
- Similarly, the provisions of Digital Personal Data Protection Bill ["DPDP"] 2023 recently passed would also have a bearing on many aspects raised in this consultation especially aspects of Govt. blocking entities collecting data which would include OTTs.

With all the aforesaid developments taking place, the TRAI must hold its hands on this Consultation Paper and must wait for the dust to settle before taking up the questions raised under this consultation.

XI. International position:

- Many jurisdictions have already determined that OTT apps are not equivalent to traditional telecom operators.
- **EU:** BEREC, while rejecting many arguments of ETNO a preliminary assessment of fair contribution debate observed that there was no evidence that large OTTs were free riding on telecom networks. It was observed that any fee or demand of fair contribution would violate net neutrality.
- **Thailand:** The NBTC withdrew after consumer and industry experts said that proposal of revenue sharing framework would increase cost and hinder economic growth. The experts warned that OTTs would then pass on the cost to consumers and several players would exit the market if the regulator implemented the revenue share mechanism. The same would be the case in the event any licensing obligations are imposed.
- **Australia:** In Apr'2018 ACCC found that there is no basis for requiring equivalent regulatory treatment of OTT and traditional voice services. They even found OTT services not to be fully substitutable for voice services and found OTT services as positive development for consumers and considered these developments as pro-competitive. In so far as blocking of illegal website is concerned and as already detailed hereinbefore, there are ample legislations available in India

which are used for the purpose of take-down and blocking of websites. Like Australia, India also has legal provisions and the judicial route to seek orders in cases of blocking of copyright infringing websites or the websites engaged in child pornography / extreme materials, and which are also actively used wherein directions are issued to the ISPs to take-down and block by complying to the orders of Court, Enforcement agencies, etc.

- **UK (Ofcom):** There are no sufficient close substitutes for termination of calls to mobile numbers to widen the market definition.
- **Austria:** With respect to the definition change of ‘number based inter-personal communication services’ and ‘number independent inter-personal communication services’ the same is only w.r.t. communication services and not for OTT in general. As submitted hereinbefore, the voice and text services are mostly an additional feature of most OTTs and not the main feature of their services.
- **Bangladesh:** The examples of the regulatory approach adopted in Bangladesh (163) which is two steps below the rankings of Press Freedom Index compared to India (161) would be highly inappropriate to adopt or to follow and if OTTs were to have commercial negotiation with infrastructure provider, the same would be highly unfair and retrograde.
- **Brazil & USA:** Countries where OTTs are not regulated and in Brazil the same are classified as “Value Added Services” which are neither telecommunication services or broadcast services. Similarly in the US which also believes in the policy to preserve vibrant and competitive free market that presently exist in the internet and other interactive services unfettered by any federal / state legislation. Also there have been no instances of internet shutdowns except certain cases of specific websites having been blocked or restricted on grounds of national security or during emergency. Clearly, the freedom of press & freedom of expression has been given the paramount place in the scheme of things. India must also consider following this model.

Accordingly, in light of the aforesaid, our responses to the questions posed for consultation by TRAI are as under:

Comprehensive Response to questions related to “OTT services”:

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

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.

Ans: First and foremost, the TRAI Act 1997 solely covers within its ambit the “telecommunication services” as also the “broadcasting and cable services” which were later added by way of an amendment under clause (k) of Sub Section (1) of Section 2 of TRAI Act in the year 2004. The Preamble of the TRAI Act reads as under:

“An Act to provide the establishment of the Telecom Regulatory Authority of India and the Telecom Disputes Settlement and Appellate Tribunal to regulate the telecommunication services, adjudicate disputes, dispose of appeals and to protect the interests of service providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector and for matters connected therewith or incidental thereto”.

Thus, OTTs fall outside the purview of the TRAI Act and TRAI may not have the jurisdiction to regulate these OTT services in general. Also, in the recent reports, OTTs have been excluded from the purview of the draft Telecommunications Bill. With all this it is submitted that any attempt to define or classify OTT services in general may turn out to be an exercise being carried without jurisdiction or can be termed as an aspect outside the scope and ambit of TRAI Act.

All the services envisaged under ‘OTT Services’ and the ‘OTT communication services’ are already covered under the Information Technology Act, 2000. The preamble of the Information Technology Act, 2000 reads as under:

“An Act to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act, 1872, the Bankers' Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto.”

The Information Technology Act, 2000 defines an intermediary as *“intermediary with respect to any particular electronic message means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message”*.

All the services provided by ‘OTT services’ are already covered in the definition of “Intermediary”. Hence no fresh definition of OTT service is required.

The consultation paper is titled as *“Regulatory Mechanism on OTT Communication Services and Selective Banning of OTT Services”*. While an attempt to define “OTT” on lines of what has been given by OECD 2013, Ofcom, ITU-T, etc. can be a reference point and a few guidelines may aid in separating Telcos from Communication OTTs to other OTTs at a higher level, delving a little deeper will demonstrate how murky the attempt will soon become. Thus, it will be extremely difficult to define OTT services at this point of time. On the one hand, the telcos are also moving away from basing their revenues on voice dialling revenues and in fact are providing unlimited calling as part of their packages. OTTs on the other hand are expanding services which is not restricted to Voice over IP and now spreads across services of entertainment, music and other content being delivered on a regular basis. There is nothing which stops telecom operator to enter OTT space and it is an open field to them whereas an OTT cannot enter the TSP space. Thus, any attempt to bring them / categorise them / regulate or treat them as telcos would only create entry barriers and would destroy innovation. However, as observed by the TRAI in its earlier recommendations in 2020, it may not be an opportune moment to give any definition to OTT and that too with the intent to regulate or for the purpose of prescribing a licensing framework like telecommunications or otherwise. As submitted hereinabove, the defining should not lead to bring within its ambit those OTT services or in fact most of the OTT services under the purview of “telecommunication services” which have commonality in the services offered by telcos in voice and messaging but in actuality purpose

& objective of these OTTs is sharing of content, photos, etc. or provision of expansive experiences to consumers which is beyond conventional messaging and communication provided by telcos. Such OTTs should be seen through a different lens and must not be brought within the ambit & scope of being regulated or to be treated as substitutable and thus to be subjected to similar rules and licensing & regulatory framework.

The attempts to define “OTT” must keep in mind the nature and character difference of them with the telecom services dealt in detail hereinabove. Secondly, the benefits that have ensued to the consumers and telecom operators and the role of OTTs acting as “Drivers of Growth” must also not be forgotten. The various other aspects in relation to the investments made by OTTs and prevent giving undue advantage of double dip to telcos as an unintended consequence to define and regulate OTTs like Telcos must also be kept in mind. Most importantly, the pertinent question of absence of opportune moment and the current state/scenario of Indian market and with the ongoing policy developments most of them being in the mid-way like the Telecommunication Bill, Digital India Act, Digital Personal Data Protection Bill 2023 and the aspect of all/most the OTTs being already regulated under various laws and regulations should be factored in before inching any further with this consultation exercise. It is our humble request that TRAI must hold back this consultation and wait for an opportune moment to relook into the same.

With respect to Para 2.39 which refers to definition of “OTT” provided by ITU (May 2019) and DoT Committee Report on “Net Neutrality” (May 2015), it is submitted that such outdated definitions should not be taken into account while attempting to define “OTT” or even to provide for a reasonable classification based on an intelligible differentia or to provide the list of categories of either “OTT services” or “OTT communication services” or ‘OTT application services’. We once again submit that it would be premature at this stage to carry on with this exercise and the Authority must wait for an opportune moment. The definition of ITU-T way back in 2019 which is even prior to the TRAI Recommendations in September 2020 or even for that matter the DoT Committee Report of May 2015 (again prior to the issuance of TRAI Recommendations of Sep 2020) can hardly be the guiding light or act as a lighthouse to help us navigate with the definition of “OTT” or its classification. Even otherwise, the ITU definition as was recommended had categorically stated that definition of “OTT” is a matter of national sovereignty and may vary from State to State. The DoT Committee Report also is very narrowly construing the aspect of “OTT communication services” as competing with the services provided by TSPs, riding on the infrastructure created by TSPs. A very generic categorisation of other OTT services has been done to cover media services like broadcast, gaming, trade & commerce like e-commerce, radio taxi, financial services, cloud services, data hosting and data management, social media, internet-based intermediaries like Facebook, X, etc. and they not competing with the telcos. We have already given the detailed explanation with relevant examples in the submissions hereinabove and thus the same are reiterated and relied upon to conclude that any attempt at this point to define or categorize would be futile, premature, and not an opportune moment. Lastly even if a definition is to be provided, it can only be an inclusive one, with illustrations of all such types of OTT services existing as of today and not with the objective to regulate the unintended OTT services.

Comprehensive Response to questions related to
“OTT communication services”:

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.

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.

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.

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.

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 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.

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.

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. B. Issues Related to Selective Banning of OTT Services.

Ans: While dealing with the questions on “OTT communication services”, the submissions made to Q1 and Q2 above would equally hold good while responding to Q3 & Q4. We once again reiterate and submit that the subject of OTT is outside the domain and scope / jurisdiction of TRAI. The attempts to define or regulate “OTT communication services” must again be done keeping in mind the nature and character difference of them with the telecom services dealt with in detail hereinabove. Secondly, the benefits that have ensued to the consumers and telecom operators and the role of OTTs acting as “Drivers of Growth” must also not be forgotten. The various other aspects in relation to the investments made by OTTs / OTT communication services and to give undue advantage of double dip to telcos as an unintended consequence to define and regulate OTT like Telcos must also be kept in mind. Most importantly, the pertinent question of absence of opportune moment and the current state/scenario of Indian market and with the ongoing policy developments most of them being in the mid-way like the Telecommunication Bill, Digital India Act, Digital Personal Data Protection Bill 2023, and the aspect of all/most the OTTs being already regulated under various laws and regulations should be factored in before inching any further with this consultation exercise. It is our humble request that TRAI must hold back this consultation and wait for an opportune moment to relook into the same.

Even if an OTT communication service is found to be fully substitutable for the same to be treated like a licensed telecom provider, it must be recognised that substitutability in itself is a complex criterion comprising of many considerations and factors. These can include to determine the fact that whether the OTT alleged to be substitutable, is competing: (i) in the same layer (network/application layer, etc.); (ii) with comparable rights to resources and offer functionally comparable services; (iii) for the same group of consumers in the same service area and (v) on comparable devices. Thus, internet communication applications and telecom operators are far from being perfectly substitutable in most of the cases. The consumer interest must also be kept in mind since any financial or compliance burden would automatically get passed on and would also increase the cost-of-service provision. Many OTTs which are providing multiple functions and communication of voice and texting being a by-product to determine the substantial nature of the same or the same being ancillary in nature, may be on extremely vague and varying factors. It can even result in OTTs attempting to disguise communication features as non-communication features to escape obligations, or any such imposition of conditions may result in reduction of investments in the sector.

At the same point we fully uphold the need to protect national security at all costs and uphold the need for consumer privacy. Regarding messaging on OTT networks, enhanced data encryption is the best way to ensure privacy and security. In 2020, TRAI had recommended to the Department of Telecommunication (DoT) that the security architecture of end-to-end encrypted services should not be tinkered with as that would compromise the privacy, safety and security of citizens. Under the current framework, OTT communication services are required to comply with several due diligence provisions such as publishing of privacy policy and user agreement and deploy grievance redressal mechanisms. Additionally, significant social media intermediaries (SSMIs) are required to appoint a Chief Compliance Officer, a Nodal Contact Person, and a Resident Grievance Officer to ensure the compliance with IT Rules, 2021. There are enough Statutes in form of IT Act & Rules, which provides for lawful interception and take down. For instance, Section 69 gives Govt. power to de-crypt and monitor resource. Similarly, Section 69A dealing with “takedown obligations”. Sec 69B empowering

Govt. to monitor and collect traffic data or information through any computer resource or cyber-security. The security, privacy, regulatory aspects, economic aspects, QoS, grievance redressal, safety, takedown and all other aspects are likely to be further strengthened under the Digital India Act, DPDP Bill 2023 & Telecommunications Bill and thus there is hardly any need for any further deliberation or consultation on the above subject since these are adequately addressed.

The Digital India Act for instance would be addressing the following:

- i. **The earlier IT Act** addressed limited issues relating to use of electronic records, SPDI (Sensitive Personal Data & Information) Rules, certification of electronic records, digital signatures, CERT-IN.
- ii. The Digital India Act **would replace the IT Act, 2000** to address the evolution, growth (850 million Digital Nagriks) and transformation of internet over last 2 decades ('Global Standard Cyber Laws'). Avoid omni-bus Legislation to avoid overlap/conflicts and to bring uniformity. Digital Economy has become more complex and diversified with AI, Blockchain, High Performance/ Cloud Computing/Web3.0.
- iii. **Open, Safe, trusted and accountable internet to address User Harm:-** From interaction to cyber-crimes, cyber security, hacking and now towards cat-fishing (fake identity), doxing (revelation of personal information), cyber-stalking/trolling/Bullying, Gaslighting (propaganda, indoctrination, mass brainwashing), Phishing, Hate-speech, weaponization of disinformation/ misinformation, fake news (20x faster than normal information), unfair trade practices, organized information wars, radicalization, ambiguities in user rights, Women & Child safety, Revenge Porn, Dark Web, Spams, Slamming & Slicing, Deep- Fakes, Chat Bots, Misuse of YouTube algorithm/AI- based porn/Morphing, Age Gating, defining high-risk AI Systems, Regulating privacy invasive devices like spy camera, wearable tech, strict KYC requirements etc.
- iv. **Accelerate growth and innovation of technology:** These include e-commerce, social media, search engines, ad tech, digital media, content- monetizing rules, AI, OTT, Gaming, WEB 3.0, Robotics, autonomous systems, IOT, Distributed Ledger/ Block chain, Quantum Computing, VR, AR, MR, Real-time Language Translators, National Language Processing etc.
- v. **Open internet principles & to promote Digital Governance:** (Elements of choice, competition, online diversity, fair market access, EoDB & Ease of compliance for start-ups, fair trade practices, prevent concentration of market power and gatekeeping).
- vi. Synchronization with amendments proposed in Competition Legislation.
- vii. **To be future proof and ready:** To address diverse intermediaries for addressing eligibility to avail safe harbor provisions/protect Rights to Digital Nagriks / Specialized dedicated and accessible adjudicatory mechanism for online civil/criminal offences to deliver timely remedies.
- viii. **Cyber Security Bill:** Likely to be a supplement or part of the larger Bill. It would provide details like penal provisions in case of cyber breaches and define 'cyber-criminal' which are currently defined under IPC. So, these provisions would be additional.

Similarly, in the DPDP Bill 2023, there are provisions whereby the blocking orders can be passed in certain circumstances empowering the Govt. to block websites for data breach upon receiving a reference from the Board and after giving an opportunity of being heard to the Data Fiduciary.

Lastly, in the Telecommunication Bill, the following aspects are likely to be addressed and thus consulting them or seeking response through this consultation process may be unwarranted or avoidable. In fact, in the absence of any clarity about the provisions that would finally stand upon enactment of these legislations, it would be highly premature to submit any response or formulate any clear thought process of response to these questions. In a recent press report, it has been stated that Union Cabinet has given its nod on the Telecommunication Bill and it covers the following:

- i. Sets a global benchmark by placing emphasis on user protection and fostering innovation.
- ii. Combating rising menace of fraudulent calls originating from international numbers.
- iii. Govt. authorised to waive fees, interest, charges, penalties and even provide exceptions. Govt. can also convert into equity, write-off, or grant relief to any licensee under extraordinary circumstances.
- iv. OTTs not to be regulated like telecom, however the user safety and online trust would be safeguarded. Relaxations for “communication services” like WhatsApp, Google Meet, etc. There are some reports which speak to the contrary which says OTTs and Satellites are also being brought under telecommunications. However, the chances are that few OTTs which are substitutable are likely to be included.
- v. Central Govt. can block, intercept, or monitor messages, in case of public emergency & public safety.
- vi. Suspension of telecom services in certain cases.
- vii. No impact on TRAI’s power
- viii. Spectrum allocation to be done through auctions, administrative process or other mechanisms as may be decided.
- ix. In the event of bankruptcy of telecom co, the spectrum would go back to the control of Govt.

Emergency Services:

Coming now to the provision of “emergency services”, it must be appreciated that the same would require the routing of calls/messages to the nearest authority like fire department, police, hospitals, etc. It needs to be appreciated that the IP/IP-PSTN connectivity is not permitted and once this restriction is removed the provision of emergency services may become possible. In any event the OTT services are not possible to be provided without telecom and thus all the consumers accessing OTT would automatically have the benefit of access to emergency services. There are several other aspects to be considered like many OTTs will not have the granular geo-location information. The OTTs are always dependent on provision of Wi-Fi which is then dependent on uninterrupted power supply and which in turn is a common cause of emergency in the form of power outages and which results in disruption of Wi-Fi supply as well. The Wi-Fi is therefore no substitute to a comprehensive caller geo-location, which is only available with the network operator. Further, depending upon the type of device, Wi-Fi may only capture the location of the last place where the user is logged in and thus dependency of emergency services upon OTT or a mandate thereof would in fact compromise rather than expand the emergency services. The reason why telcos have emergency service requirements under their license is because they own the network and know whether the consumers (GPS

information and tower location) are located and thus can route the calls properly. Thus, there should not be any mandate to provide emergency call/text services not at this point.

Collaborative framework and challenges:

With respect to the collaborative framework, what first needs to be appreciated is the fact that OTTs offer an array of different services that are accessed by users through the data services provided by telecom operators. Even the National Digital Communications Policy (“NDCP”) 2018 recognises that “*communication systems and services as essential connectivity infrastructure at par with other connectivity infrastructure like roadways, airways, waterways, etc*”. In fact, telecom is an essential commodity from NTP 2012 wherein telecom was recognized including “*broadband connectivity as a basic necessity as education & health and work towards right to broadband*”. The regulation of ‘essential service’ must be on a different pedestal as to the OTT, which are supplementary in nature, operating in extremely competitive market and have no critical infrastructure of any value to the public. Thus, heavy regulatory framework is unwarranted for OTTs, and it is the TSPs who own the critical infrastructure, should not be acting as gatekeepers or blocking access. The OTTs are also adequately regulated by various laws under Competition Law, Information Technology, Consumer Protection and have sufficient regulation in place for them to operate. Any kind of licensing regime would only create entry barriers and would put the customer to a great disadvantage for availing full fledged benefit of global online applications and stifle innovation. Keeping the internet open, de-centralised and free from barriers and enabling them to grow and reach more people and making them useful to businesses, would help to reach the economy targets.

The collaborative framework between OTT communication service providers and licensed telecommunication service providers may lead to potential challenges related to net neutrality, consumer access, and consumer choice. This is because the licensed telecommunication service providers may have an unfair advantage over the OTT communication service providers, who may not have the same level of resources and infrastructure. The collaborative framework may also impact consumer access to OTT services. For example, licensed telecommunication service providers may choose to restrict or block access to certain OTT services that compete with their own offerings. This could limit consumer choice and stifle innovation in the OTT market.

The multiplicity of functionality would be another big challenge to define or segregate communication OTTs from non-communication OTTs and with increased number of functionalities being offered, the distinctions would become more and more complicated, giving rise to entirely new consideration to determine, define and segregate between communication OTTs and non-communication OTTs. The collaborative framework may also limit consumer choice by favouring certain OTT services over others. This could lead to a situation where consumers are forced to use certain OTT services that are bundled with their telecommunication service plans, rather than being able to choose the services that best meet their needs. This would also be a major cause for both regulatory and innovation paralysis. Thus, on account of fundamental, technical, and business differences between traditional telecom apps and OTTs, any kind of proposed License Raj would lead to incoherent regulatory governance. Therefore, there should be clarity and eliminate regulatory risk by adopting forbearance regime to the OTT sector instead of trying to draft regulations which would soon be obsolete with the development of new technologies and services.

Comprehensive Response to questions related to “Selective Banning of OTT services”:

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.

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

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.

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.

Ans: While the consultation paper is titled “*Regulatory Mechanism for Over-the-Top (OTT) Communication Services and Selective Banning of OTT Services*”, the scope of banning has been extended to all types of OTT services. In the capacity of a content platform or a digital news content platform, it is submitted that there are adequate regulations and laws in place which are capable of addressing all concerns instead of bringing in the content platforms/digital news platforms or content OTTs or any kind of other digital services which are capable of being offered through OTTs whether education, healthcare, online publication, social media websites, or any other OTT hosting content.

We would like to highlight the already existing legislative and regulatory landscape that already governs the content, digital news and/or the generic OTT services:

- First and foremost, the FDI infusion can only be done by way of prior approval of the Central Govt. for all digital media companies including the ones which are in the business of uploading, streaming of news and current affairs through digital media under the applicable FDI policy. These digital news websites/portals, news aggregators and news agencies operating through digital media are also required to submit details such as shareholding patterns, names, and addresses of shareholders, promoters, and significant beneficial owners to MIB.
- Further, all the media entities are covered under several statutes like Cable TV Act 1995, Indian Penal Code 1860, Emblems and Names (Prevention of Improper Use) Act 1950, Indecent Representation of Women (Prohibition) Act 1986, SC & ST (Prevention of Atrocities Act) 1989, Protection of Children from Sexual Offences Act 2012, Copyright Act 1957, etc.
- The media entities are also bound by various guidelines issued by the respective Ministries and self-regulatory bodies like NBDSA, BCCC, DMCRC, DPCGC, who have been mentioned by the Supreme Court in several judgements.

In any event globally it is accepted that internet-based services should not be statutorily regulated but the content thereof should be subject to self-regulation. Making OTT subject to stringent regulation will only lead to the growth story of the OTT services being brought to a

grinding halt, reduce the number of players offering digital services and negatively impact service quality. The digital content and digital news must be governed by principles of self-regulation and the same is what is even contemplated and structured in the IT Rules 2021 which are currently a subject matter of challenge.

Attention is also invited to a recent introduction into the IT Rules on the provisions relating to “Fact Check” whereby MeitY had empowered itself with the power to notify a “fact checking body” for all information pertaining to Govt. on social media platforms. It also provided that the failure of social media platforms to block or remove content would result in losing the “safe harbour provisions” for social media platforms/companies. The PIB which was earlier stated in the draft proposal was also replaced with a body which would be approved by the Govt. These provisions are already a subject matter of challenge before the Bombay High Court and wherein the Court has already orally observed during the hearing that “you can’t bring a hammer to kill an ant” and that “Govt. is not the ultimate repository of truth which cannot be questioned”. In fact, fearing interim orders, the Govt. has itself verbally assured that the Fact Check Unit would not be getting constituted till 4th September 2023. The matter is now listed on 31st August 2023 and is sub-judice. Thus, it would be important to see judicial trends & developments in these proceedings and it would be advisable to tread with caution in this direction i.e., recommending or coming up with regulations on the subject matter of “selective banning of OTT services”. In fact, to repeat the apt word used by the Authority itself in the previous recommendations that it would not be an opportune moment to discuss these aspects as it may overlap and be also contradictory with the judicial precedents / jurisprudence that is in the course of getting evolved.

Thus, any attempt to selectively ban under a separate procedure or even to consider bringing them under the scope and ambit would be highly detrimental to free speech which is guaranteed under the Constitution and upheld by the Supreme Court in various judgements. It is further imperative to note that Selective banning of OTT services could also have economic impact as it could lead to a decrease in foreign investment and a negative impact on trade relations with other countries. Additionally, it could harm the reputation of the country as a destination for business and innovation. Ultimately, the decision to selectively ban specific websites must be based on a careful analysis of the potential benefits and drawbacks. If the primary motivation is to suppress dissenting voices or limit access to information, then such measures may be viewed as an infringement on civil liberties and could have unintended consequences.

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.

Ans: None.

Summary and Conclusion

Thus, the important Pointers that emerge from above submissions can be summarized as under:

1. The Consultation is without jurisdiction on the subject matter of OTT. The same is pre-mature and contradicting TRAI’s own stand of not being an “*opportune moment*”. Neither has there been any such cause or reason or occasion, which needed interference by the regulator at this point of time. The market forces are smoothly operating, and any attempt to regulate or License

would only and solely be to the benefit or further the interest of select stakeholder at the cost of all others.

2. In any event, there are so many legislations already pending discussion like the Telecommunications Bill, Digital India Act, Digital Personal Data Protection Bill 2023 and various other consultations by TRAI vis-à-vis Convergence, Spectrum Auction, Media Ownership, and so on and thus to have this consultation on this subject would be jumping the gun and seeking response at a stage when we do not have the clarity on the emerging regulatory and legislative scenario. Most of the answers even if attempted to be given would only lead to a half-cooked position or stand which again may be subject to change, upon the enactment of these upcoming/forthcoming legislations. In fact, even the questions that have been posed would need to be changed.
3. Thus, any such recommendations or legislation if being issued, will have to be revisited in the event there are any provisions to the contrary, which is likely to be the case once all these legislation and regulations are enacted / attained some form of finality.
4. Even otherwise, there is a big difference between OTT services and telecommunication services, both in terms of network architecture, business model, nature of services, and we have already made detailed submissions in the draft Telecommunication Bill as to why “broadcast services” and “OTT” should not be brought under the definition of “telecommunication services”. The present definition of OTT Services should not lead to bring within its ambit those OTT services or in fact most of the OTT services under the purview of “telecommunication services” which have NO commonality in the services offered by telcos and which are beyond conventional messaging and communication provided by telcos. OTTs should be seen through a different lens and must not be brought within the ambit and scope of being regulated or to be treated as substitutable to telecom services and thus to be subjected to similar rules and licensing & regulatory framework.
5. It must also be appreciated that the presence of OTT ecosystem has only benefited the telecom services providers/telcos, who have been able to fetch big returns by maximizing data consumption and thereby increasing revenues. The telcos who are also into content business or have group companies which are in the business of selling content, have come up with bundled offers whereby the revenue opportunities are diverted towards bandwidth consumption and by offering them free content either offered by the group companies or by having arrangements with other content companies and having / taking the advantage of proximity to the last point contact, who offers both carriage and content as a bundled service.
6. The telcos should not be given the advantage to benefit both from the consumers as also the OTTs and it must be appreciated that huge investments are also made by OTT players to ensure that content gets consumed and delivered to the end consumer with minimal load on the telecom infrastructure. Even the consumers make substantial investments towards the hand-held devices / smartphones.
7. Any kind of licensing framework being proposed would only lead to a decline in the innovation market and would also dissuade investments and would impact the overall growth in the OTT content / news space.
8. The telcos in any event are under a forbearance regime and are also attracting consumers to use bundled packages wherein content gets offered for free on bandwidth / telecom subscription. Further, telcos have a free access and ability to enter OTT segment as there is no bar on them to come and compete in the OTT space.
9. On the contrary, if OTT were to enter telecom by getting a license merely because of ability provided in the form of messaging or doing calls, when indeed the prime purpose is provision

for different service like food delivery, health services, fintech, ed-tech, gaming services, etc. Thus, mere availability and the capability of an OTT platform to provide messaging and voice services shall not result in them being subjected to licensed terms like the telecom operators.

10. Another aspect which needs to be appreciated is that none of OTTs can be offered in the absence of telecom network or without the telcos offering the broadband services. In other words, the entire architecture of offering of substitutable services is completely different and it is like one service riding over the service provided by the other, which is why these are referred to OTT services. It must be understood that what has been lost in terms of revenue because of these substitutable services of voice and message by OTTs, has been gained in manifold terms because of the explosive use of the broadband services.
11. What further needs to be understood is that this explosive growth of broadband services is only due to the presence of OTTs.
12. Another aspect w.r.t. the load on the telecom network is that the content is being sought / demanded by a telecom consumer only. The said consumer also has a contractual agreement with telcos as well and telcos get paid from the said consumer for usage of broadband.
13. Further telcos are not prohibited from charging more from a consumer who is the cause behind the excessive usage of network. TRAI Regulations are also supportive by giving full freedom to price the end consumer a regulatory regime of “forbearance”.
14. It would therefore be unfair and unjust because of an excessive usage by some consumers of broadband network, that any kind of Network Usage Fee (NUF) or any other type of financial burden or the idea of regulating OTTs gets deliberated or discussed.
15. The telcos therefore must be redirected to make up for the losses (if any) on account of fall in SMS or Voice revenue without a corresponding increase in the broadband revenue (which looks highly unlikely) towards that consumer who is responsible for the same and the same can easily be done in a “forbearance regime” regulations of TRAI.
16. In fact, any ground to put the blame on OTTs for excessive usage of broadband network, would also be self-contradictory to telcos’ own action of promoting premium content like IPL on their own network. In such cases, the business model is to monetise on broadband revenue and ad revenue to attract more users / telecom subscribers and foregoing the revenue of OTT / digital content platforms. While the vertically integrated telcos may be able to gain out of the bargain, the standalone OTT content / digital content player ends up losing to arrive and derive an appropriate value on the investment made on content. The said phenomenon is only and solely because he has not adequately invested in owning a telecom license. A regulatory mandate to adopt such business model by OTTs or to lose in the content segment would be fatal to any healthy competition and create opportunities for the mighty or those having presence and stakes in both carriage and content to act as gatekeepers or to foreclose competition and would also be in gross breach of “Net Neutrality” principles.
17. The discussions that took place in the recent past namely Convergence, Telecom Bill, etc. is to either have the ability to own by investing on both carriage and content business and also to undergo the licensing related compliances or perish as a content creator or being in the business of content as without owing a telecom network, the inherent right to distribute content or news, stands forfeited or extinguished.
18. All the services covered under the definition of “OTT Services” in present CP are already covered and regulated under the IT Act and hence, neither fresh definition of OTT Services is required nor the additional regulation for such services are warranted. Thus, the OTT content / digital news platforms have sufficient regulation in place and also have a self-regulatory body/mechanism to adjudicate upon the banning/prohibition/takedown, in the form of Cable TV Act, Uplinking & Downlinking Guidelines, IT Act & Rules, ASCI Guidelines, NBDA

Guidelines and so on and thus any kind of further regulatory restrictions of the same would result in unreasonable restrictions of freedom of speech & expression. Thus, the OTTs are adequately regulated by various laws such as Competition Law, Information Technology Act, Consumer Protection Act, and thereby sufficient regulation is already in place for the same. Any further regulations and any kind of licensing regime would only create entry barriers and would put the customer to a great disadvantage for availing full fledged benefit of global online applications and stifle innovation.

19. In any event globally it is accepted that internet-based services should not be statutorily regulated but the content thereof should be subject to self-regulation. Making OTT subject to stringent regulation will only lead to the growth story of the OTT services being brought to a grinding halt, reduce the number of players offering digital services and negatively impact service quality.
 20. TRAI therefore must wait for an opportune moment and let the turbulence of various legislative developments settle and permit a bedrock of clarity to emerge before proceeding with the consultation process and the questions raised in this consultation paper.
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