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To: "Akhilesh Kumar Trivedi" <advmn@trai.gov.in>
Sent: Thursday, August 31, 2023 11:19:14 AM
Subject: Response to TRAI's paper on Regulation and Selective Banning of OTT Services

Dear Sir,

I am writing to you to offer our inputs on the consultation paper on 'Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services' on which comments have been invited till September 01, 2023. I am of the opinion that the current definition of OTT services adopted by TRAI, and as an extension, any classification of such services, will be unable to reflect the complexity arisen by the multiple functions performed by a service. Hence, on principle itself, I hold a preliminary view against the licensing and registration of OTT services. I also believe that in addition to a lack of adequate evidence indicating a need for regulatory intervention, lack of a clear statutory basis or reasoning exists for TRAI to take this matter up for consultation. I am also apprehensive of the approach of selective banning of OTT services, given its ad-hoc, ambiguous, and impractical application, and the negative consequences it may have of user choice and freedom.

Kind Regards,
Vishal

Detailed submissions on the 'OTT Regulation and Selective Banning' consultation paper

A. Issues Related to Regulatory Mechanism for OTT Communication Services

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

The ambit of this consultation is sought to be limited at the outset with the definition of OTT [Over-The-Top] being narrowly defined by the Consultation Paper. While an OTT service may be any internet application or service which sits on "top" of a telecommunication ("telecom") network, the present consultation limits the scope to only those which, "is accessed and delivered through an application (App) over the public Internet, using the network infrastructure of telecom service providers" and "is a direct technical/ functional substitute for traditional telecommunication services provided by the telecom service providers".

There is some historical baggage to this particular choice. In the previous Net Neutrality and OTT Regulation paper published on March 27, 2015, the Telecom Regulatory Authority of India (TRAI) lacked precision in its argument outlining the regulatory and economic imbalance between TSP and OTT services, and ended up making paternal statements for regulation, citing arguments such as online gaming and social media addiction.[1] This approach seems to be driven by an instinct to regulate the internet per se from the lens of TSPs rather than satisfy any regulatory need. The SaveTheInternet.in campaign also consistently avoided the use of "OTT" in preference to "internet applications and services". To many, "OTT" was a reductionist term which limited the vibrant, innovative pace of applications and services.

In an effort to reach a firmer understanding of the term "OTT", it lists various attempts made to define it by various jurisdictions, forums and international bodies. In this consultation paper, TRAI lists definitions of OTT services published by Organisation for Economic Co-operation and Development (OECD), The Office of Communications (Ofcom), United Kingdom, Body of European Regulators for Electronic Communications (BEREC), etc. There is a problem in this approach as India has adopted an indigenous, progressive approach towards net neutrality which is in many ways due to the leadership of TRAI setting the norms of net neutrality. Hence, while India may learn from definitions developed in other jurisdictions, we may have an opportunity to help globally set standards once again. Notably, BEREC has also criticised the suggestion to make OTT content providers pay for the rollout of 5G and broadband in Europe and voiced its concerns on whether such a move would help the EU meet its connectivity targets.[2] As per recent reporting, telecom ministers from 18 countries either rejected the proposed network fee levy on tech firms, or demanded a study into the need and impact of such a measure.[3]

One of the criterias used by TRAI to define OTT services in this consultation paper is that they are direct technical/ functional substitutes for traditional telecommunication services. This, according to us, is a very reductive and improper criteria as the substitutability of any service cannot be clearly made out and is closely linked to a large list of criteria. Let us for instance consider internet based calls, in which user behaviour is distinct due to voice quality, reliability and ease. For instance, many use voice calls in preference to data calls and would usually do it for emergency services. We may on the contrary use data calls when the network is spotty or we are talking to a friend abroad. Both services co-exist, for very different purposes. There are inherent structural differences between the two as well, the primary one being that OTT communication services are essentially internet-based apps, which don't own or operate telegraph equipment.[4] Further, OTT communication services do not enjoy exclusive permissions enjoyed by telcos, such as ability to obtain numbering resources, the right of way to set up

Infrastructure, etc.[5] Thus, the arguments for substitutability of services between telcos and OTT communication services are unfounded.[6]

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.

Here, our concern is in extension to the one alluded to in our response to the previous question. The current definition of OTT services adopted by TRAI, and as an extension, any classification of such services, will be unable to reflect the complexity arisen by the multiple functions performed by a service. Several internet applications and services offer multiple functionalities — which may include voice calling and instant messaging—even though their primary functionality, for instance, may be social networking. With WebRTC, nearly all browser based content and mobile applications can have a communications layer that supports messages, voice, and video. Will such services also be brought within the regulatory ambit? Furthermore, how will these services be classified as their functions may be cut across several categories.

TRAI lists the classification of OTT services as provided by various jurisdictions and forums. One of these classifications was provided by the Department of Telecommunications (“DoT”) in their ‘Committee Report on Net Neutrality’ published in May 2015, wherein DoT grouped OTT services into OTT communication services (providing realtime person to person telecommunication services) and OTT application services (services such as media, trade, commerce, social media, trade). [7] TRAI lists similar classification attempted by other forums and organisations such as BEREC, Commonwealth Telecommunication Organization, etc. However, what remains unclear is how an OTT service, which provides social networking services and also electronic communication services as a primary and secondary functions respectively, will be categorised.

To us, this is again illustrative of the oversimplification of a debate that commences from dulling the feature richness and diversity of internet applications and services into the straightjacket of OTT. The dangers of avoiding bright lines of regulation and the uncertainty in treatment may prevent free expression which is the very basis for innovative thought and action. There are also concerns that overbearing and costly legal compliances and product decisions which may harm India’s vibrant start-up ecosystem. Even a case-by-case assessment may bring in uncertainty and build ad-hocism. Hence, on principle itself, we hold a preliminary view against the functional definitional treatment of internet applications and services as OTTs as well as their categorisation as per the services offered by them which further builds into a case for licensing and registration to protect telecom service providers (“TSPs”).

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.

Same response as given for Q1.

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.

Same response as given for Q2.

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

Regulatory aspects;

Economic aspects;

Security aspects;

Privacy aspects;

Safety aspects;

quality of service aspects;

consumer grievance redressal aspects; and

any other aspects (please specify).

Kindly provide a detailed response with justification.

TRAI lists the obligations applicable to TSPs and the arguments put forth by organisations such as ITU and BEREC on the

need (or lack thereof) for developing a policy and regulatory framework for OTT communication services. To substantiate the economic premises put forward by the ITU, TRAI listed some data (declining number of outgoing SMS and international long distance voice minutes of usage, as well as increasing volume of monthly wireless data usage and monthly average revenue per user (ARPU) for wireless subscribers). There are also subsidiary arguments made to further these two premises. These include the rising user consumption of data, the dropping price of data per GB due to competition amongst telcos, growing convergence (where even voice calls originate over data networks), which requires investments for upgradation and increasing the capacity of existing networks.[8] All these trends are stated on the basis of reference to reports by consultancies and industry associations.

We urge TRAI to interrogate the premise, i.e. the existence of service substitutes, in which several internet services are supposedly direct substitutes of traditional services and are thus stealing the latter's revenues and profits as well as the existence of a market failure, in which there is a lack of adequate financial incentive for large telecom players to invest in infrastructure due to the lack of compensation. TRAI, throughout the Consultation Paper, makes this to be the causal link requiring regulatory intervention.

Ideally any prescriptions on this in the consultation paper should commence from a data driven analysis which provides evidence for the revenue losses borne by traditional telecom companies thus impairing future telecom network investment. To fill this gap we conducted an economic analysis of the financials of large telecom players over a 7 year period from 2015, based on their own publicly-available quarter-to-quarter statistics [Link] [See here the data sheet broken across quarters that maps the financials of the sector based of TRAI data, and three large telecom companies, Airtel, VI (Vodafone and Idea), and Reliance Jio]. [9] As such, we determined that three inferences could be made from the data:

Both voice and data usage have seen a significant increase between 15Q2 and 18Q1, i.e. roughly between July 2015 and June 2018, exploding after 16Q2 with the entrance of Reliance Jio into the telecom sector.

This massive growth coincided with a drop in per user revenue for the major telecom players. Such fall appears to be due to a hyper-competitive environment engineered in the sector by the entry of Reliance Jio, however with a wave of consolidation this period may soon end. We also further predicted that with a wave of then-upcoming consolidations (like the merger of Idea and Vodafone), this period of lower revenue streams would soon end. These trends are as per statements in the press by leading executives of telecom companies and analyst reports such as Moody's and Fitch.[10]

We also noted that while the data displayed a need for continued investment, the extent of the necessary investment was unclear from the data available from the telecom companies. We thus called for a clear, public statement backed with data to be made, if there is truly a need for investment.

What the data thus implies is that an increase in data use - and therefore the services accessed using such data, including the use of OTT communication services like instant messaging or voice and video calling - cannot be blamed for decreasing or negatively affecting revenue streams. Although major telecom companies tend to attribute various factors to this decline, intense competition remains most likely to be the main cause. It is our initial belief that implementing regulations that impose financial burdens or levies on internet platforms and services is not a wise public policy approach. Rather than protecting company profits of both telcos and OTT service providers, the goal of regulation should be to serve the public's best interests.

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.

This is a relevant concern for the Consultation Paper to indicate as the market power of large online platforms concentrates and quite often there is a lack of compatibility or ease of migration from one online service or app to another. This can result in a lock-in for a user to a particular online service provider. While this is a credible public policy concern and may require regulatory intervention, we are unsure whether the TRAI, as a telecom regulator, should be the one to take this up.

Before we deal with issues around TRAI taking up this public policy concern, we must deal with a fundamental question, i.e. whether licensing is an appropriate approach to tackle competition concerns. The aim of licensing is to ensure responsible use of resources that are scarce in nature.[11] This is why the government provides licences for mining operations and electromagnetic spectrum. However, since OTTs are non-scarce and non-rivalrous internet based applications, the rationale for licensing does not apply. Any social or competition concerns that arise out of the use of these apps are/should be tackled already by sectoral legislations such as the Consumer Protection Act, 2019, Information Technology Act, 2000, Digital Personal Data Protection Act, 2023, etc. Further, the Competition Commission of India (CCI), in its report summarising the main findings of the Market Study on the Telecom Sector in India noted that "experts feel a separate regulatory framework is not necessary for OTTs and excessive regulation may stifle technological innovation, and therefore be counterproductive". [12]

An accompanying fundamental problem to ponder over is the effect OTT licensing may have on non-dominant service providers. In a sector where market concentration is likely, the inclusion of a non-dominant player under the licensing regime may further create barriers for entry into the market and the ease of doing business. Inclusion of OTT players under the

regime on an ad-hoc basis, primarily due to the ambiguity around definition and classification of OTT services, may also have negative implications.

In addition to our fundamental concerns with the approach, our other two basic reasons for hesitation are: firstly, the lack of a clear statutory basis to do so (TRAI may go outside its legal mandate by dealing with issues of competition and consumer interest); and secondly, it may turn the TRAI into a regulator for the internet based applications. We believe the absence of legality and authority, even to seek opinion on such matters, would also blur the objectives of regulation and the boundaries within which TRAI would have to restrict itself. We hope that the issue of interoperability is picked up within competition law and consumer protection frameworks, which may be better suited to undertake this task.

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:

lawful interception;

privacy and security;

emergency services;

unsolicited commercial communication;

customer verification;

quality of service;

consumer grievance redressal;

eligibility conditions;

financial conditions (such as application processing fee, entry fee, licence fee, bank guarantees etc.); and

any other aspects (please specify).

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

Lawful interception: This is an incredibly concerning issue, as India's recently enacted data protection law does not put into place any meaningful safeguards against overbroad surveillance.[13] We have been advocating and campaigning for a strong, user centric data privacy law that includes surveillance oversight and reform. The Expert Committee instituted by the Union Government on data protection chaired by Justice Srikrishna acknowledged that current legal provisions and practices on surveillance - including the absence of any judicial oversight - fail to adequately protect our fundamental right to privacy. [14] A line of argument, one we do not agree with, states that any required safeguards have been achieved through technical measures implemented by users -- this principally includes end to end encryption (E2EE). At this juncture, it is necessary to clearly state that lawful interception of messages can only happen by weakening E2EE, bypassing it, or by not encrypting communication altogether. Not only would this force several encrypted messaging platforms to stop providing their services in the country, but it would also result in erosion of trust among users. Global studies have also shown that similar laws which weaken E2EE have resulted in financial losses and hindered economic growth.[15] Given the safety and security afforded to users, businesses, and governments by end-to-end encrypted messaging platforms, we are of the belief that these services must not be compelled to weaken or abandon E2EE. The use of legal or technical means to access data and intercept communications in India must only be authorised only in emergency situations, under judicial control and oversight, and with other protections to safeguard our citizens.

Even though the Digital Personal Data Protection Act (DPDPA), 2023, has been notified the current version lacks a provision on surveillance reform within its ambit or a provision to regulate intelligence and policing agencies, which are the principal recipients of such information. Hence, any conversation which progresses to argue for expanding the applicability of lawful interception, that too in the absence of relevant safeguards, is completely against user interest and will be another step in building a surveillance state.

Privacy and Security: We do not dispute the line of thought that internet platforms and services need to be governed appropriately when a clear social need arises in a rights respecting framework and pursuant to legality. Although India now has a notified data protection law, risks to privacy/security due to interception still exist as the law does not include any safeguards against overbroad surveillance. As we have stated previously, any attempts to intercept communication and weaken E2EE will lead to the erosion of trust, safety, and security of users. Also as indicated before we are not adverse to examination of large social media platforms or data driven businesses within consumer protection and competition law

frameworks. However, as we have stated before, this examination must be undertaken by the relevant authorities and not by TRAI.

Emergency services: We have in the past held a view that the conversation regarding this may be deferred to a later date. We believe we have not yet reached the moment for regulatory intervention, but we do hope that better citizen advocacy and user demand spur market mechanisms that may require application providers of internet applications and services to clearly mark that they do not have the functionality for emergency calling. Some other services may by themselves opt-in and offer this feature to users as a product feature. But, the primary point which needs to be stressed is that voice calling and SMS messaging by itself still persists and is a feature which is always available on feature- and smartphones. Hence, emergency services are at present available to users in India to an extent where a regulatory intervention may not be justified.

Unsolicited commercial communications and customer verification: On November 29, 2022, the TRAI released a consultation paper titled 'Consultation Paper on Introduction of Calling Name Presentation (CNAP) in Telecommunication Networks', wherein a proposal for the introduction of CNAP in India was floated. As per the CNAP proposal, the information of a caller would be provided to the receiver, thus giving the consumer the right to make an informed choice as to whether to take the call or not. This proposal was suggested to contain prevalence of robocalls (automated calls used to dupe consumers financially), spam calls (unsolicited marketing calls that bypass the do-not-disturb feature), and fraudulent calls that may obtain details of bank accounts or OTPs with an aim to defraud consumers.

On September 21, 2022, the Department of Telecommunications ("DoT") released the draft Indian Telecommunication Bill ("Telecom Bill"), 2022 for public consultation.[16] Clause 4(7) of the Bill requires every entity receiving a licence to "unequivocally identify the person to whom it provides services, through a verifiable mode of identification as may be prescribed." The "verifiable mode of identification" remains unknown as of now, but what is known with certainty is that the identity of the person receiving the service will have to be established, with complete assurance, by the service provider. Additionally, as per Clause 4(8), the identity of the sender of a message using telecommunication services "shall be available to the user receiving such message, in such form as may be prescribed, unless specified otherwise by the Central [Union] Government". In the explanatory note, the government notes that these provisions are "important to prevent cyber frauds". [17]

While the recognition and acknowledgement of a need to tackle increasing cyber frauds in India is appreciable, potential excessive data collection and retention by several entities raises concerns. These provisions essentially strip away the user's right to stay anonymous while communicating, both offline and online. This can have a deleterious impact on vulnerable individuals such as whistleblowers, who wish to keep their identity anonymous.[18] Services such as Twitter and Instagram, which provided users with the option to communicate anonymously, will possibly have to take back this facility if they wish to operate in India.

Although a data protection law has now been notified, there is still some ambiguity with respect to a user's ability to de-list themselves in case they don't wish their details to be revealed to receivers of messages. Similar ambiguity exists on the ability of the users to get their data deleted, erased, and forgotten. While the DPDPA, 2023 does not include the 'right to be forgotten', the Minister of IT claims that this right has been subsumed under the right to erasure. This conflation between the general right to erasure with the right to be forgotten, which is specific to disclosure of personal data, leads to ambiguity. The mention of right to erasure is also limited by the need to retain information for "compliance with any law for the time being in force" [Section 12(3)] - which when combined with various sectoral/ other data retention requirements, may result in heavy dilution of this right. Moreover, Section 17(3) also includes an exemption from Clause 8(7) which obliges a fiduciary to erase personal data/ ask a data processor to erase it once consent is withdrawn (and the purpose is served). Thus, any and all provisions of the Act must be read with and in context of the exemption provisions as well as other broad qualifiers.

Moreover, given the inadequate safeguards that currently exist for users to avail in case of violation of their fundamental rights, such overbroad requirements must be reconsidered. Given these grave concerns, any measure adopted or suggested by TRAI for verification of customer identity or any efforts to tackle spam calls must not lead to weakening of the user's right to privacy and as an extension, right to anonymity.

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.

It bears repetition that the core thesis of a market failure and the need to correct regulatory imbalances is yet to be established, contrary to our economic analysis that shows that the economic stress is due to a period of hyper-competitiveness. We even dispute the arguments for substitutability of services between telcos and internet applications and services. Thus, we reiterate our stance that there is inadequate evidence at the moment, and therefore no need, for creating a collaborative framework between OTT communication service providers and the licensed telecommunication service providers.

TRAI, in this consultation paper, lists the recommendations given by International Telecommunication Union (ITU) on 'Collaborative framework for OTTs'. The "collaborative framework" recommended by the ITU needs to be read with its

accompanying introduction, which reads as follows:

“Consideration of the economic impact of OTTs should be based upon recognition of the fundamental differences between traditional telecommunication operators and OTTs, including inter alia, control of broadband Internet access, level of regulatory exposure, barriers to entry, competitive environment, level of substitutability between OTTs and traditional telecom services and interconnection to public networks. In particular, determination of competitive scenarios involving OTTs and traditional telecommunication services should consider the complexity of their interrelationship. In some cases, they may deliver similar functionalities, in other areas they may be supplementary, whereas in other aspects, OTT may exceed what traditional telecom services typically deliver. Moreover, the advancement in the telecom network catalysed the OTT development, further extending consumer benefits. To continue the momentum in development, competition, innovation and investment need to be encouraged to foster the growth of the entities in the ecosystem, including network operators and providers of OTTs.”

Thus, the adoption of any framework must be preceded with an understanding and analysis of the complex relationship and the fundamental differences between the OTT services and TSPs.

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.

As part of our comments dated January 07, 2019, and counter comments dated January 21, 2020 on the consultation paper on ‘Regulatory Framework for Over-The-Top (OTT) communication Services’ released by TRAI in 2018, we urged TRAI to prioritise users interest and choice, over that of telcos and OTT service providers.[19] We submitted that the paper set multiple faulty premises to pose queries and was thereby representative of inaccurate information, which may lead to problematic regulations. We called for legislative action and regulatory reform in the domains of privacy, consumer protection, and competition law frameworks. We also highlighted that TRAI's consultation queries fell outside the jurisdictional scope of telecom regulation, and thus outside of TRAI's.

B.Issues Related to Selective Banning of OTT Services

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

No response.

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.

Highlighting the high economic and social cost of complete internet shutdowns, TRAI is seeking comments on an alternative approach, i.e. to selective banning of specific OTT applications and websites etc. in specific regions, “which are likely to be used by the terrorists or anti-national elements”. The Standing Committee on Communication and Information Technology in its 2021 report on ‘Suspension of telecom services/internet and its impact’ recommended that the DoT examine TRAI's recommendation and develop a policy to selectively ban OTT services with suitable technological interventions.[20] Similar approach of ‘whitelisting’/‘allowlisting’ some services has earlier played out in Jammu and Kashmir in 2020.[21] Here, some questions arise with respect to the technical ability to implement and overall efficiency of such bans.

What processes and criteria will be applied to select and reject specific URLs/ services/ websites for banning? Will all services providing similar or comparable services be banned or will that decision be taken on a case-to-case basis. The latter may lead to ad-hocism, impose compliance burden on MSMEs, and negatively impact user experience as well as choice.

The Jammu and Kashmir allowlisting order also stated that “The ISPs shall be responsible for ensuring that access is allowed to whitelisted sites only”. In the case of the entries that contain neither URLs nor qualifying information about including subdomains or about permitting mobile applications, it should not be left to the discretion of an Internet Service Provider (ISP) to determine the appropriate URLs or the appropriate mode of access (mobile or desktop application, mobile or desktop version) of a allowlisted service or website. ISPs are intermediaries and are not authorised to take a judgement call on the orders they receive from the government. Actions to be taken by an intermediary in case of invalid or indeterminate URLs may also be unclear, leading to ambiguity around how allowlisted entries are to be implemented. Another concern that was witnessed in the Jammu and Kashmir allowlisting order was how the residents were informed of the services that had been made accessible. It is worth noting that these orders appeared in an issue of the gazette, which may not be accessible by everybody.

A paper published by researchers at the Centre for Internet and Society found that different ISPs deployed different techniques for banning services.[22] It also found that less than 30% blocked URLs were common across the ISPs. Such

inconsistencies may lead to users having limited to no recourse due to the ISP's lack of accountability and transparency. The ability to make arbitrary decisions regarding accepting/ rejecting the request to ban certain services along with deploying their own techniques to ban services may lead to inconsistent and ad-hoc application.

What also remains uncertain are the methods through which a selective ban will be implemented. Will the ban be limited according to duration of ban or geographical area of ban? A concern worth noting is will the availability of a "restricted shutdown" be misused and lead to more number of shutdowns being ordered, just because they are perceived to be "limited in their impact"? Or will the ban be restricted according to the access to medium (wired or wireless connections)? In this case, will the Union or state authority take into consideration the prevalent digital divide in the country as well as the fact that a minority in the country have wired connections. Notably, while 96.13% of the population have wireless mobile connections, only 3.74% of the population have wired connections.[23]

Other concerns include the impact of banning multi-purpose OTT communication services, such as WhatsApp which is used for communication, payments, and to conduct business. Although the intention to ban may be to curb communication through an app in an area, it may have the unintended consequence of introducing barriers in conducting payments and business. For instance, small-scale businesses with a predominant social media presence faced difficulties in performing business and receiving payments when WhatsApp faced a six-hour long outage in October 2021.[24] It is also unclear if the Union Government will take into consideration a hierarchy of apps while considering banning, i.e. whether to ban an app that occupies most of the internet traffic online by providing multiple online services as compared to another app providing a single service. As per the orders laid down by the court in the Anuradha Bhasin v. Union of India and Ors Judgement, the government would have to comply with tests of proportionality and of least intrusive methods of imposing a restriction.

On July 25, the government of Manipur marginally lifted the internet shutdown.[25] The order allowed restoration of the internet for broadband users (Internet leased line and fibre to the home) subject to several "impractical" conditions. These partial lifting of the internet suspension was made subject to fulfilment of the following terms and conditions:

- a) Connection will be only through static IP and that the subscriber concerned shall not accept any other connection other than allowed for the time being [TSP/ISP shall be held responsible for non-compliance of this condition];
- b) No Wifi Hotspots shall be allowed from any of the routers and systems using the connection at any cost by the subscriber concerned;
- c) Media Access Control Address (MAC) binding at the system level or router shall be ensured with the help of ISP/TSP concerned;
- d) Blocking of social media websites and VPNS at the local level will be ensured by the subscriber concerned;
- e) Shall have to ensure removal of any existing VPNs softwares from the system and not to install any new softwares/ VPN App by the subscriber concerned;
- f) Enforcing Physical Monitoring by subscriber concerned/the concerned authority/officials of checking violation of the terms and conditions specified;
- g) Changing of log in ID and Password for respective system on daily basis; and
- h) Will obey all orders/ Regulations regarding any change in the condition under which service is being allowed issued by the State Government from time to time by the subscriber concerned.
- i) Further, in the event of any violation, subscriber concerned will be liable to be punished as per provisions of relevant laws of the land in force and that I also agree to be fixed personally responsible for any leakage/ activities done by any Secondary user of internet, In case Wifi/ Hotspot had been activated without approval of Home Department from my system/router.
- j) ISP shall ensure to obtain undertaking to the extent as explained above before giving any internet connection in the prescribed format (enclosed herewith) without fail.

The order requires users to have static IP connections with system-level MAC binding of devices which allows for precise geolocating of the users. This effectively does not provide any relief to the large population of Manipur, and only helps a negligible section of users with broadband connections and a static IP. According to the Indian Express, "Mac-binding essentially means binding together the MAC and IP addresses, so that all requests from that IP address are served only by the computer having that particular MAC address. In effect, it means that if the IP address or the MAC address changes, the device can no longer access the Internet. Also, monitoring authorities can trace the specific system from which a particular online activity was carried out." [26] This sort of monitoring is extremely worrisome, especially given the hostile environment prevailing in areas under an internet suspension order. Moreover, the requirement on the user to block access to social media websites and VPN services, and to ensure that no wifi hotspots are allowed from the routers or systems using the connection effectively shifts the burden/ responsibility to an individual subscriber. The enforcement of physical monitoring by subscribers

or the concerned authority is an example of how the implementation of this order and adherence with conditions at scale becomes impractical. The order worryingly holds the individual subscriber liable for punishment for not just the violation of the aforementioned conditions, but also for the actions of a secondary user of the internet. Thus, the Manipur order is a testament to the fact that a restricted shutdown is impractical and may lead to increased burden, cost, and worrying consequences for subscribers.

We understand TRAI's temptation to consider selective banning over complete internet shutdowns. However the technicalities of implementing such selective bans as well as their effectiveness, must be examined before putting forth this proposal. To date, there has not been any demonstration of the perceived effectiveness of blanket internet restrictions either. We advise against using such means in the name of perceived benefits, especially when evidence exists to portray the real harms.

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

Which class(es) of OTT services should be covered under selective banning of OTT services? Please provide a detailed response with justification and illustrations.

What should be the provisions and mechanism for such a regulatory framework? Kindly provide a detailed response with justification.

As we have stated previously, we are of the opinion that 'selective banning' as a concept is extremely concerning and may lead to several unintended consequences. It is worth considering that while malicious actors may find workarounds, citizens that rely on a daily basis on services using the internet at scale may not, and thus will be impacted. Alternatively, those seeking workarounds without any malintent may be also be criminalised. Workarounds may include using alternate applications - which may then prompt the government to continuously expand the list of banned/ blocked applications. It may also include the use of means to proxy/route connections (such as VPNs), ordering restrictions on which would be disproportionate and implementation of which would be challenging, requiring onerous, unimplementable orders like the Manipur order. The use of VPNs, even for legitimate uses, may result in criminal liability. Thus, we would like to reiterate our apprehension against selective banning and would urge TRAI to issue a recommendation against the framework.

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.

Same response as given for Q11.

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.

Same response as given for Q11 and 12.

[1] "Consultation Paper On Regulatory Framework for Over-the-top (OTT) services", (Telecom Regulatory Authority of India, March 27, 2015) <https://trai.gov.in/sites/default/files/OTT-CP-27032015.pdf>.

[2] Foo Yun Chee. "EU regulators' group sides with Big Tech against telcos' network fee push." (The Print, May 19, 2023) <https://theprint.in/tech/eu-regulators-group-sides-with-big-tech-against-telcos-network-fee-push/1584287/>.

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A PUBLIC BRIEF ON THE **DRAFT INDIAN TELECOMMUNICATION BILL, 2022**

Internet Freedom Foundation



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Internet Freedom Foundation ("IFF") is a registered charitable trust which advocates for the digital rights of Indians. Our mission is to ensure the growth of digitisation with democratic rights guaranteed under the Constitution of India..

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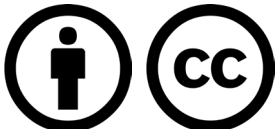
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A public brief on the draft Indian Telecommunication Bill, 2022

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A. EXECUTIVE SUMMARY

The Draft Indian Telecommunication Bill, 2022 ("[Telecom Bill, 2022](#)") has been a subject of much debate in the recent month. The discourse around it has been rich and diverse so far, with analysis from experts across fields and disciplines ranging from language specific criticism to deep concern.

KEY CONCERNS

This 26 page brief aims to provide an in-depth analysis of the content of the Telecom Bill, 2022. Before expanding on a detailed analysis, we list below seven main concerns with the Telecom Bill, 2022:

1: Replication of colonial control

While the objectives of the Telecom Bill, 2022 are to create a modern and future-ready comprehensive framework for the telecommunication sector in India, it retains an antiquated approach. The preamble fails to include proper constitutional references such as the link between telecommunications and the right to freedom of speech and expression.

2: Expansive definitions

The definitions clause brings a plethora of modern technologies under the purview of the Telecom Bill, 2022 which will now be required to obtain government issued licences for operating in India [Clause 2(21)]. Any and all telecommunication devices may be subject to licensing [Clause 3(2)]. Further, powers to issue standards are vague and may undermine end-to-end encryption [Clause 24(2)(a)].

3: Greater state surveillance

There is replication of language from the Telegraph Act, 1885 [Section 5(2)] to the Telecom Bill, 2022 [Clause 24(2)(a)], maintaining surveillance powers without any meaningful oversight or accountability processes. This centralises power in the Union and State Executive and is contrary to Supreme Court judgements and advances in surveillance regulations in comparative, common law jurisdictions.

4: Internet shutdowns power

The Telecom Bill, 2022 cements an internet suspension power with the Department of Telecommunications (“DoT”) without putting in place any of the procedural safeguards directed by the Indian judiciary and Parliament [Clause 24(2)(b)].

5: Ignoring net neutrality

With greater market concentration in the telecom sector and increased data flows the principles of net neutrality remain relevant for statutory recognition. Here, there is a need for DoT to act on Telecom Regulatory Authority of India (“TRAI”) recommendations for the creation of a multi-stakeholder body [[TRAI’s recommendations on Traffic Management Practices \(TMPs\) and MultiStakeholder Body for Net Neutrality dated September 22, 2020](#)].

6: Onerous KYC processes

User’s right to anonymity and the fundamental right to privacy is weakened by allowing for identification of the sender of a message [Clause 4(7) and 4(8)]. This may lead to providing a legislative basis for the linking of Aadhaar to mobile phones which was ruled as unconstitutional by the Supreme Court of India. Further collection of personal information is being advanced in the absence of any data protection law, or surveillance reforms.

7: Excessive penalties

Introduces penalties for users who use services provided by an unlicensed entity [Clause 47 read with Schedule 3]. It also makes the company officials personally liable for any offence that the company may be liable for under the Telecom Bill, 2022 [Clause 48].

OUR RECOMMENDATIONS

We urge the DoT to withdraw the Telecom Bill, 2022, publish a white paper with justifications and reasoning for introducing any changes, and set up an institutionalised system of broad, multi-city, in-person stakeholder consultation. We also urge the Union Government to appoint a Law Commission and/or an independent Standing Committee or expert body to look into reforms for the telecommunication sector.

For a quick summary of our main concerns and analysis of the Telecom Bill, 2022 refer to the 5-page table at the end of this document.

B. BACKGROUND

1. On September 21, 2022, DoT, under the Ministry of Communications (“MoC”), released the Telecom Bill, 2022 for public consultation. The consultation consists of three documents, the primary one being the Telecom Bill, 2022 itself. This is accompanied by an “Explanatory note to the draft Indian Telecommunication Bill, 2022”.¹ The explanatory note emphasises the need for a new framework to govern telecommunications in India. It states that the current framework under the Indian Telegraph Act, 1885 is a colonial law which fails to sufficiently respond to the advancements made in telecommunications technology. The explanatory note also identifies the role telecommunications technologies play in the socio-economic growth of the country. The third accompanying document is a press note which explains the process for submission of comments to the Telecom Bill, 2022 in which they may be sent by October 20, 2022 to naveen.kumar71@gov.in.² The deadline for submission of comments was subsequently extended to October 30, 2022. It may also be noted that on July 23, 2022 the DOT published an initial consultation paper titled as, “Need for a new legal framework governing Telecommunication in India”.³
2. The Telecom Bill, 2022 seeks to govern the provision, development, expansion, and operation of telecommunication services, telecommunication networks, and telecommunication infrastructure in India as well as the assignment of spectrum in the country. Consequently, it repeals the Indian Telegraph Act, 1885, the Indian Wireless Telegraphy Act, 1933, and the Telegraph Wire (Unlawful Protection) Act, 1950 while amending certain provisions of the TRAI Act, 1997.⁴ However, it does not repeal any rules, guidelines, or administrative orders, already made or purported to have been made under these legislations. As per Clause 52 of the Bill, they shall continue to be in force. Further, it states the Union Government may prescribe rules under this Bill for “the grant of licence, registration, authorization or assignment, their terms and conditions and payments”.
3. Further, the Telecom Bill, 2022 misses the opportunity for sweeping legislative reform on important issues affecting individual rights such as surveillance, internet shutdowns, and perhaps most drastically, on net neutrality. While provisions for surveillance and internet shutdowns have been included in the Telecom Bill, 2022, albeit in the absence of necessary procedural safeguards, principles of net neutrality find no mention in the draft legislation. This is even after the sustained public movement for net neutrality which swept the country in 2016 which ultimately led to the TRAI sending a set of recommendations to the DoT to uphold net neutrality principles.

1. Department of Telecommunications, “Explanatory Note to the Draft Indian Telecommunication Bill, 2022” (Ministry of Communications, September 21, 2022), <https://dot.gov.in/relatedlinks/indian-telecommunication-bill-2022>

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4. Department of Telecommunications, Ministry of Communication, Government of India, “The Indian Telegraph Act, 1885,” accessed October 21, 2022, https://www.indiacode.nic.in/bitstream/123456789/2307/1/a1885_13.pdf; see also Department of Telecommunications, Ministry of Communication, Government of India, “The Indian Wireless Telegraphy Act, 1933,” accessed October 21, 2022, <https://www.indiacode.nic.in/bitstream/123456789/2396/1/A1933-17.pdf>; see also Department of Telecommunications, Ministry of Communication, Government of India, “The Telegraph Wire (Unlawful Protection) Act, 1950,” accessed October 21, 2022, <https://www.indiacode.nic.in/bitstream/123456789/1907/1/a1950-74.pdf>; see also Department of Telecommunications, Ministry of Communication, Government of India, “The Telecom Regulatory Authority of India Act, 1997,” accessed October 21, 2022, https://traigov.in/sites/default/files/The_TRAI_Act_1997.pdf.

C. ANALYSIS

1. BROAD LEVEL CONCERNS WITH THE CONSULTATIVE PROCESS

- 1.1 Our concerns not only lie with the current state of the Telecom Bill, 2022, but also with the lack of transparency with which the entire consultative process was held. In response to our RTI application, DoT informed us that roughly 500 pages worth of responses were submitted on a consultation paper titled “Need for a new legal framework governing Telecommunication in India”.⁵ However, to our disappointment, none of these responses were released and made publicly available. Additionally, it is worth noting that the Telecom Bill, 2022 was released just three weeks after the submission deadline for the consultation paper.
- 1.2 In our response to the consultation paper submitted on August 25, 2022, we already mentioned the need for certain necessary additions in the new framework as well as the need for the revision of existing standards for public safety and national security. Unfortunately, none of these changes were reflected in the Telecom Bill, 2022. Further, the consultation paper also did not explicitly include either the reasoning or the indication for including substantive changes such as the expansion of definition of “telecommunication services”. Although the explanatory note mentions the “need for updating the nomenclature and definitions of relevant terms in the telecommunication legal framework” as a key theme emerging from the consultation responses, it is unfortunate to note that the responses received by DoT were not made public. DoT, in compliance with the Pre-legislative Consultation Policy, at the very least must release a summary of these submissions.⁶ We request DoT to adopt a public process with the highest standard of transparency as well as widest possible citizen and stakeholder engagement, aimed at protecting user autonomy, dignity, and privacy.
- 1.3 A sound legal framework will most definitely revolutionise the current state of the industry but it will also significantly impact the end user. However, the consultative process followed so far is not commensurate with the ambitious and vital goal to establish a modern legal framework for the telecom sector. Therefore, following the withdrawal of the Telecom Bill, 2022, we urge DoT to compose an independent Standing Committee or expert body to look into reforms for the telecommunication sector. An alternate option could be the appointment of a Law Commission to publish a report on the subject.⁷ The composition for such a committee, body or commission must have diverse representation from vulnerable and marginalised communities as well as digital rights advocates, human right activists, technical experts, etc. Further, the DoT must publish all its documents in multiple languages and allow participation through online and offline modes, to ensure that the consultation is inclusive.

5. Internet Freedom Foundation, “Response from Department of Telecommunications on RTI application DOTEL/RT/22/00785,” *Internet Freedom Foundation*, October 12, 2022, <https://drive.google.com/file/d/1Uilz2ZF1A1S2I1tMUR6DH2BYJfKlw5J/view?usp=sharing>.

6. Legislative Department, “Pre-legislative Consultation Policy (PLCP),” *Ministry of Law & Justice*, February 5, 2014, <https://legislative.gov.in/sites/default/files/plcp.pdf>.

7. Asia News Internations, “SC to hear plea for appointment of Chairperson, members of Law Commission on Oct 10,” *Asia News International*, October 08, 2022, <https://www.aninews.in/news/national/general-news/sc-to-hear-plea-for-appointment-of-chairperson-members-of-law-commission-on-oct-1020221008163428/>.

2. THE PREAMBLE

2.1 Since the Preamble is considered as an internal aid of statutory construction, it must reflect constitutional and public law doctrines including those from the Supreme Court of India. Here, to reimagine a legal regime for telecommunications in modern India, there must be reference to the, “public trust doctrine” that governs Further, specific references to, “diversity and plurality of information mediums” and, “freedom of speech and expression” which are vital objectives must be expressly referred to within the preamble.

2.2 As determined by the Supreme Court of India in the seminal case of *The Secretary, Ministry of Information & Broadcasting v. Cricket Association Of Bengal & Anr*⁸

“It has been held by this Court - and rightly - that broadcasting media is affected by the free speech right of the citizens guaranteed by Article 19(1)(a). This is also the view expressed by all the Constitutional Courts whose opinions have been referred to in the body of the judgement. Once this is so, monopoly of this medium (broadcasting media), whether by Government or by an individual, body or Organisation is unacceptable. Clause (2) of Article 19 does not permit a monopoly in the matter of freedom of speech and expression as is permitted by clause (6) of Article 19 vis-a-vis the right guaranteed by Article 19(1)(g).”

2.3 Further, the Supreme Court of India in *Natural Resources Allocation In Re , Special Reference No. 1 of 2012* stated that:⁹

“As far as “trusteeship” is concerned, there is no cavil that the State holds all natural resources as a trustee of the public and must deal with them in a manner that is consistent with the nature of such a trust...”

3. CHAPTER 2: DEFINITIONS

3.1 The DoT, in the explanatory note, mentions the need to update the nomenclature and definitions of relevant terms in the telecommunication legal framework. The Telecom Bill, 2022 seeks to do away with “outdated concepts” such as “telegraph”, and introduces new definitions which are “comprehensive and relevant to present day realities.” One such notable change in the Bill is the expanded definition of “telecommunication services”. Definition of “Telecommunication services” as contained in Clause 2(21) under the Telecom Bill, 2022 (the text in red indicates the newly added services).

“telecommunication services” means service of any description (including broadcasting services, electronic mail, voice mail, voice, video and data communication services, audiotex services, video tex services, fixed and mobile services, internet and broadband services, satellite based communication services, internet based communication services, in-flight and maritime connectivity services, interpersonal communications services, machine to machine communication services, over-the-top (OTT) communication services) which is made available to users by telecommunication, and includes any other service that the Central Government may notify to be telecommunication services;

8. 1995 SCC (2) 16.

9. [2012] 9 S.C.R. 408.

3.2 The above definition has been significantly expanded to include new services (text in red such as internet and broadband services, satellite based communication services, OTT communication services, etc. were not included in the previous definition), which were originally not included in the definition of ‘telecommunication services’ under the TRAI Act, 1997. Figure 1 lists the additional services, which primarily offer online communication services, and examples (non-exhaustive list) of such service providers. It is important to note here that most terms as contained in Clause 2(21) have not been defined, which increases scope for ambiguity and overlap. Given that significant sections of the Bill are applied to telecommunication services as defined in the Telecom Bill, 2022, the expansion in scope will have far reaching implications for this sector. Such implications will be expanded upon in the following sections.

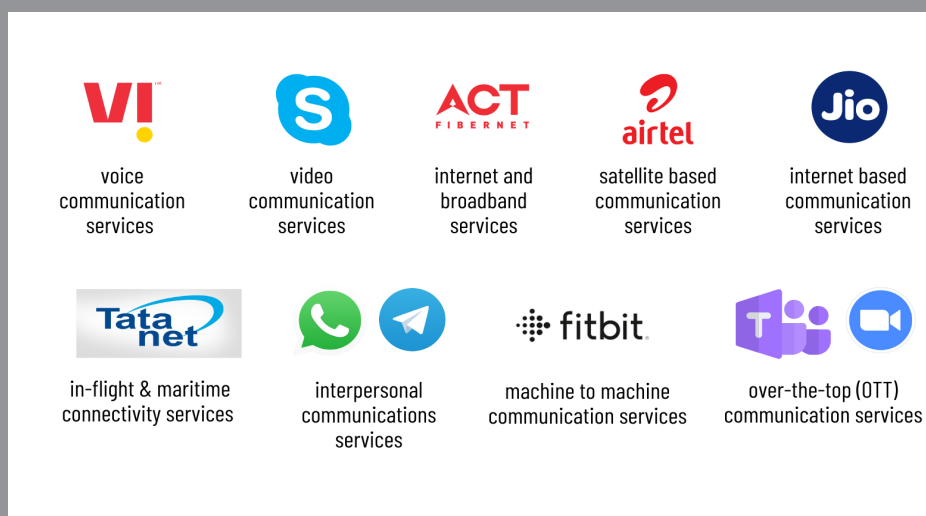


Figure 1:
Additional services included under the expanded definition of “Telecommunication services”

3.3 As a result of inclusion of such definitional bundling all online communication service providers under “telecommunication services”, the former will be treated at par with telecom service providers (“TSP”), internet service providers (“ISP”), and broadcasters.¹⁰ This raises certain doubts about the jurisdictional regulation of online communication service providers, as they are already governed by the Ministry of Electronics and Information Technology (“MeitY”), specifically under the Information Technology (“IT”) Act, 2000. The overlap becomes particularly clear in the following sections, where we expand on the powers given to the Union Government under the Telecom Bill, 2022, several of which already existed with the government under the IT Act, 2000.

3.4 This is however not the first instance where online communication services have been converged with the telecommunication services (as defined by the TRAI Act, 1997). The National Digital Communications Policy, 2018 (“NDCP”), released by the DoT, replaced the National Telecom Policy, 1994.¹¹ Under the NDPC, Section 1.1(g) refers to infrastructure convergence of IT, telecom and broadcasting. Sub-clause (i) of Section 1.1(g) refers to the amendment of the Indian Telegraph Act, 1885 and other relevant acts “for the purpose of convergence in coordination with respective ministries”. Sub-clause (iii) of Section 1.1(g) refers to restructuring of: legal, licensing and regulatory frameworks for reaping the benefits of convergence”.

10. Meghna Bal, “Signal to Telegram, India Wants to Monitor Communication Apps. But Telecom Bill Not the Answer,” *The Print*, October 13, 2022, <https://theprint.in/opinion/signal-to-telegram-india-wants-to-monitor-communication-apps-but-telecom-bill-not-the-answer/1163066/>.

11. Department of Telecommunications, Ministry of Communication, Government of India, “National Digital Communications Policy, 2018,” accessed October 19, 2022, <https://dot.gov.in/relatedlinks/national-digital-communications-policy-2018>; see also Department of Telecommunications, Ministry of Communication, Government of India, “National Telecom Policy, 1994,” accessed October 19, 2022, <https://dot.gov.in/national-telecom-policy-1994>.

3.5 In the absence of clear definitions, several service providers which have multiple functionalities may have to be dealt with on a case-to-case basis, leading to ad hocism. Given the broad range of services that have been included under the ambit of telecommunication services, the DoT must define each service so as to reduce any scope for ambiguity and vagueness. On a broader level, legislative and jurisdictional ambiguities must be cleared up in order to avoid overlap of powers between the DoT and MeitY. Specifically, “telecommunication services” as included in Clause 2(21) must not be expanded to include online communication services.

4. CHAPTER 3: LICENSING, REGISTRATION, AUTHORIZATION AND ASSIGNMENT

4.1 Clause 3(1)(a) bestows upon the Union Government the exclusive privilege to provide telecommunication services. Among other things, Clause 3(2)(a) allows the Union Government, in exercise of its privilege, to grant any entity a licence for providing telecommunication services. Thus, every entity under the ambit of “telecommunication services” will have to obtain a specific licence from the Central Government to provide services in India. This could be applicable to all the service providers listed in the previous image, and more, such as WhatsApp, Skype, Jitsi, Telegram, Signal, Zoom, Facebook messenger, etc.

Telecom companies vs. OTT communication services

4.2 The move towards regulation of OTT communication services has, for a long time, been a demand raised consistently by traditional telecom companies (“telcos”). According to telcos, the lack of equivalent or same regulations over OTT communication service providers creates an uneven playing field. This argument also stems from their belief that OTT services are a “substitute” of the services provided by telcos, giving rise to the “same service same rules” argument.¹² Telcos have in the past also placed the blame on online communication services providers for having stolen profits from them. This builds into arguments for levying some form of a toll to “compensate” telcos for their losses.

4.3 We dispute the arguments for substitutability of services between telcos and OTT services, and in extension believe that the “same service same rules” argument used by telcos are unfounded.¹³ Firstly, there are inherent structural differences between telcos and OTT communication service providers. The latter quite often offer multiple functionalities—which may include voice calling and instant messaging—even though their primary functionality, for instance, may be social networking. With WebRTC, nearly all browser based content and mobile applications can have a communications layer that supports messages, voice, and video. Little clarity exists on whether all such online service providers and applications will be brought within this regulatory ambit. This lack of clarity, will also lead to a lot of ad hocism, where such issues will have to be dealt with on a case to case basis, thus increasing costs for the service provider as well as the State.

4.4 Further, while telecom operators control the underlying broadband internet access and thus are its gatekeepers, OTT services do not have these controls. OTTs are essentially internet-based apps, which don’t own or operate telegraph equipment. This is also how TRAI, in its 2015 paper on Regulatory Framework for OTT Services, defined “OTT provider”, i.e., as a service provider which offers Information and Communication Technology (“ICT”) services, but neither operates a network nor leases network capacity from a network operator.¹⁴ Therefore, the entire argument that OTT services “free ride” on telecom services is premised on an incorrect understanding of “OTT”.

12. Press Trust of India, “Go for ‘Same Services Same Rules’, Internet Body to TRAI,” *The Indian Express*, April 24, 2015, <https://indianexpress.com/article/technology/social/go-for-same-services-same-rules-internet-body-to-trai/>.

13. Brian Williamson, “Deconstructing the ‘Level Playing Field’ Argument – an Application to Online Communications,” *Communication Chambers*, n.d., <http://static1.1.sqspcdn.com/static/f/1321365/27575015/1495793366237/LPFMay24.pdf>.

14. Apar Gupta, “Understanding TRAI’s most recent ‘Over-The-Top’ Consultation Paper #SaveTheInternet #NetNeutrality,” *Internet Freedom Foundation*, December 6, 2018, <https://internetfreedom.in/understanding-trais-most-recent-over-the-top-consultation-paper-savetheinternet-netneutrality/>.

- 4.5 Further justification exists to prove that the two entities aren't placed in similar or identical circumstances, and thus the "level-playing field" argument doesn't hold. Telcos enjoy several exclusive permissions that are not enjoyed by OTT services providers.¹⁵ These include the ability to acquire interference-free spectrum, ability to obtain numbering resources, ability to interconnect with the public switched telephone network ("PSTN"), and right of way to set up infrastructure. Additionally, OTT service providers don't have the exclusive privilege to deploy their own OTT applications, as it can and may be done by telcos as well.
- 4.6 In November 2018, when TRAI released a consultation framework on OTT regulation, we conducted a preliminary analysis to question the economic premise of "stolen profits".¹⁶ Below are our findings, in brief:
- 4.6.1 Both voice and data usage have seen a significant increase in the past few years. This exploded after Q2, 2016 which is when Reliance Jio started its services. The rate of growth is increasing and more people are coming online.
- 4.6.2 This massive growth has coincided with a drop in per user revenue for the major telecom players. Such fall appears to be due to a hyper-competitive environment after the entry of Reliance Jio, however with a wave of consolidation this period may soon end. These trends are as per statements in the press by leading executives of telecom companies and analyst reports such as Moody's and Fitch.
- 4.7 Thus, from a data perspective, devising regulations to place stifling regulatory burdens and financial levies on internet applications is not a sound public policy. To us, this is again illustrative of the reductiveness of a debate that commences from dulling the feature richness and diversity of internet applications into the straightjacket of OTT.
- 4.8 Lastly, the stolen profits arguments are unfounded as OTT services make huge investments in telecom infrastructure and networks such as data centres, undersea cables, content delivery networks ("CDN"), edge computing, etc. Even more importantly, they are significant revenue generators for the telcos. In fact, they are a big engine for creating demand pull for broadband services. OTTs are also powerfully and exponentially driving data usage and revenue growth for telcos.¹⁷
- 4.9 The move towards regulation of OTT communication services has not only been a demand raised consistently by telcos, but also something that has been considered by TRAI and Department of Telecommunications (DoT) in the past.¹⁸ This Bill has essentially cemented this provision by expanding the definition of "telecommunication services". This may result in additional cost and compliance burden for small service providers, and affect the vibrant innovation culture of India. It is worth noting here that TRAI issued recommendations on September 14, 2020 accepting most demands by digital rights organisations on behalf of everyday internet users.¹⁹ Although these recommendations still needed to be accepted by the DoT, it was a small victory as TRAI's recommendations were broadly supportive of user choice. The Telecom Bill, 2022, instead of democratising telecom services in India, consolidates more power with the Union government and introduces overburdening regulations on OTT service providers, which may create an environment of uncertainty not just for them, but also for OTT service users.

15. Abhishek Raj, "An Overview of Telecommunications Policy and Regulation Framework in India" *Centre for Internet & Society*, March 22, 2022, <https://cis-india.org/telecom/overview-telecommunications-policy-regulation-framework-india>.

16. Consultation Paper on Regulatory Framework for Over-The-Top (OTT) Communication Services," Telecom Regulatory Authority of India, November 12, 2018, <https://www.trai.gov.in/consultation-paper-regulatory-framework-over-top-ott-communication-services>; see also Apar Gupta, "Summary of TRAI's OTT Consultation Paper #SaveTheInternet," *Internet Freedom Foundation*, November 15, 2018, <https://internetfreedom.in/our-summary-of-the-ott-consultation-paper-savingtheinternet/>.

17. TV Ramachandran, "Why Telcos and OTTs Need to Band Together to Drive Digital Future," *Financial Express*, February 7, 2019, <https://www.financialexpress.com/opinion/why-telcos-and-otts-need-to-band-together-to-drive-digital-future/1479520/>.

18. Apar Gupta, "Thank you TRAI for recommending against internet licensing! #SaveTheInternet," *Internet Freedom Foundation*, September 28, 2020, <https://internetfreedom.in/thank-you-trai-for-recommending-against-internet-licensing-save-the-internet/>.

19. "TRAI Releases Recommendations on Regulatory Framework for Over-The-Top (OTT) Communication Services," Telecom Regulatory Authority of India, September 14, 2020. <https://trai.gov.in/notifications/press-release/trai-releases-recommendations-regulatory-framework-over-top-ott>.

4.10 The government neither has an obligation to protect the revenues and profits of the telcos, nor is it obliged to secure them from disruptive innovations. As we have already established, telcos and OTTs aren't placed in similar circumstances and thus there are no regulatory asymmetries to be done away by the government. What the government must do is allow the growth of the overall sector, without impacting the innovations being ushered in as a result of technological advancement.

Dilution of user's right to privacy

4.11 Lastly, Clause 4(7) requires every entity receiving a licence to "unequivocally identify the person to whom it provides services, through a verifiable mode of identification as may be prescribed." The "verifiable mode of identification" remains unknown as of now, but what is known with certainty is that the identity of the person receiving the service will have to be established, with complete assurance, by the service provider. Additionally, as per Clause 4(8), the identity of the sender of a message using telecommunication services "shall be available to the user receiving such message, in such form as may be prescribed, unless specified otherwise by the Central Government". In the explanatory note, the government notes that these provisions are "important to prevent cyber frauds".

4.12 While the recognition and acknowledgement of a need to tackle increasing cyber frauds in India is appreciable, potential excessive data collection and retention by several entities, that too in the absence of a data protection law, raises concerns. These provisions essentially strip away the user's right to stay anonymous²⁰ while communicating, both offline and online. This can have a deleterious impact on vulnerable individuals such as whistleblowers, who wish to keep their identity anonymous. Services such as Twitter and Instagram, which provided users with the option to communicate anonymously, will possibly have to take back this facility if they wish to operate in India.

4.13 Although Clause 4(8) empowers the Union government to disallow the application of this sub-clause, this safeguard is not sufficient in light of the broad and excessive requirements introduced under Clause 4(7) and 4(8). In the absence of data protection law, there is also no clarity on the ability of users to de-list themselves in case they don't wish their details to be revealed to receivers of messages. Similar ambiguity exists on the ability of the users to get their data deleted, erased, and forgotten. Moreover, given the inadequate safeguards that currently exist for users to avail in case of violation of their fundamental rights, such overbroad requirements must be reconsidered.

Expansion of government power

4.14 The Union Government may, using its power under Clause 7(1), suspend (for a specified period), curtail (the period of), revoke, and/ or vary a licence, registration, authorisation or assignment, in case of a breach of its terms and conditions. This power of the Government has expanded in comparison to the provisions under the Telegraph Act, 1885. As per Section 8 of the latter, the Union Government was empowered to revoke licences following breach of any of conditions or in default of a payment. It did not, however, have any provisions for suspension of the licence.

4.15 Clause 7 of the Telecom Bill, 2022 also empowers the Government to impose a penalty (as specified in Schedule 4) after determining the category of severity of the breach. Schedule 4 lists the penalties for breach of terms and conditions of licence, registration, authorisation or assignment. Similarly, the penalties have also significantly increased under the Telecom Bill, 2022, as compared to the Telegraph Act, 1885. Under the latter, the punishment for such a breach was limited to a fine of up to Rs. 1000, and a further fine up to Rs. 500 for every week during which the breach continued. Under the Telecom Bill, 2022, the penalty ranges from a written warning for a non-severe breach, and a fine of up to Rs. 5 crores for a severe breach.

20. Matt Burgess, "How Whistleblowers Navigate a Security Minefield," *Wired*, September 13, 2022, <https://www.wired.com/story/whistleblower-safety-mudge-twitter-senate-hearing/>

Categorization	Penalty
Severe	Penalty up to Rs 5 Cr
Major	Penalty up to Rs 1 Cr
Moderate	Penalty up to Rs 10 Lakh
Minor	Penalty up to Rs 1 Lakh
Non-severe	Written warning

*Table 1:
Schedule – 4 of the Telecom Bill, 2022*

- 4.16 The justification behind categorising breaches is so that the penalties are commensurate with the severity of the breach. We appreciate the fact the government doesn't adopt a one-size-fits-all approach with penalties for breaches. It is also pertinent to note that the Clause does provide the concerned party an opportunity to be heard. So while this safeguard exists, it is insufficient in the absence of checks and balances, given that the decision of suspending and revoking a licence rests solely with the Union Government.
- 4.17 Clause 4(5) read with Clause 2(23) and Clause 2(18) leads to an understanding that each user will require an authorisation to possess wireless equipment, i.e., essentially any device used to communicate, which can be interpreted to mean phone, laptop, etc. The Indian Wireless Telegraphy Act, 1933 also included similar provisions under Section 3 wherein it prohibited the possession of a "wireless telegraphy apparatus", unless it was under and in accordance with a licence issued under the Act. "Wireless telegraphy apparatus" is defined as any apparatus, appliance, instrument or material used or capable of use in wireless communication. Section 4 of the Indian Wireless Telegraphy Act, 1933 also empowers the Union Government to exempt persons from the provisions of this Act. Similarly, Clause 4(5) also allows for an exemption from the need to require an authorisation.
- 4.18 However, what remains baffling is the retention of such a clause when the Government has in the past chosen to exercise its power of exemption. The retention of such a clause only increases anxiety among the industry as well as the end-users and centralises power with the Union Government. Further, continuation of such regulatory burden defeats the aim of bringing about economic growth as it increases cost and compliance burden for the industry, thus directly contradicting with the practical realities of the digital economy. While we may understand the need to establish ownership of devices to tackle the issue of rising cyber frauds and device theft, the end goal may be achieved by merely making provisions for registration of devices, accompanied with a legal framework.

5. CHAPTER 6: STANDARDS, PUBLIC SAFETY AND NATIONAL SECURITY

- 5.1 Chapter 6 of the Telecom Bill, 2022 contains provisions related to standard setting for telecommunication equipment, telecommunication services, telecommunication network and telecommunication infrastructure; as well as provisions related to “public safety” and “national security”. However, both these terms that have been used in Clause 24 have not been explicitly defined in the Telecom Bill, 2022. In the absence of defined parameters on what constitutes a public emergency/safety, scope for suspension of internet services on ambiguous grounds exist.
- 5.2 Clause 24(1)(a) of the Telecom Bill, 2022 empowers the Union and State governments to take temporary possession of any telecommunication services, network, or infrastructure from a licensee or registered entity. They may do so on grounds of occurrence of any public emergency or in the interest of public safety. There are two notable changes under this Clause in the Telecom Bill, 2022 compared to the Telegraph Act, 1885. Firstly, and fairly obviously, the term “telegraph” has been replaced with “telecommunication”. Secondly, the time limit on the possession which existed under the Telegraph Act, 1885 (Section 5(1): “for so long as the public emergency exists or the interest of the public safety requires the taking of such action”) has been removed in the Telecom Bill, 2022. The implication of such an omission is that the governments may keep possession of the telecommunication services, network, or infrastructure even when the grounds for it no longer exist or remain valid.
- 5.3 Additional concerns exist with respect to the expansion of the ambit of telecommunication services. Given the new definition, as per power accorded to the governments under Clause 24(1)(a), they will become empowered to take possession of service providers such as Telegram, Signal, Zoom, Jitsi, etc. on undefined grounds of “public emergency” or “public safety”. It is pertinent to note here that the Telegraph Act was enacted before the Supreme Court judgement in *Justice K. S. Puttaswamy & Anr. vs Union Of India & Ors.*²¹ Given that since then several landmark safeguards have been accorded to users, specifically with respect to their fundamental right to privacy, the Telecom Bill, 2022 must have included more protections for the users, and not less.

Greater state surveillance

- 5.4 Clause 24(2)(a) of the Bill replicates the requirements of Section. 5(2) of the Telegraph Act, 1885 with one major change.²² Section. 5(2) currently authorises the interception of messages transmitted through a telegraph as part of the surveillance framework in the country by the Central or State Government, or any officer authorised on their behalf. While Clause 24(2) (a) of the Bill contains the same requirements, it expands the scope of the surveillance to “telecommunication services or telecommunication network”. As a result, OTT communication

21. (2017) 10 SCC 1.

22. Section 5(2), Indian Telegraph Act, 1885: On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially authorised in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order: Provided that the press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section.]

service providers such as Whatsapp, Signal etc., which practise the privacy protecting process of End-to-End encryption (E2EE), may now also be required to not transmit, or intercept or detain or disclose any message or class of messages to the officer specified in the surveillance request/order.

- 5.5 While this is concerning, it is not the first attempt made by the Government to get OTT communication service providers to allow surveillance. Previously, the Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009 ("2009 Rules") have also attempted to require OTT communication service providers to break E2EE and allow decryption.
- 5.6 Further, Rule 4(2) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ("IT Rules, 2021") also contain mandatory provisions requiring significant social media intermediaries (entities with fifty lakh registered users or more) to enable tracing of the originator of information on their platform ("traceability"). Several platforms (Whatsapp, Signal, Telegram, etc.) retain minimal user data for electronic information exchange and also deploy end-to-end encryption to provide reliability, security, and privacy to users.²³ Encryption becomes even more important now as more of our lives involve our personal data being aggregated and analysed at a scale that was never possible before. Given these concerns, both 2009 Rules and Rule 4(2) of the IT Rules, 2021 are currently under challenge before the Supreme Court.²⁴ It remains to be seen how the online communication service providers will respond to the present Bill.
- 5.7 The Government has, sadly, passed up a chance to introduce surveillance reform provisions in the Telecom Bill, 2022. The Telecom Bill, 2022 does not reflect improvements to India's surveillance architecture on the basis of privacy, transparency, and accountability. Even where the Telecom Bill, 2022 has tried to bring in certain safeguards through the 'public safety' and 'public emergency' requirements, it must be noted that the power to intercept messages transmitted through a "computer resource" already exists under Section.69 of the IT Act, 2000, and has been provided to the MeitY. However, Section. 69 does not contain the 'public safety' and 'public emergency' requirements. Effectively, this means the Government, via MeitY, can bypass the 'public safety' and 'public emergency' threshold by conducting the surveillance under Section.69 of the existing IT Act. This makes the procedural safeguards provided under 24(2) practically meaningless.
- 5.8 One such attempt at meaningful surveillance reform was envisaged under the Personal Data and Information Privacy Code Bill, 2019.²⁵ It sought to ensure the protection of informational privacy of individuals through a rights-based individual-centric data protection regime and declared at its outset that every person has a natural right to privacy. The guiding principles of the Personal Data and Information Privacy Code Bill, 2019 made it mandatory that personal data be processed fairly and lawfully. These principles also stated that any invasion of privacy should be evaluated based on the principles of legality, necessity and proportionality, and thus enshrined the privacy test laid down in the Puttaswamy judgement. The collection of personal data under the Personal Data and Information Privacy Code Bill, 2019 was envisaged through a meaningful, revocable, and accountable notice and consent framework.

23. Anushka Jain et al., "Latest Draft Intermediary Rules: Fixing big tech, by breaking our digital rights?," *Internet Freedom Foundation*, February 25, 2021, <https://internetfreedom.in/latest-draft-intermediary-rules-fixing-big-tech-by-breaking-our-digital-rights/>.

24. Apar Gupta, "Supreme Court issues notice on IFF's petition for surveillance reform #SaveOurPrivacy," *Internet Freedom Foundation*, January 14, 2019, <https://internetfreedom.in/supreme-court-issues-notice-on-iffs-petition-for-surveillance-reform-saveourprivacy/>; see also "SC Stays Petitions Challenging Regulatory Frameworks for Social Media, OTT Platforms," *The Hindu*, May 9, 2022, sec. India, <https://www.thehindu.com/news/national/sc-stays-petitions-challenging-regulatory-frameworks-for-social-media-ott-platforms/article65398652.ece>.

25. Dr. Ravikumar, "The Personal Data And Information Privacy Code Bill, 2019" (2022), <https://saveourprivacy.in/bill>.

- 5.9 The constitutionality of Section 5(2) of the Telegraph Act was the issue considered by the Supreme Court in *PUCL v Union of India*.²⁶ The Court argued that neither a public emergency nor public safety could be “secretive”, but must be evident to the reasonable person.²⁷ It also held that the use of the intercepted material must be limited to the minimum that is necessary and suggested taking into account other measures for reasonable acquisition of the material/information. Such safeguards need to be built into the Rules which are yet to be prescribed by the government.
- 5.10 The decision of the Supreme Court in *Justice K. S. Puttaswamy & Anr. vs Union Of India & Ors.* as well as the 2018 Justice B.N. Srikrishna Committee of Experts on Privacy Report has also expressed the urgent need for surveillance reform.²⁸ However, the Bill squanders this chance for significant legislative reform based on the knowledge and experience which has been accumulated post independence. Instead, it replicates the colonial moorings of the Telegraph Act, 1885 by transplanting essentially the same provision onto this new Bill and ultimately fails to be the custodian of India’s telecommunications sector in the 21st century.

Concerns of data localisation

- 5.11 Concerns around data localisation requirements also arise as a result of the move towards licensing OTT communication services. The government may now ask these services to store data, including personal and sensitive information such as our private conversations, locally, in India. Such a licensing requirement would confer excessive discretion to the government, and adversely affect individual privacy by potentially giving the government and law enforcement agencies greater access to our data. In our analysis here, we elaborate on the concerns/threats associated with data localisation.²⁹
- 5.12 This is not the first time that data localisation norms for OTT communication services have been suggested. Back in 2020, when TRAI released the consultation paper on regulatory framework for OTT services, various stakeholders, who were in favour of cross-border data transfer, raised concerns about the government’s inability to intercept personal communications and information stored in data servers located abroad, that too in the absence of data localisation norms.³⁰

Internet shutdowns power cemented

- 5.13 Through the Telecom Bill, 2022, the Union Government cements its internet suspension powers, by including clear provisions to that end in Clause 24(2)(b). While such power resided with the Union Government earlier as well, it didn’t exist as clearly before.³¹ What does remain

26. (1997) 1 SCC 301.

27. Gautam Bhatia, “Surveillance and Privacy in India – IV: Analysing the Landmark PUCL Judgment,” *Indian Constitutional Law and Philosophy*, December 18, 2013, <https://indconlawphil.wordpress.com/2013/12/18/surveillance-and-privacy-in-india-iv-analysing-the-landmark-pucl-judgment/>.

28. “Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors.,” Privacy Library, <https://privacylibrary.ccgnlud.org/case/justice-ks-puttaswamy-ors-vs-union-of-india-ors/>; see also Anushka Jain and Apar Gupta, “Need for surveillance reform stronger than ever in light of the Draft Data Protection Bill, 2021,” *Internet Freedom Foundation*, December 21, 2021, <https://internetfreedom.in/surveillance-reform-pdpb/>.

29. Fathima V N, “#DataProtectionTop10: Data Localisation,” *Internet Freedom Foundation*, May 21 2021, <https://internetfreedom.in/dataprotectiontop10-data-localisation-a-threat-to-free-and-open-internet/>.

30. “Recommendations on Regulatory Framework for Over-The-Top (OTT) Communication Services,” Telecom Regulatory Authority of India, September 14, 2020, https://www.trai.gov.in/sites/default/files/Recommendation_14092020_0.pdf

31. Krishnesh Bapat, “Internet Shutdown Rules: Gauhati HC on IFF’s Application,” *Internet Freedom Foundation*, January 13, 2022, <https://internetfreedom.in/gauhati-hc-intervention>.

consistent is the grounds on which suspension of internet services can be imposed, i.e., on the occurrence of a public emergency or in the interest of public safety and if the government is satisfied that it is necessary to do so in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states or public order or for preventing incitement to the commission of an offence.”

- 5.14 While the procedure to be followed by the governments to suspend internet services is provided in Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 (“TSTS Rules”), it fixes none of the issues of the TSTS Rules.³² Rule 2(5) of the TSTS Rules require a three-member Review Committee, consisting of only bureaucrats, to be created. In case a shutdown is illegal, the Committee did not have the power to set aside the order and was merely supposed to ‘record its findings’.³³ The Committee continues to remain toothless as the Telecom Bill, 2022 doesn’t make any meaningful changes to its powers. The constitutionality of the TSTS Rules has also in the past been challenged before the Gauhati High Court.³⁴ One of the grounds of this challenge is that the TSTS Rules permit the executive to suspend internet services without any ex-post or ex-ante independent parliamentary/ judicial oversight.³⁵ The Bill fails to enact any provisions for judicial oversight over the suspension orders or to strengthen the powers of the review committee.
- 5.15 The Supreme Court in *Anuradha Bhasin vs Union of India* held that internet suspension is a drastic measure and must be considered by the government only if “necessary and unavoidable” and after assessing the existence of less intrusive remedies.³⁶ Amongst other things, the Court directed the executive to always publish internet suspension orders and to ensure that the orders are lawful, necessary, proportionate and limited in scope.³⁷ Yet internet shutdowns remain the norm and not the exception, and continue to be imposed even if there is no apparent need.
- 5.16 The Court had also stated that expressing one’s views or conducting one’s business through the internet are protected under Articles 19(1)(a) and 19(1)(g) of the Constitution respectively. Further, the Standing Committee on Information Technology in its report on internet shutdowns has also made a range of recommendations including a review of the legal regime for suspension of internet services, as it found the DoTs’ existing process lacks sufficient safeguards.³⁸ Here again, there is a missed opportunity for legal reform.
- 5.17 According to Top10VPN, the internet was shut down in India for 1,157 hours in 2021, and it cost the economy \$582.8 million.³⁹ Over the course of three years, internet services were suspended for 14,280 hours, representing a loss of nearly \$4.7 billion.⁴⁰ While the economic

32. Department of Telecommunications, Ministry of Communication, Government of India, “Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017,” <https://dot.gov.in/circulars/temporary-suspension-telecom-services-public-emergency-or-public-safety-rules-2017>.

33. Rule 2(6): The review committee shall meet within five working days of issue of directions for suspension of services due to public emergency or public safety and record its findings whether the directions issued under sub-rule (1) are in accordance with the provisions of sub-section (2) of Section 5 of the said Act.

34. Ajit Kumar Bhuyan v, State of Assam & Ors, PIL No. 79/2019.

35. Krishnesh Bapat, “Internet Shutdown Rules: Gauhati HC on IFF’s Application,” *Internet Freedom Foundation*, January 13, 2022, <https://internetfreedom.in/gauhati-hc-intervention>.

36. (2020) 3 SCC 637.

37. “Bhasin v. Union of India - Global Freedom of Expression,” *Global Freedom of Expression*, July 14, 2022, <https://globalfreedomofexpression.columbia.edu/cases/bhasin-v-union-of-india/>.

38. Rohin Garg and Krishnesh Bapat, “Concerned with Frequent Internet Suspensions, Parliamentary Committee Recommends an Overhaul,” *Internet Freedom Foundation*, December 4, 2021, <https://internetfreedom.in/concerned-with-frequent-internet-suspensions-parliamentary-committee-recommends-an-overhaul/>.

39. Samuel Woodhams and Simon Migliano, “The Global Cost of Internet Shutdowns 2021 Report,” Top 10 VPN, January 2022, <https://www.top10vpn.com/research/cost-of-internet-shutdowns/2021/>.

40. Krishnesh Bapat, “IFF Provides Inputs to United Nations on Internet Shutdowns,” *Internet Freedom Foundation*, February 11, 2022, <https://internetfreedom.in/ohchr-internet-shutdowns-submission/>.

cost of internet shutdowns can be estimated, societal impact and psychological trauma cannot be quantified.⁴¹ Internet shutdowns relegate affected individuals to second-class citizens and serve as a ‘collective punishment’ upon them.⁴² Given the economic and social impact of internet shutdowns, the Telecom Bill, 2022 not only fails to safeguard the rights of citizens but also fails to protect their economic interests. This failure results in the Bill’s unsuccessful attempt to fulfil its stated objective which is to bolster economic growth as it identifies telecommunication as a key driver of socio-economic development.

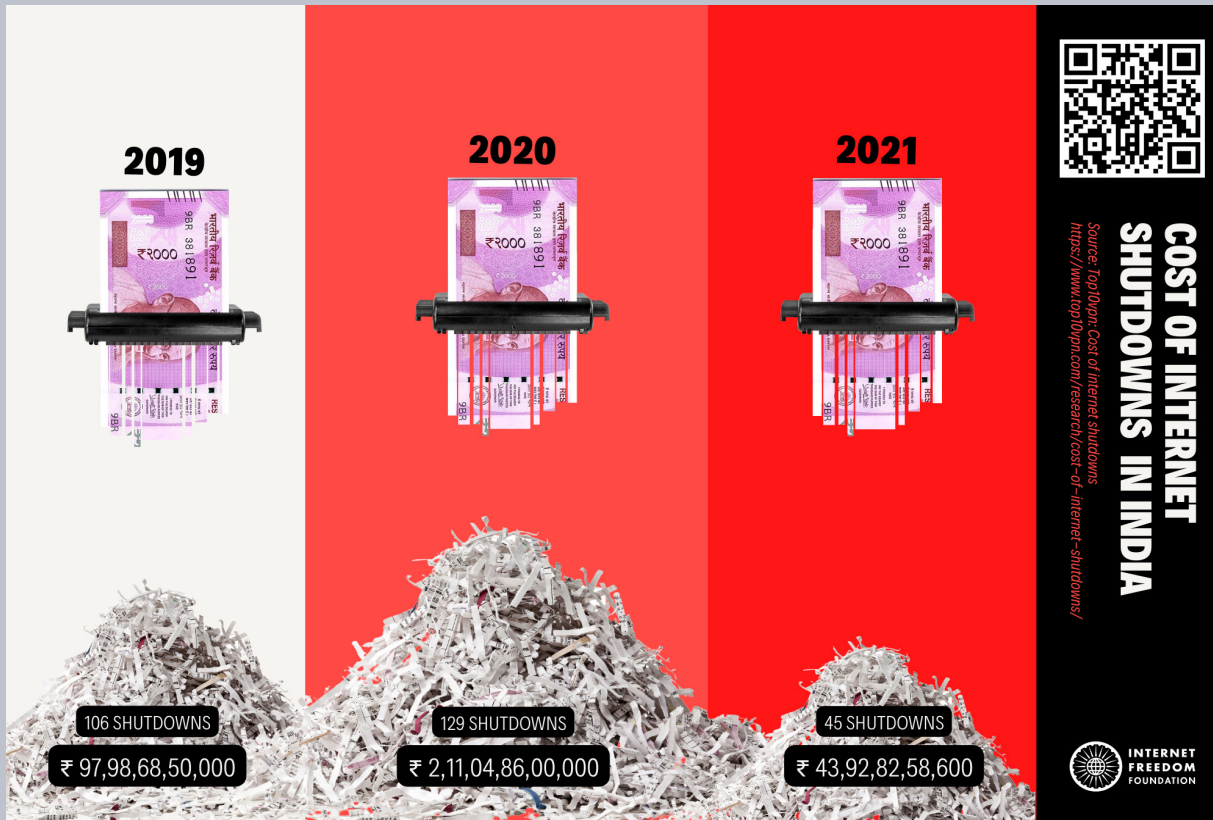


Figure 2:
 Cost of Internet Shutdowns (2019 to 2021)

6. CHAPTER 9: PROTECTION OF USERS

6.1 As stated in the explanatory note, Chapter 9 provides an enabling framework for the Union Government to prescribe measures to ensure protection of telecommunication users. Clause 33(2) empowers the Union Government to prescribe these measures. Clause 33(1) specifies that the users must be protected from specified messages, which include any message offering, “advertising or promoting goods, services, interest in property, business opportunity, employment opportunity or investment opportunity”.

41. Darrell M West, “Internet Shutdowns Cost Countries \$2.4 Billion Last Year.” *Center for Technology Innovation at Brookings* (2016), <https://www.brookings.edu/wp-content/uploads/2016/10/intenet-shutdowns-v-3.pdf>.

42. Romita Saluja, “Kashmiris, Farmers Struggle With Life Under Frequent Indian Internet Lockdowns,” *Foreign Policy*, February 19, 2021, <https://foreignpolicy.com/2021/02/19/internet-shutdowns-india-farmers-protests-mental-health/>. See also: “Input for OHCHR Report for internet shutdowns and human rights,” *Internet Freedom Foundation*, February, 2022, <https://drive.google.com/file/d/1FNvKQoXatLydQNFvAVriZ0yzHNHAcDN/view>.

- 6.2 The Clause further clarifies that these measures are to be prescribed against such messages despite its veracity or legality. The list of measures that could be prescribed by the Union Government include obtaining prior consent of users for receiving certain messages or class of messages (Clause 33(2)(a)); the preparation and maintenance of register(s), to be called as “Do Not Disturb” (DND) register, to prevent users from receiving such messages without prior consent; and the mechanism to enable users to report such messages received in violation of this Clause. Clause 33 rightly centres user consent and safety as its guiding principle. Additionally, one or multiple DND registers, which functions efficiently, along with a complaint mechanism, will undeniably prove to be beneficial for the users.
- 6.3 The telecom regulator, TRAI, already has the concept of a DND registry under its Unsolicited Commercial Communications (“UCC”) guidelines.⁴³ However, the current mechanisms to prevent such unsolicited telemarketing calls and messages are ineffective.⁴⁴ The issue isn’t just limited to annoyance to users, but extends to the threat of cyber fraud and threat to user privacy. As per a study from the United States, ISPs have been known to collect and share user data beyond need or purpose for further improving their ad targeting services or for other business purposes such as selling user data to third party advertising entities.⁴⁵ Such troublesome and excessive data collection practices fail to offer consumers meaningful choices about how, and if at all, this data can be used, shared, sold, and monetised.⁴⁶
- 6.4 While these measures introduced under the Telecom Bill, 2022 will protect users from unsolicited spam and fraud messages, little clarity exists on measures to protect users’ information and prevent data sharing with third parties without explicit consent in the first place. The excessive data gathering and sharing practices by telcos put users at a disadvantage, that is not limited to the spam and fraud messages. The other, and definitely more, damaging disadvantage is that entities who have access to such customer data may use it to profile, discriminate and target users.

7. CHAPTER 10: MISCELLANEOUS

- 7.1 In addition to expanding its own powers for granting licences, the Union Government has also diluted the powers of the TRAI under Clause 46 of the Telecom Bill. To that end, they have deleted certain key provisions of the TRAI Act, 1997. Clause 46(f) of the Telecom Bill, 2022 has deleted the second proviso to sub-section (1) of section 11 of the TRAI Act under which the government, prior to issuing a new licence to a service provider, had to ask the regulator, i.e, TRAI, for recommendations. Subsequently, TRAI would have to forward recommendations within 60 days of the government making such a request. Additionally, Clause 46(g) has deleted the third proviso to sub-section (1) of section 11 of the TRAI Act which empowered TRAI to ask the Union Government to furnish necessary information or documents, which the latter would have to handover within 7 days of receipt of such request.

43. Srinath Sridharan, “DND: Indian telecom’s grand failure,” *Fortune India*, June 17, 2022, <https://www.fortuneindia.com/opinion/dnd-indian-telecoms-grand-failure/108625>.

44. ANI, “Do Not Disturb’ Mode Ineffective in Preventing Spam Calls,” *Business Standard*, January 14, 2018, https://www.business-standard.com/article/news-ani/do-not-disturb-mode-ineffective-in-preventing-spam-calls-118011400272_1.html

45. “A Look At What ISPs Know About You: Examining the Privacy Practices of Six Major Internet Service Providers,” *Federal Trade Commission* (2021), https://www.ftc.gov/system/files/documents/reports/look-what-isps-know-about-you-examining-privacy-practices-six-major-internet-service-providers/p195402_isp_6b_staff_report.pdf.

46. FTC Staff Report Finds Many Internet Service Providers Collect Troves of Personal Data, Users Have Few Options to Restrict Use,” *Federal Trade Commission*, October 21, 2021, <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-staff-report-finds-many-internet-service-providers-collect-troves-personal-data-users-have-few>.

- 7.2 Through the deletion of these provisions, the Union Government essentially retains with itself the complete decision making power with respect to prescribing licences to various entities. This is reflective of an unfortunate instance wherein the Union Government is strengthening its own power, diluting existing checks and balances, and reducing accountability.
- 7.3 Under Clause 42(1), the Union Government is empowered to alter any of the 5 Schedules to the Telecom Bill, 2022 by a notification, except Schedule 3, to which alteration can be undertaken only through an amendment. This is significant especially with respect to Schedule 2. Schedule 2 lists the various broadband services which will require licences. Currently, these include Direct to Home (DTH) Services, community radio stations, FM radio broadcasting services through private agencies, Internet Protocol Television (IPTV) services, and downlinking and uplinking of television channels. With the application of the power under this Clause, the Union Government may expand the scope of this Schedule, thus increasing regulatory burden for several other broadcasting services.

8. CHAPTER 11: OFFENCES

- 8.1 As mentioned in Schedule 3, the penalty for providing telecommunication services or establishing a telecommunication network without obtaining a licence is imprisonment up to one year, or a fine up to Rs. 50 lakhs, or both. Additionally, a person or entity may be fined with up to 1 lakh INR for use of a unlicensed telecommunication network, infrastructure or network by a person or entity, either knowingly or having reason to believe it to be unlicensed. Clause 47 includes the provisions for instituting the penalties for such offences.
- 8.2 Clause 48 reads that in case of an offence committed by a company, the employees, who at the time of the offence were responsible for the conduct of the business relating to the offence, shall be liable and punished accordingly. Clause 48 read with Clause 47 thus states that, if a service provider such as Telegram or Signal, doesn't obtain a licence from the Union Government, and continues to provide services in India, their officers may be criminally prosecuted. On an even more concerning note, if a user continues to use such services, i.e., services which are being offered by unlicensed entities, they may be fined a hefty amount of 1 lakh INR. The ground "having reason to believe so" may be misused and may put the user at a disadvantage as it appears to place the burden on them to prove lack of knowledge about the licence status of any service provider.
- 8.3 Clause 51 states that if the government (Union, State or Union Territory) is satisfied that any information, document, or record in possession or control of any licensee, registered entity, or assignee is necessary to be furnished in relation to any pending or apprehended civil or criminal proceedings, then a specially authorised officer shall on the government's behalf request such information. Subsequently, the licensee, registered entity, or assignee will have to comply with the direction of such officer.
- 8.4 Here, ambiguity in the phrasing of this Clause opens it to misuse. There is an absence of clear parameters of information which may be revealed and the specific circumstances in which the authorised officer may request it to be furnished to them as the Clause allows requests to be made even in situations where the officer "apprehends" any illegal activity. This vagueness may lead to overbroad requests for disclosure which could result in the violation of the right to privacy of users.

D. SUMMARY OF OUR ISSUES AND SUGGESTIONS

Concern(s) and Clause(s)	Analysis	Suggestions
<p>1. Concerns with the consultative process</p>	<p>Despite receiving 500 pages worth of responses on the consultation paper “Need for a new legal framework governing Telecommunication in India”, the DoT did not make them publicly available. Due to this lack of transparency, we are unable to understand the reasoning and justification behind the introduction of several changes in the Telecom Bill, 2022. The consultative process followed so far is not commensurate with the ambitious and vital goal to establish a modern legal framework for the telecom sector. [For a detailed analysis, see paras 1.1 to 1.3]</p>	<p>The DoT must publicly release all responses. It must also publish a white paper with justifications and reasoning for introducing any changes in the Telecom Bill, 2022, and set up an institutionalised system of broad, multi-city, in-person stakeholder consultation. A Law Commission and/or an independent Standing Committee or expert body must be appointed to look into reforms for the telecommunication sector.</p>
<p>2. Preamble</p>	<p>The preamble lacks specific references to, “diversity and plurality of information mediums” and, “freedom of speech and expression” which are vital objectives must be expressly referred to within the preamble. [For a detailed analysis, see paras 2.1 to 2.3]</p>	<p>The preamble must include a reference to the, “public trust doctrine” that governs the role of the Union Government in public resources allocations where it acts as a custodian or fiduciary.</p>

Concern(s) and Clause(s)	Analysis	Suggestions
<p>3. Legislative and jurisdictional overlap</p>	<p>Online communication services, which are already governed under the IT Act, 2000 by the MeitY, are also included under the Telecom Bill, 2022 thus leading to ambiguity about which regulatory framework will be applicable to them. The inclusion of these services under “telecommunication services” in Clause 2(21) causes overlap which results in confusion. [For a detailed analysis, see paras 3.1 to 3.5]</p>	<p>Legislative and jurisdictional ambiguities must be cleared up in order to avoid overlap of powers between the DoT and MeitY. Online communication services should continue to be governed under the IT Act, 2000.</p>
<p>4. Lack of clarity due to absent definitions Clause 2(21), 24, 51</p>	<p>Many new services which have been included in the new definition of “telecommunication services” as contained in Clause 2(21) under the Telecom Bill, 2022 remain undefined. This increases scope for ambiguity and overlap. Terms “public safety”, “national security” and “public emergency” used under Clause 24 remain undefined. These undefined grounds may be misused by the government to intercept communication or to suspend internet services. Lastly, “apprehended civil or criminal proceedings” under Clause 51 is also not defined or elaborated on, thus leading to scope for ambiguity and misuse. [For a detailed analysis, see paras 3.2, 5.1, 7.6, and 7.7]</p>	<p>To avoid a situation where service providers with multiple functionalities are being dealt with on a case-to-case basis, the DoT must define each service. There must be defined parameters on what constitutes a “public emergency”, “public safety”, and “national security”. The term “apprehended” must either be explained or removed so as to reduce any scope for ambiguity and vagueness.</p>

Concern(s) and Clause(s)	Analysis	Suggestions
<p>5. Increased regulatory burden and centralisation of power</p> <p>3(1), 3(2)(a), 7(1), 24(1)(a), 42(1) 46(f), 46(g)</p>	<p>Clause 3(2)(a) read with Clause 3(1) and Clause 2(21) allows the Union Government, in exercise of its privilege, to grant any entity a licence for providing telecommunication services. Thus, instead of democratising the telecommunication sector, it centralises more power with itself and introduces overburdening regulations on online communication services. Under Clause 7(1), the decision to suspend, curtail, revoke, and vary a licence rests solely with the Union Government. Clause 42(1) empowers the Union Government to alter any Schedule to the Telecom Bil by a notification, except Schedule 3, to which alteration can be undertaken only through an amendment. This gives the Union Government the power to unilaterally alter language and thus scope of the Telecom Bill, 2022. Clause 24(1)(a) empowers the Union and State governments to take temporary possession of any telecommunication services.</p> <p>In both these cases, there is an absence of any checks and balances. In addition to expanding its own powers for granting licences, the Union Government has also diluted the powers of TRAI through Clause 46(f) and 46(g), thereby concentrating with itself the complete decision making power with respect to prescribing licences to various entities. [For a detailed analysis, see paras 4.1 to 4.10, 4.14 to 4.16, 5.2, 5.3, and 7.1 to 7.3]</p>	<p>Given the inadequate safeguards that currently exist for users to avail in case of violation of their fundamental rights, such an overbroad licensing regime for online communication service providers must be reconsidered. Additionally, checks and balances as well as accountability must be introduced with respect to the Union Government's power to prescribe licences as well as to suspend, revoke, curtail, and vary them. Protections must be included by amending Clause 42(1) to limit the Union Government's ability to alter the language and scope of the Telecom Bill, 2022. Grounds on which the government may take temporary possession must be defined and a limit on the time for keeping possession must be specified. Lastly, additional safeguards for the user's privacy must be included.</p>

Concern(s) and Clause(s)	Analysis	Suggestions
<p>6. Diluted user safety, and increase in Executive's surveillance powers</p> <p>Clause 4(7), 4(8), Clause 24(2)(a)</p>	<p>Clauses 4(7) and 4(8), which requires licensed entities to "unequivocally identify" all its users, and make such identity available to all recipients of messages sent by such a user, essentially ending anonymity over the internet. Clause 24(2)(a) includes provisions for interception of messages, expanding the scope of surveillance to telecommunication services and breaks existing protocols for the deployment of end-to-end encryption. [For a detailed analysis, see paras 4.11 to 4.13, and 5.4 to 3.10]</p>	<p>The Telecom Bill, 2022 must include an improved surveillance architecture based on privacy, transparency, and accountability through independent judicial oversight. Safeguards must also be included such that the rights of the user being surveilled is protected. It must also include the learnings accumulated through the Srikrishna Committee Report and the Supreme Court's decisions in Puttaswamy v Union of India and PUCL v Union of India.</p>
<p>7. Missed opportunity for legal reform on internet shutdowns</p> <p>Clause 24(2)(a), 24(2)(b), 33</p>	<p>The Telecom Bill, 2022 represents a missed opportunity for legal reform as it fails to enact any provisions for judicial oversight over the suspension orders or to strengthen the powers of the review committee. Instead, it replicates the provisions of the colonial-era Telegraph Act, 1885. [For a detailed analysis, see paras 5.13 to 3.17]</p>	<p>Access to the internet must be recognised as a right, rather than a service. Further, certain suggestions made by the Standing Committee on Communication and IT in its report on internet shutdowns such as review of the legal regime for suspension of internet services, establishment of a centralised database of internet shutdown orders, review of the TSTS Rules, diverse composition of the Review Committee, etc. must be accepted.</p>

Concern(s) and Clause(s)	Analysis	Suggestions
8. Disproportionate offence Clause 47 and Schedule 3	Schedule 3, S. No. 8 penalises a person or entity with a fine of up to 1 lakh INR for use of an unlicensed telecommunication network, infrastructure or network, either knowingly or having reason to believe it to be unlicensed. This is concerning as the ground “having reason to believe so” may be misused and may put the user at a disadvantage as it appears to place the burden on them to prove lack of knowledge about the licence status of any service provider. [For a detailed analysis, see para 7.4 and 7.5]	Clause 47 includes provisions relating to penalties related to offences listed under Schedule 3. This particular provision under Schedule 3 must be amended to ensure that the user are not penalised for using services provided by an unlicensed service.



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INTERNET
FREEDOM
FOUNDATION

To,
Telecom Regulatory Authority of India
advqos@traigov.in

January 07, 2019

Dear sir,

Re: Comments by the Internet Freedom Foundation on TRAI's Consultation Paper on OTT [Over-The-Top] Consultation released on November 12, 2018

The Internet Freedom Foundation (IFF) is a non-profit organisation created by members of the SaveTheInternet.in movement for net neutrality. Over one million of our fellow citizens wrote to the TRAI in April 2015 as part of the consultation paper on OTT services using the SaveTheInternet.in platform, and continued to engage the TRAI and the Dept of Telecommunications on subsequent consultative exercises in this area. Our submissions in these consultation exercises has been consistently to protect net neutrality and prevent onerous licensing of internet platforms and services.

The later question on licensing is emerging again, albeit in different forms and regulatory reasoning. In our submissions we underline some concern but base all our views with the perspective of helping achieve and assisting in the goal of securing public interest.

IFF aims to promote the rights of Indian Internet users – freedom of speech, privacy, net neutrality and freedom to innovate - before policymakers, regulators, the courts, and the wider public sphere. We are grateful to submit our views in the consultation on TRAI's Consultation Paper on OTT [Over-The-Top] Consultation released on November 12, 2018.

To broaden stakeholder comment and inform a larger number of people, we also prepared a page summary of the present consultation paper to help citizens in understanding the issues at play in this subject and empower them to be better placed if they wish to provide their views to TRAI [[link](#)]. We have also put out our presumptive views [[link](#)] and conducted an economic analysis of the major telecom companies [[link](#)] to deepen public understanding of the thrust of the present consultation. Our responses on specific questions is contained below.

Sincerely,

Apar Gupta, Executive Director
Internet Freedom Foundation



IFF's Submission on TRAI's Consultation Paper on OTT [Over-The-Top] Consultation released on November 12, 2018

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

The ambit of this consultation is sought to be limited at the outset with the definition of OTT [Over-The-Top] being narrowly defined by the the Consultation Paper. While an OTT service may be any internet application or service which sits on “top” of a telecom network, the present consultation limits the scope to only those which, “*only on regulatory issues and economic concerns pertaining to such OTT services as can be regarded the same or similar to the services provided by TSPs*” .

There is some historical baggage to this particular choice. The [previous Net Neutrality and OTT Regulation paper](#) published on March 27, 2015, made the unfortunate decision of lacking precision and ended up making paternal statements for regulation, citing arguments such as online gaming and social media addiction. To many in the SaveTheInternet.in movement this also seemed to be driven by an instinct to regulate the internet *per se* from the lens of telcos rather than satisfy any regulatory need.

At this juncture we would like to recount past submissions on this issue where the SaveTheInternet.in campaign consistently avoided the use of “OTT” in preference to “internet applications and services”. To many, “OTT” was a reductionist term which limited the vibrant, innovative pace of applications and services and viewed the internet from the lens of a telco. This has real implications on regulation as we soon discover.

The second problem is the ambiguity of the term as the Consultation Paper itself accepts that the phrase OTT does not yet have any firm, universal definition. To reach a firmer understanding, it conducts a comparative assessment of the regulatory documents and proposals in foreign jurisdictions and international bodies.

There is a problem in this approach as India has adopted an indigenous, progressive approach towards net neutrality which is in many ways due to the leadership of TRAI setting the norms of net neutrality. Hence, while India may learn from comparative models under development in other jurisdictions, we may have an opportunity to help globally set standards once again.



On principle itself, we hold a view against the functional definitional treatment of internet applications and services as OTTs which further builds into a case for licensing and registration to protect telcos.

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

To us, substitutability is a bad criteria as the substitutability of any service cannot be clearly made out and is closely linked to a large list of criteria. Let us for instance consider internet based calls, in which user behaviour is distinct due to voice quality, reliability and ease. For instance, many of use voice calls in preference to data calls and would usually do it for emergency services.

We may on the contrary use data calls when network is spotty or we are talking to a friend abroad. Both services co-exist, for very different purposes. Or, even internet based messaging, which is richer and more interactive than SMS based texting. The substitutability if any, by itself, operates on a very reductive criteria.

Substitutability as a criteria also leads to the problem of disaggregation, which the Consultation Paper acknowledges as well. In short, internet applications and services quite often offer multiple functionalities—which may include voice calling and instant messaging—even through their primary functionality, for instance, may be social networking. With WebRTC, nearly all browser based content and mobile applications can have a communications layer that supports messages, voice, and video. Will such services also be brought within the regulatory ambit?

To us, this is again illustrative of the reductiveness of a debate that commences from dulling the feature richness and diversity of internet applications and services into the straightjacket of OTT. The dangers of avoiding bright lines of regulation and the uncertainty in treatment may prevent free expression which the very basis for innovative thought and action. There are also concerns that overbearing and costly legal compliances and product decisions which may harm India's vibrant start-up ecosystem. Even a case-by-case assessment may bring in uncertainty and build ad-hocism.

Hence, we urge that the criteria that is distinct from substitutability, but a priori first examine the very need under which such a test is being devised. We would urge the TRAI to first examine the very premise and need for devising such criteria.

Q.3 Whether regulatory or licensing imbalance is impacting infusion of investments in the telecom networks especially required from time to time for network capacity



expansions and technology upgradations? If yes, how OTT service providers may participate in infusing investment in the telecom networks? Please justify your answer with reasons.

One of the cardinal sins of any public policy dialogue can be the problem of self-evidence. It is when the premise which forms the basis for the prescription itself is not validated because it is never examined and hence lacks evidence. This becomes important in this consultation as its first principles arise from an economic overview, contained in Chapter 3 of the Consultation Paper with two distinct premises which need to be interrogated.

The first premise: there exists a market failure, in which there is a lack of adequate financial incentive for large telecom players to invest in infrastructure. The second premise: several internet services may be direct substitutes which have taken away revenue from voice and text revenues. This is to an extent where data revenues at present do not compensate for the losses, or may not be able to do so in the future, hence marking a disincentive for future investment in telecom networks. By itself, large swathes of the Consultation Paper, make this to be the causal link requiring regulatory intervention.

There are also subsidiary arguments made to further these two premises. These includes the [rising user consumption of data](#), the [dropping price of data per GB](#) due to competition amongst telcos, growing convergence (where [even voice calls originate over data networks](#)), which requires investments for upgradation and increasing the capacity of existing networks. All these trends are stated on the basis of reference to reports by consultancies and industry associations. While we may like to dispute the sources, there is a much more concerning aspect which requires a concentrated analysis. This is on the profitability and the continued investment of major telcos.

Ideally any prescriptions on this should commence from a data driven analysis in which the profitability of large and medium telcos was set out in the consultation paper. To fill this gap we conducted an economic analysis of the financials of large telecom players which is available in full, broken into quarters to the fullest extent of their public filings over a 3 year period from 2015 to the present quarter of financials [[Link](#)].

Our economic, data driven analysis reveals the following:

- **Massive growth post 16Q2:** Use in both voice calling and data use is growing across the sector. This explodes after 16Q2 which is when Reliance Jio starts services. The rate of growth is increasingly and more people are coming online.
- **Fall in average rate per user:** This massive growth has coincided with a drop in per user revenue for the major telecom players. Such fall appears to be due to a hyper-competitive environment after the entry of Reliance Jio, however with a wave



of consolidation this period may soon end. Such trends are as per statements in the press by leading executives of telecom companies and analyst reports such as Moody's and Fitch.

- **Ambiguity in the amount of investment:** While there is a need for continued investment, we do not know to what extent, to what number and in what period of time. The data here is spotty and while the number may be large to devise any public policy measure there needs to be evidence.

We urge the authority to refer to the spreadsheet with the bare figures [[click here](#)] which also contains a links to the data points which lead to this view. This has also been further explained by us in a public analysis of the data [[click here](#)].

This leads us to submit that, we cannot any longer keep blaming increased data use for a fall in profitability for telecom companies. Statements by major telecom companies usually attribute multiple correlations, but the overwhelming consensus is hyper-competition. As per analyst reports this is slated to end sometime next year (latest by QY20) when the sector enters a period of consolidation given that only three major telecom companies will exist (Airtel, Idea-Voda, Reliance Jio).

We hold a view that devising regulations to place regulatory burdens or financial levies on internet platforms and services by itself is not a sound public policy measure from the perspective of data. The objective of regulation should not be to protect the profits of companies, it should be to serve public welfare.

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

This is a relevant concern for the Consultation Paper to indicate as the market power of large online platforms concentrates and quite often there is a lack of compatibility or ease of migration from one online service or app to another. Hence, this quite often results in a lock-in for a user to a particular online service provider. While this is a credible public policy concern and may require regulatory intervention, we are unsure whether the TRAI, as a telecom regulator is well tasked to take this up.

Our two basic reasons for hesitance are: firstly, the lack of a clear statutory basis to do so (TRAI may go outside its legal mandate); and secondly, even beyond the niceties of law, it may turn the TRAI into some sort of internet regulator. We believe the absence of legality and authority would also blur the objectives of regulation and the boundaries within which TRAI would have to restrict itself.



We hope that the issue of interoperability is picked up within a competition law and consumer protection frameworks, which may be better suited to undertake this task. IFF holds the committed belief that that web and mobile services that lock-in users should be regarded as anti-competitive.

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

Lawful interception is an incredibly concerning issue, as we first need to step back and consider that India does not have any comprehensive privacy and data protection law. We at IFF have been supporting the #SaveOurPrivacy campaign which asks for a strong, user centric privacy law that includes surveillance oversight and reform.

The Government of India's own expert committee on data protection chaired by Justice Srikrishna acknowledged that current legal provisions and practices on surveillance - including the absence of any judicial oversight - fail to adequately protect our fundamental right to privacy. Some may argue (we do not agree fully) that any safeguards present today have been achieved through technical measures by users -- this principally includes end to end encryption. Even if we do consider a hypothetical scenario where the data protection law under debate becomes law, there is no active government proposal to either bring surveillance reform within its ambit or to regulate intelligence and policing agencies, which are the principal recipients of such information. Hence, any conversation which progresses to argue against end-to-end encryption or for weakening it is completely against user interest and will be another step in building a surveillance state.

We strongly hold onto the position of asking for reform of India's surveillance law (including introducing judicial oversight such as directed in the Puttaswamy-Aadhaar Judgement) and defending the use and deployment of encryption technologies. We believe both these measure protect the privacy of individuals and also safeguard them from second order impacts such as identity and data theft, which in many cases today lead to social and economic harms. It is also not out of place to mention that platforms are under pre-existing legal obligations under a swathe of legal provisions including Section 69 of the Information Technology Act, 2000 and the rules made thereunder to provide personal data to law enforcement. Even this requires urgent reform.

At this juncture we are also concerned by the steps being taken by the TRAI to challenge the the ruling of the Delhi High Court by which it has permitted persons who are put under surveillance to utilise the Right to Information Act to file applications with telecom operators with a copy to the authority requesting for disclosure if their communications have lawfully intercepted. We urge TRAI to rather than challenging this decision, to



support it as this is one of the only existing methods of ensuring scrutiny and accountability in the process of interception which is a power which is highly concentrated in the executive branch of government.

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

On this issue, we hold a view that the conversation can be deferred to a later date. We believe we have not yet reached the moment for regulatory intervention, but we do hope that better citizen advocacy and user demand spur market mechanisms may require application providers of internet applications and services to clearly mark that they do not have the functionality for emergency calling. Some other services may by themselves opt-in and offer this feature to users as a product feature.

But, the primary point which needs to be stressed is that given that voice calling and SMS messaging by itself still persists and is a feature which is always available on feature- and smartphones. Hence, emergency services are at present available to users in India to an extent where a regulatory intervention may not be justified. We also hold the preliminary view that our broad suggestion to avoid regulation for emergency calling does not include VOIP services which hold E.164 Numbers and terminate on PSTN networks (on which the authority has cited references to OFCOM, European Commission and the french regulator ARCEP). This is as such services substantially mimic conventional voice calling and build user expectations.

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

It bears repetition that the core thesis of a market failure and the need to correct regulatory imbalances is yet to be established on the contrary our economic analysis shows that the economic stress is due to a period of hyper-competitiveness. We even dispute the arguments for substitutability of services between telcos and internet applications and services.

We do agree that the extant regulatory framework on telcos needs to be further liberalised with a focus on user benefits. Viewed as service providers, the telcos should provide a quality of service; however, as per most anecdotal accounts, their service remains incredibly inconsistent, despite the efforts of the TRAI. We would urge that renewed regulatory efforts are made to ensure that the regulatory burden on telcos does not



compromise their obligations towards users. Ultimately, telcos rely on and utilise spectrum, a public resource held in trust by the Government for our benefit.

We do indicate that internet platforms and services need to be regulated when a clear social need arises in a rights respecting framework and pursuant to legality. This is most immediately necessary in the domain of privacy, where a comprehensive, horizontally applicable national privacy and data protection law is necessary. One such proposal supported by us is the Indian Privacy Code available at www.saveourprivacy.in.

This model law - and several other proposals - seeks to establish Central and state level privacy and data protection regulators, which may be best suited to perform the duties of privacy and data protection through active enforcement. Also as indicated before we are not adverse to examination of large social media platforms or data driven businesses within consumer protection and competition law frameworks.

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

Inapplicable as per the response to Q.7



To,
Telecom Regulatory Authority of India
advqos@traigov.in

January 21, 2019

Dear sir,

Re: Submission of our counter-comments to the Consultation on OTT Platforms and Services

The Internet Freedom Foundation (IFF) is a non-profit organization arising from the SaveTheInternet.in movement for net neutrality.

In April 2015, through the SaveTheInternet.in platform, over a million Indian citizens wrote and engaged with the TRAI and the Department of Telecommunications on consultative exercises to protect net neutrality. A core part of the submissions consistently aimed to prevent the licensing of internet platforms and services. To our dismay, we have noticed in the comments posted in response to the present consultation similar arguments for licensing of internet platforms and services resurfacing. These have primarily been made by telecom operators.

We submit that the underlying factors have not changed and many of the old arguments are being repackaged today under the cover of a regulatory imbalance and a threat to network investment. In our counter-comments, we highlight the submissions of service operators, who have largely seen the present consultation as an opportunity to extend a telecom licensing framework to the internet. This would harm users, innovation and satisfy no clear public policy goal.

We would like to restate our recommendations at the same time on the role of the TRAI for greater privacy protection and surveillance reform. This role can be positively carried out by TRAI in the telecom sector. For our detailed counter comments, for ease, we have prepared our submission in a tabular form which is attached to this covering letter.

Sincerely,

Apar Gupta
Executive Director
Internet Freedom Foundation
apar@internetfreedom.in

Question No. 1 Which service, when provided by the OTT service provider, should be regarded as the same or similar to services being provided by the TSPs? Please list all such OTT services with descriptions comparing it with services being provided by TSPs.

Service Provider's Submissions	IFF Response
<p>Airtel: Services allowing a person to communicate with another individual or a group of target people, such as voice calls, video calls, message exchange through the OTT service provider are substitutable to the services provided by the traditional TSPs. They propose that the definition of OTT communication services by EU should be adopted in the Indian context as well. Social media and other gaming applications do not fall in the category of OTT communication services. The definition should be flexible to bring in other substitutable services under its ambit without hampering growth and technology.</p> <p>BSNL: Services providing voice calls, video calls, SMS, MMS, any messaging service and audio/video conferencing services may be regarded as similar to services given by TSPs.</p> <p>Cellular Operators Association of India (COAI): VOIP and messaging services provided by OTT communication services providers can potentially substitute telecommunications services. They suggest that TRAI may adopt the definition of "interpersonal communication services" suggested by the EU.</p> <p>Vodafone: Supports the definition in the EU framework of "interpersonal communications services" which is defined as "direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons, whereby the persons initiating or participating in the communication determine its recipients". OTT definition needs to be finalized to cover it as any service that may substitute or supplement telecom services.</p> <p>MTNL: All communication services for which incumbent TSPs have been authorized under their licenses should be considered for the purpose. They say that the OTT services comparable to the services of TSPs are- Voice over IP for voice calls, video chat services, instant messaging services, video and audio streaming services.</p> <p>Reliance: All online services which have substituted traditional telecommunications services such as voice calls and messaging should be considered the same or similar to services being provided by TSPs.</p> <p>Reliance JIO: Services which are functionally similar to services provided by TSPs should be regarded as communication services. They request the authority to adopt the classification proposed by the EU to define OTT. The definition must be flexible to include rapidly changing markets and technologies of the future.</p> <p>Tata: OTTs that provide a replacement service to the services offered by TSPs should be regarded as the same as services offered under a Telecom license in India. This includes services like Skype, Viber, Whatsapp, Facebook Messenger.</p>	<p>We submit and restate our original definition that OTT is a reductive term which reduces the diversity of functionality offered by online platforms and services. We urge that any attempt at a definition based on either the criteria of, "substitutability" or, "functionality" may be avoided at present.</p> <p>In our view, internet platforms and services and TSPs cannot be compared. Firstly, online providers are not substitutes because they are dependent on TSPs physical networks to provide their services. Secondly, they operate at different layers, with TSPs at the telecom layer and internet services at the application layer. Thirdly, TSPs have several advantages over internet platforms in terms of exclusive rights to acquire spectrum, to obtain numbering resources, to interconnect with PSTN, the right of way to set up infrastructure.</p> <p>Also, the internet services market is far more competitive and thereby they offer their services at nearly no cost. Further, internet platforms usually offer diverse services, not limited to the straight jacket categories of TSPs. Some of these services use messaging or call features to augment unrelated services and improve the consumer experience.</p> <p>We would also like to caution against the adoption of the EU framework which appears to be a proposal at present.</p>

Question No. 2: Should 'Substitutability' be treated as the primary criteria for comparison of regulatory or licensing norms applicable to TSPs and OTT service providers? Please suggest factors or aspects, with justification, which should be considered to identify and discover the extent of substitutability.

Service Provider's Submissions	IFF Response
<p>Airtel: Yes, substitutability should be the main parameter for defining any service as an OTT communication service. Services may be identified as substitutable if they allow a person to communicate with another individual or a group of target people.</p> <p>BSNL: Yes, OTTs are substituting traditional telcos by offering low/no-cost services resulting in a decline in the demand for those causing a loss in revenue for TSPs. Increase in revenue from increased data consumption doesn't compensate for the loss from voice/SMS services being substituted.</p> <p>Cellular Operators Association of India (COAI): Yes, substitutability of a service should be one of the primary and important criteria. The test followed by EU in their electronic communication code may be applied to determine whether the functionality forms a 'substantial' or 'ancillary' part of the service/platform.</p> <p>Vodafone: Yes, substitutability should be the criteria. They have cited an EU recital which says that end-users are increasingly substituting services by TSPs such as voice calls, messaging etc. with 'functionally equivalent' online services.</p> <p>MTNL: Scope of consideration should not be limited to 'substitutability'. All communication services authorized to TSPs under their license should be considered under the present context.</p> <p>Reliance: Substitutability should be treated as the primary criteria for comparison of regulatory or licensing norms applicable to TSPs and OTT service providers. Any OTT application providing above services within or using the same platform should be considered to identify and discover the extent of substitutability.</p> <p>Reliance JIO: Demand-side substitutability should act as the criteria. Any platform that allows for one-to-one communication outside of TSPs has the potential to be a national security risk and must, therefore, be properly regulated.</p> <p>Tata: Strongly agree with substitutability as the criteria. OTTs utilize TSP infrastructure and make large amounts of profits that don't go back to the government or to the people who provide the infrastructure. There also exists a national security risk if OTTs are not regulated.</p>	<p>According to us, the substitutability criteria is an incorrect premise to base any regulation as several other bases exist to examine the economic interaction between telecom services and internet services. We would submit these services are by their very nature complementary rather than being substitutes. For instance, as the ITU report on "Regulatory challenges and opportunities in the new ICT ecosystem" as cited in some responses, online messaging platforms have significant additional functionality, because, <i>"while a portion of IP messaging is a substitute for SMS services, not all such messaging would have been SMS traffic"</i>. Hence, their functionality extends beyond and does not compete with the functionality of an SMS.</p> <p>These include indicatively, ubiquity and adoption, consumer welfare, addressable markets, innovation, the level of competition, maturity of the industry, the lifecycle of product/services and impact in the economy, nature of the underlying technology, switching costs etc. are all important factors to consider. An analogy for this would be to compare airlines to cars or railways and to try to apply the same regulatory standards to them which wouldn't work out.</p> <p>Invoking substitutability to justify regulation or licensing requirements for online services will hurt consumers and the industry creating new barriers to entry for both new apps and service providers by raising the cost of service which would be unfavourable as the low barriers to entry, open nature of the internet and rich interactions and experiences that online application and content providers enable are key to the continued growth of the digital economy and for user's who are its ultimate beneficiaries.</p>

Question No. 3: Whether regulatory or licensing imbalance is impacting infusion of investments in the telecom networks especially required for time to time for network capacity expansions and technology upgradations? If yes, how OTT service providers may participate in infusing investment in the telecom networks? Please justify your answers.

Service Provider's Submissions	IFF Response
<p>Airtel: They agree that increasing usage of OTT services has led to higher consumption of mobile broadband network facilitated by TSPs to cater to huge traffic being generated by the OTT service providers. They believe that higher network utilisation is contributing towards increased revenues which would lead to higher investments in TSPs networks.</p> <p>BSNL: Yes, because TSPs burden the main costs, have to comply with regulatory requirements, face penalties for non-compliance. OTTs provide direct competition to TSPs without having the same burden.</p> <p>Cellular Operators Association of India (COAI): Yes, the regulatory imbalance between TSP and OTT communications provider is impacting the sustainability of the TSP's. The telecom industry will require INR 200,000 crores over the next 3-5 years for network capacity expansion and technology up gradation. They recommend reviewing the taxes/ levies on the operators to ensure that the telecom industry remains financially stable.</p> <p>Vodafone: TSPs have regulatory requirements such as investment into the creation and maintenance of high-speed networks, high licensing and taxation regime etc. which OTTs don't have to deal with. They argue that the non-level playing field the OTTs enjoy means that presently, they do not have a sustainable business case which prevents them from investing in improved broadband infrastructure which also inhibits the growth of OTT services.</p> <p>MTNL: There exists an imbalance. OTT services replacing TSPs means that Telecoms lose out revenue in these areas. Also, data tariffs have gone extremely low because of price competition and predatory pricing by some of the players. OTTs should have a revenue sharing model that allows them to compensate the infrastructure costs, spectrum fee, license fee etc.</p> <p>Reliance: Yes, the regulatory imbalance is affecting the sustainability of TSPs. A substantial part of international traffic has been shifted over to OTT. TSPs revenue is subject to licensing fee and entry fee while OTTs have no such burden. This imbalance also affects the TSPs ability to invest in better networks.</p> <p>Reliance JIO: It cannot conclusively be said that OTT traffic is impacting investment in telecom networks. Yes, the syphon off a part of the revenue through substitutable services, but they also create revenue in terms of data usage. They do not recommend imposing license or fees on OTT and instead say that existing fees on TSPs should be decreased to allow them more capital to use for investments etc.</p> <p>Tata: OTTs use TSP infrastructure and TSPs benefit because of the excess data consumption, however, there is an imbalance in the revenue they get. The regulatory framework should require OTTs to invest in network infrastructure before they can roll out services in India. Regulations regarding calling services, gaming, content broadcast etc. must be standardized between OTTs and TSPs.</p>	<p>We would like to refer to our economic analysis as we had first put it in our submission which clearly shows that there is not only a lack of causation, but even correlations between a purported, "regulatory or licensing imbalance" and, "infusion of investments in the telecom networks". We urge for specific data to evidence these claims.</p> <p>As per our economic analysis, the poor financial health of the telecom sector is because of the intense price competition between infrastructure providers which has hurt the margins of TSPs. We do agree that there may be a need to rationalise the tax burden and levies on TSPs however that is an issue for telecos to satisfy with data and evidence.</p> <p>We further submit that investments made by TSPs into their networks are primarily due to revenue opportunities offered by providing data services for accessing online services and applications. Online providers have to lead the investment in this sector by building physical facilities such as data centres, fiber networks, servers and routers.</p>

Question No. 4: Would interoperability among OTT services and also interoperability of their services with TSPs services promote competition and benefit the users? What measures may be taken, if any, to promote such competition? Please justify your answers with reasons.

Service Provider's Submissions	IFF Response
<p>Airtel: Interoperability would hinder innovations in the OTT space. Any requirement for interoperability should be left to market forces and technical innovations.</p> <p>BSNL: Interoperability will promote healthy competition and benefit users.</p> <p>Cellular Operators Association of India (COAI): Interoperability between OTT services should not be mandated and should be left to market forces.</p> <p>Vodafone: Interoperability is not currently necessary to promote competition.</p> <p>MTNL: Interoperability will be beneficial only for new operators using IP based network technology.</p> <p>Reliance: Interoperability would promote competition and can be done through light touch licensing of OTT service providers.</p> <p>Reliance JIO: Interoperability goes beyond the purview of light touch regulations and therefore should not be considered at this time.</p> <p>Tata: Interoperability amongst OTTs can only happen when the Government of India takes a stance on PUBLIC E.164 Number Mapping (ENUM) standard services in India.</p>	<p>We support interoperability on online services and platforms through a data protection and a competition law framework. At the same time, this is an issue which falls outside the concern of telecom regulation.</p>

Question No. 5: Are there issues related to lawful interception of OTT communication that are required to be resolved in the interest of national security or any other safeguards that need to be instituted? Should the responsibilities of OTT service providers and TSPs be separated? Please provide suggestions with justifications.

Service Provider's Submissions	IFF Response
<p>Airtel: Due to encryption methods deployed by OTT service providers and their infrastructure being outside India, TSPs face difficulties to meet the requirements of national security. This also leads to issued in obtaining KYC details of the users by TSPs, and therefore Government agencies cannot effectively ensure lawful interception or protect consumer privacy. They argue in favour of a regulatory framework mandating the requirement of LIM, compliance with data privacy requirements, maintenance of data within India and compliance with existing Indian regulations.</p> <p>BSNL: In the interest of national security, OTTs should be regulated by interception laws and maintain a local data centre to add ease to requests by an authority.</p> <p>Cellular Operators Association of India (COAI): OTT communication service providers should be subjected to the rules to meet the national security and privacy norms. Data mining by some content providers is a risk to the customer's privacy and security. Further problems arise when data is stored outside India. They propose provisioning of LIM, record maintenance, subscriber</p>	<p>We restate our submission on the need for a comprehensive privacy law with surveillance reform to overhaul the present regulatory apparatus. We submit that the present regulations and rules for decryption are already onerous and against the fundamental right to privacy.</p> <p>We urge the TRAI to take steps to safeguard privacy by service operators and urge for a separate consultation paper on it.</p>

<p>traceability, sharing customer details with law enforcement agencies and compliance with other Indian regulations.</p> <p>Vodafone: Rules associated with lawful interception must be equal between OTT and TSPs to enable security agencies to get this information. OTTs presently store their data overseas while TSPs have regulations that prevent data from leaving the country.</p> <p>MTNL: OTTs must comply with the same regulations as TSPs. They must be required to out their content/servers in India. Maintain records of data, communications, decoded content to be shared with government/LEAs.</p> <p>Reliance: In the interest of national security, OTTs should have the same Legal Interception and Monitoring (LIM) requirements as TSPs. Also, there must be a decryption key for their data accessible by the Government.</p> <p>Reliance JIO: The biggest problem with OTT providers is that they are overseas so there is no jurisdiction for authorities to demand data. Also, the information is encrypted which means an authority cannot read the same. As such OTTs should comply with LIM requirements. They also support a comprehensive data privacy law to help protect people's rights and freedoms.</p> <p>Tata: The responsibility of national security should be equal to both TSPs and OTTs. The best way for this is to consider Public E-NUM services. They also contend that as OTTs do not have their company or any liabilities in India means that they are not concerned with security and just view citizens as a means of revenue.</p>	
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Question No. 6: Should there be provisions for emergency services to be made accessible via OTT platforms at par with the requirements prescribed for telecom service providers? Please provide suggestions with justification.

Service Provider's Submissions	IFF Response
<p>Airtel: No, because OTT Service Providers are not interconnected to the PSTN network. However, they can deploy a centralized emergency response centre which can be connected to 112 deployed by various states. It may be desirable but not mandated to provide an option to route the traffic directly to the response centres.</p> <p>BSNL: Yes they should provide emergency services as additional safety for the public is a good thing.</p> <p>Cellular Operators Association of India (COAI): Emergency services are desirable, however, do not need to be mandated.</p> <p>Vodafone: Provision of emergency services by OTTs should be desirable but not mandated. However, they should be required to inform users about the lack of the same.</p> <p>MTNL: It would be better for OTTs to have emergency services on par with those TSPs provide because a lot of people use these services.</p> <p>Reliance: Emergency services should be mandated in the same manner as TSPs.</p> <p>Reliance JIO: OTT service providers should be encouraged, not mandated, to provide emergency services.</p> <p>Tata: OTTs should provide emergency services especially because the medium allows for an enhanced version of emergency services that TSPs can't provide.</p>	<p>We restate our initial submissions and only online services that offer video calling which can originate and terminate on a PSTN network may require provision for emergency calls. Even in these instances in most cases, users do not have any expectation of such features as to route such calls they rely on the pre-existing voice calling features on their smartphones.</p>

Question No. 7: Is there an issue of the non-level playing field between OTT providers and TSPs providing the same or similar services? In case the answer is yes, should any regulatory or licensing norms be made applicable to OTT service providers to make it a level playing field? List all such regulations and licenses with justification.

Service Provider's Submissions	IFF Response
<p>Airtel: Yes, having a 'same service same rule' policy is important to protect competition. The regulatory requirements of OTT service providers should be limited to the provisioning of services and should not include the regulatory requirement for building the network. A light licensing requirement with compliance to lawful interception, localization of consumer sensitive data, consumer privacy, subscriber verification/KYC, traceable user identity, record maintenance, and compliance with other Indian regulations would be adequate.</p> <p>BSNL: Yes, there exists an uneven playing field. TSPs are highly regulated and OTTs don't have the same burdens. If OTTs aren't brought under a licensing regime, it will impede the efforts of TSPs to upgrade the network across the country.</p> <p>Cellular Operators Association of India (COAI): Yes, there are regulatory imbalances between TSPs and OTTs. The existing regulatory and licensing conditions imposed on TSPs should be reviewed and minimised. However, OTT communications services should be subject to critical compliances such as Security/ Lawful Interception & Monitoring, Customer Data Privacy and Data Localization.</p> <p>Vodafone: Yes, there is a non-level playing field as TSPs have a lot more regulations to comply with. This non-parity broadly exists in terms of financial conditions, security conditions, consumer protection conditions and commercial conditions. The exact regulatory differences have been detailed in their submission.</p> <p>MTNL: (Same answer as the one to Q3)</p> <p>Reliance: Multiple OTT services may be considered perfect substitutes to services offered by TSPs, however, only TSPs have to deal with the regulations thereby creating a non-level playing field that hampers the latter's ability to compete fairly in the marketplace.</p> <p>Reliance JIO: In terms of financial levies, the uneven playing field between OTTs and TSPs is not a clear and present concern. However, there needs to be regulation regarding LIM and data privacy laws.</p> <p>Tata: Yes, there are imbalances. They believe that OTT should have regulatory mandates regarding- Lawful Interception, takedown obligations, privacy and cyber-security obligation, license compliance, revenue sharing, tax compliance.</p>	<p>Since internet services and platforms and TSPs offer fundamentally different services, any regulation should also be suited as per the specific public policy need. While we support greater scrutiny on internet services and platforms through the competition law and consumer protection frameworks we oppose any telecom style licensing system being extended to them.</p> <p>The argument of, "same service, same rules" has been conclusively debunked and discredited in earlier instances of consultations. It is also relevant to consider that licensing of online platforms and services would force them to pay exorbitant fees which would disincentivize small companies and innovators as it would disproportionately increase costs and create conflicts which would deprive users of many of the services we enjoy today. This could create entry-level barriers and also impair the ability of Indian businesses to use online applications to grow and reach more people.</p>

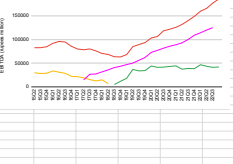
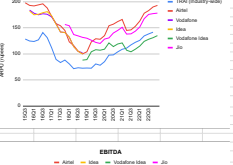
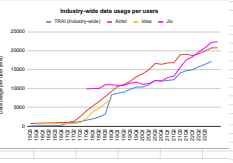
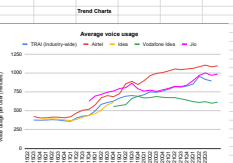
Question No. 8: In case, any regulation or licensing condition is suggested to be made applicable to OTT service providers in response to the previous question, then whether such regulations or licensing conditions are required to be reviewed or redefined in the context of OTT services or may these be applicable in the present form itself? If review or redefinition is suggested, then propose or suggest the changes needed with justifications.

Service Provider's Submissions	IFF Response
<p>Airtel: Licensing requirements for OTT service providers should be limited in comparison to TSPs to allow flexibility for technological innovations and developments. They should be brought under light licensing and regulatory norms.</p> <p>BSNL: TRAI needs to examine the details.</p> <p>Cellular Operators Association of India (COAI): OTT communications services can be licenced by introducing the OTT Communication Authorization under the Unified License. OTTs should be subject to compliances such as Lawful Interception & Monitoring, Customer Data Privacy, Data Localization, and UCC Regulations.</p> <p>Vodafone: Emphasize that all rules need to be reviewed and lightened to be uniformly applicable to all so that both players operate under a balanced and uniform regulatory framework/regime.</p> <p>MTNL: Both OTTs and TSPs should be treated at par in terms of regulatory/licensing provisions pertaining to privacy/security issues. However, issues related to QoS, revenue sharing and other commercial issues should be left to be decided by market forces.</p> <p>Reliance: The regulatory imbalances include- Quality of service parameters, obligations under Telegraph act, customer care set up, UCC compliance, emergency and public utility services, monitoring services, payments to exchequer including GST.</p> <p>Reliance JIO: Propose that financial regulations, QoS etc. should not be imposed on OTT service providers to allow them to innovate and grow. However, they should be required to develop mechanisms which deal with fake identity, fake news, rumours etc. which may culminate in a threat to national security.</p> <p>Tata: OTTs should be under obligations to provide real-time communications and internet peering/interconnections.</p>	<p>Since we have not suggested any licensing conditions, no review or redefinition is required. We urge the authority not to consider ancillary concerns which have been raised by service providers particularly by Reliance Jio on issues such as fake identity, misinformation etc. which are much beyond the remit of the present consultation and likely to harm user rights of privacy and free expression.</p> <p>We strongly oppose the suggestion by COAI to extending provisions of the Unified License to internet services and platforms.</p>

IFEs snapshot of key financials of Telecom Operators

We encourage you to read:
 (1) A summary of the IFEs prepared in September 2016: [http://www.iftel.com/~/media/IFTel/2016/09/2016-09-20-IFEs-Summary.pdf](#)
 (2) Our analysis of the 2016 OTC Consolidation Paper: [http://www.iftel.com/~/media/IFTel/2016/09/2016-09-20-OTC-CP-Analysis.pdf](#)
 (3) Our analysis of the data in the IFEs: [http://www.iftel.com/~/media/IFTel/2016/09/2016-09-20-IFEs-Data-Analysis.pdf](#)
 (4) Our Public Brief on the Impact of OTC Regulation in Asia: [http://www.iftel.com/~/media/IFTel/2016/09/2016-09-20-OTC-Regulation-Asia.pdf](#)
 (5) Our complete analysis (9/2016): [http://www.iftel.com/~/media/IFTel/2016/09/2016-09-20-IFEs-Complete-Analysis.pdf](#)

	15Q1	15Q2	15Q3	15Q4	16Q1	16Q2	16Q3	16Q4	17Q1	17Q2	17Q3	17Q4	18Q1	18Q2	18Q3	18Q4	19Q1	19Q2	19Q3	19Q4	20Q1	20Q2	20Q3	20Q4	21Q1	21Q2	21Q3	21Q4	22Q1	22Q2	22Q3		
TRAI (Industry)																																	
Voice usage per user (minutes)	376	374	376	381	377	366	360	405	408	437	455	594	606	627	667	697	697	697	701	705	698	613	627	624	655	655	654	654	654	654	654		
Q-o-Q growth	-0.5%	0.5%	0.3%	1.3%	-0.8%	-2.8%	-1.6%	10.3%	0.8%	2.8%	3.1%	13.7%	17.8%	4.1%	3.1%	0.3%	2.3%	1.3%	1.4%	0.6%	-0.8%	-2.2%	2.3%	4.2%	0.6%	1.2%	2.3%	11.8%	4.2%	-0.1%			
Yo-Y growth	-0.2%	-0.1%	0.3%	0.7%	-0.1%	-0.4%	5.3%	17.8%	17.8%	17.8%	44.8%	60.6%	63.4%	74.7%	74.7%	74.7%	74.7%	74.7%	74.7%	74.7%	74.7%	74.7%	74.7%	74.7%	74.7%	74.7%	74.7%	74.7%	74.7%	74.7%			
TRAI (Data usage per user)																																	
Data usage per user (MB)	65.07	109.89	122.93	133.87	142.82	225.91	1006	1206	1616	1985	2447	3216	4000	6740	9800	9770	10370	10400	11000	12100	11960	12130	12330	14100	14750	14600	15000	16400	17180	17180			
Q-o-Q growth	81.44	11.87	8.30	8.69	6.89	68.18	278.64	15.76	24.85	28.56	35.17	23.43	19.37	5.04	3.85	7.93	6.14	0.28	5.76	0.45	-1.56	1.42	1.84	14.35	4.46	1.02	9.30	3.79	4.25				
Yo-Y growth	189.81	114.64	109.24	105.48	77.61	63.46	278.64	278.64	278.64	278.64	278.64	278.64	278.64	278.64	278.64	278.64	278.64	278.64	278.64	278.64	278.64	278.64	278.64	278.64	278.64	278.64	278.64	278.64	278.64	278.64			
TRAI (ARPU)																																	
ARPU (INR)	124.65	124.68	123.77	126.91	148.80	131.1	118.43	89.34	83.41	84.88	86.77	71.62	73.34	73.2	72.62	72.49	80.85	78.17	85.07	87.64	88.01	103.87	108.78	110.98	117.26	122.23	123.98	124.5	128.25	141.96			
Q-o-Q growth	-0.02%	0.02%	-0.7%	2.54	19.91	-4.84	-14.85	-18.97	-8.40	0.61	4.31	-21.33	2.40	-1.12	-0.24	-0.34	8.86	-4.56	9.48	9.94	-1.81	3.58	4.19	2.03	5.85	4.24	3.07	6.77	2.79				
Yo-Y growth	-0.02%	-0.02%	-0.7%	2.54	19.91	-4.84	-14.85	-18.97	-8.40	0.61	4.31	-21.33	2.40	-1.12	-0.24	-0.34	8.86	-4.56	9.48	9.94	-1.81	3.58	4.19	2.03	5.85	4.24	3.07	6.77	2.79				



	15Q1	15Q2	15Q3	15Q4	16Q1	16Q2	16Q3	16Q4	17Q1	17Q2	17Q3	17Q4	18Q1
Vodafone													
Voice usage per user (minutes)	424	426	425	415	414	406	419	471	507	519	570	606	726
Q-o-Q growth	4.72	0.25	-0.24	-2.47	-0.24	-1.93	3.2	15.41	7.84	2.17	11.90	16.52	4.68
Yo-Y growth	0.5	0.5	0.4	0.3	0.3	0.3	13.49	22.46	27.79	37.23	42.25	36.07	24.3
Airtel													
Data usage per user (MB)	706	705	643	859	904	1000	972	1331	2011	4027	5040	6585	7864
Q-o-Q growth	8.36	10.20	13.90	25.24	10.62	20.80	36.30	33.11	58.33	30.88	33.11	18.42	4.9
Yo-Y growth	23.05	30.12	35.20	54.69	39.63	59.63	100.63	100.63	100.63	100.63	100.63	100.63	100.63
Airtel													
ARPU (INR)	108	103	102	104	106	108	112	104	104	104	104	104	104
Q-o-Q growth	-2.53	-0.52	1.94	1.03	1.03	1.03	1.03	1.03	1.03	1.03	1.03	1.03	1.03
Yo-Y growth	-1.01	-0.59	-0.42	-0.38	-0.43	-0.43	-0.43	-0.43	-0.43	-0.43	-0.43	-0.43	-0.43
EBITDA (INR million)	62617	62023	64748	61863	64662	67956	70628	76231	80077	79411	70341	63070	63000
Q-o-Q growth	0.94	-0.15	4.42	-0.43	4.42	4.86	4.74	7.92	3.31	-0.81	-7.28	-8.90	-7.32
Yo-Y growth	16.09	14.53	11.33	-13.01	16.09	16.09	16.09	16.09	16.09	16.09	16.09	16.09	16.09

	15H1	16H2	16H1	16H2	17H1	17H2
EBITDA (INR million)	917	860	850	704	507	473
Q-o-Q growth	-2.07	-6.67	-11.08	-20.88	-15.58	-47.35
Yo-Y growth	-	-	-	-	-	-

	16Q1	16Q2	16Q3	16Q4	17Q1	17Q2	17Q3	17Q4	18Q1
Reliance									
Voice usage per user (minutes)	408	380	380	387	388	386	402	401	388
Q-o-Q growth	-0.39	1.81	-1.83	-2.07	-0.20	4.62	7.01	7.04	4.08
Yo-Y growth	-7.11	-4.65	-2.04	6.46	16.36	24.73	32.21	40.25	38.10
Reliance									
ARPU (INR)	134	126	125	129	130	122	114	107	108
Q-o-Q growth	-5.17	-6.76	4.30	1.30	-1.30	-6.15	-6.56	-2.14	0.92
Yo-Y growth	-2.99	-3.17	-17.05	-18.02	-10.21	-24.56	-27.10	-32.41	-32.41
Reliance									
ARPU (INR)	599	615	653	641	674	694	730	697	2024
Q-o-Q growth	2.67	6.18	-1.84	5.12	2.27	1.30	36.53	100.20	72.64
Yo-Y growth	12.52	12.85	7.86	49.30	227.00	448.27	574.54	531.75	231.62
Reliance									
ARPU (INR)	147	144	145	147	144	110	119	105	95
Q-o-Q growth	-2.04	0.69	1.38	-3.40	-4.63	-14.62	-9.90	8.38	-11.76
Yo-Y growth	-3.40	-9.72	-20.45	-25.17	-18.26	-18.23	-14.41	-18.50	-31.08
Reliance									
ARPU (INR)	162	178	178	179	181	173	142	141	132
Q-o-Q growth	-3.85	9.57	1.70	1.12	-4.42	-8.29	-9.05	-0.70	-6.38
Yo-Y growth	-0.50	-1.44	-0.80	-0.87	-21.14	-22.75	-11.54	-19.93	-16.53
Reliance									
EBITDA (INR million)	29619	27864	28835	32843	39742	28977	21917	21988	18753
Q-o-Q growth	-2.17	2.62	16.44	-7.80	-7.71	-22.75	-3.28	-11.54	-16.53
Yo-Y growth	3.81	1.68	-23.46	-36.42	-39.00	-47.07	-44.48	-31.73	-64.83

	16Q1	16Q2	16Q3	16Q4	17Q1	17Q2	17Q3	17Q4	18Q1
Vodafone									
Voice usage per user (minutes)	505	500	500	500	500	500	500	500	500
Q-o-Q growth	-1.00%	-1.00%	-1.00%	-1.00%	-1.00%	-1.00%	-1.00%	-1.00%	-1.00%
Yo-Y growth	-1.00%	-1.00%	-1.00%	-1.00%	-1.00%	-1.00%	-1.00%	-1.00%	-1.00%
Vodafone									
Data usage per user (MB)	1414	1717	2047	1434	1717	1940	2046	2018	3030
Q-o-Q growth	-	20.88%	20.41%	0.20%	20.88%	6.77%	8.22%	89.60%	5.97%
Yo-Y growth	-	20.88%	6.77%	93.32%	57.08%	43.73%	44.35%	45.53%	48.23%
Reliance									
ARPU (INR)	88	88	104	108	107	109	131	114	119
Q-o-Q growth	-	-	18.50%	3.69%	-0.92%	1.87%	11.01%	-13.79%	4.20%
Yo-Y growth	-	-	17.95%	18.35%	14.05%	3.96%	10.88%	9.92%	-13.08%
Reliance									
EBITDA (INR million)	4614	1138	1783	3650	3347	3425	4361	4094	4124
Q-o-Q growth	-	58.41%	57.05%	104.45%	4.30%	2.19%	28.05%	-6.42%	1.32%
Yo-Y growth	-	62.71%	60.73%	103.94%	10.20%	10.36%	10.20%	6.65%	10.20%

	16Q1	16Q2	16Q3	16Q4	17Q1	17Q2	17Q3	17Q4	18Q1
Reliance									
Voice usage per user (minutes)	620	604	744	744	744	744	744	744	744
Q-o-Q growth	-2.74%	23.18%	17.20%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
Yo-Y growth	-	-	-	-	-	-	-	-	-
Reliance									
Data usage per user (MB)	9000	10000	10000	11000	11000	10000	11000	12000	12000
Q-o-Q growth	-	11.11%	0.00%	9.09%	0.00%	-9.09%	9.09%	9.09%	0.00%
Yo-Y growth	-	14%	13%	17%	12%	-22.84%	7.69%	1.80%	0.00%
Reliance									
ARPU (INR)	186.4	194	137.1	134.5	131.7	130	128.2	122	120
Q-o-Q growth	-4.30%	4.30%	-5.11%	-1.94%	-2.13%	-1.55%	-1.55%	-5.41%	-1.55%
Yo-Y growth	-	-	-16.46%	-15.60%	-15.60%	-15.60%	-15.60%	-15.60%	-15.60%
Reliance									
EBITDA (INR million)	14430	20380	20440	31470	35730	40330	43900	46800	50000
Q-o-Q growth	-	41.60%	0.30%	34.60%	13.00%	11.60%	6.30%	6.30%	7.10%
Yo-Y growth	-	82.12%	2.15%	18.82%	11.84%	11.84%	11.84%	11.84%	11.84%

	16Q1	16Q2	16Q3	16Q4	17Q1	17Q2	17Q3	17Q4	18Q1
Interconnect									
ARPU (INR)	130	140	140	140	140	140	140	140	140
Q-o-Q growth	7.69%	7.14%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
Yo-Y growth	7.69%	7.14%							