

To,
Mr. Akhilesh Kumar Trivedi,
Advisor (Networks, Spectrum and Licensing),
Telecom Regulatory Authority of India,
New Delhi, India

1 September 2023

Subject: Comments on TRAI's consultation paper 10/2023, on the 'Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services'

Dear Sir,

Thank you for the opportunity to submit our comments on the captioned consultation paper ("Consultation Paper") dated 7 July 2023 relating to regulation and selective banning of OTT services.

We are Ikigai Law, a law and policy firm focused on technology and innovation. Telecom and technology law are our core areas of work; and we have extensive experience working with several stakeholders, including Indian startups, industry associations, and global companies in these areas. We also independently research and write on these issues; you may find our writing on our [website](#), and our [LinkedIn page](#).

We appreciate the Indian government's efforts towards building an effective regulatory framework for OTT services. We believe, however, that attempting a static or granular classification of OTT services, subjecting them to a licensing regime or regulating OTT players like telecom players, does not achieve the intended purpose of effective regulation. It does not consider the inherent differences in the workings of OTT and telecom players or the fact that OTT services are already well-regulated under various laws and regulations. We also believe that selectively banning OTT services does not solve the concerns posed by mass internet shutdowns.

Our responses and recommendations focus on issues raised in questions 1-11 of the Consultation Paper. In brief, they are:

1. OTT providers offer multiple functionalities, ranging from communication to payments, on the same platform. A static definition for OTT services, based solely on their functionalities, is therefore not feasible.
2. For the same reason, classifying OTT providers into OTT communication services and other sub-categories will be based on an artificial and flawed premise. Therefore, OTT services must be taken as a whole.
3. Any regulatory framework must account for the technical, operational and functional differences between OTT and TSP services.
4. OTTs are already well-regulated under several laws, and any additional regulation will hinder their growth.

5. OTT platforms and telecom service providers already work in tandem in a collaborative fashion that is determined by market forces. Mandatory collaborative frameworks will distort this relationship, further entrenching the position of TSPs as gatekeepers of the internet.
6. Selective banning will not resolve the fundamental challenges with internet shutdowns in India. Rather, it could lead to increased instances of shutdown of communication, under the pretext that selective banning is a proportionate or moderate response. The existing law provides sufficient powers and safeguards for blocking illegal content. Therefore, there should not be any additional framework to selectively ban OTT services.

Given the opportunity, we would be honoured to discuss our comments and share other learning with you or your team in person. We would be delighted to assist you with research, inputs and writing as you continue your deliberations. Please reach out to us on any of the details in my signature if we may be of further assistance. Thank you for your time and consideration.

Yours truly,

Nehaa Chaudhari
Partner



Ikigai Law’s comments to TRAI’s consultation paper titled “Regulatory Mechanism for Over-the-top (OTT) Communication Services, and Selective Banning of OTT Services”

Part I: REGULATORY MECHANISM FOR OTT COMMUNICATION SERVICES

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

The term ‘over-the-top’ (“OTT”) encompasses a wide range of dynamic and constantly evolving applications and services.¹ A single OTT application can provide multiple functions/services like instant communication-voice, video or text, social networking, e-commerce, and payments, among many others.² For example, e-commerce platforms, ed-tech platforms, and online gaming platforms all offer chat features to enhance user experience or provide customer grievance redressal. OTT applications are also constantly evolving with businesses upgrading features and integrating a variety of cross-functional services onto a single platform to enhance user experience. We, therefore, believe that a static and rigid definition of OTT platforms based solely on their functionality may be counterproductive and serve limited regulatory purpose.

The definition provided by ITU-T³ as cited in The Consultation Paper is that OTT is an application accessed and delivered over the public internet “*that may be a direct technical/ functional substitute for traditional international telecommunication services.*”

We are of the view that it is superficial to define OTT services based solely on their substitutability to services provided by traditional telecom service providers (“TSPs”). This approach presupposes OTT services to be direct and functional substitutes for TSP services and fails to account for the underlying differences in technology, functionality and the resources they utilize. Important differences are:

1. **TSPs have exclusive rights and benefits:** TSPs have the exclusive right to use and monetize a public resource-spectrum, control critical network infrastructure, right of way to build infrastructure, obtain numbering resources, and interconnect with the Public Switched Telephone Network (PSTN) network. This is accompanied by high entry barriers for others, reduced competition, and exclusivity in business operations. OTT platforms do not enjoy similar benefits and depend on the internet access provided by TSPs. Their markets are characterised by intense competition due to low entry barriers.

¹ Broadband India Forum, *The Economic and Societal Value of Rich Interaction Applications in India*, November 2017, available on: <https://broadbandindiaforum.com/wp-content/uploads/2020/12/THE-ECONOMIC-AND-SOCIETAL-VALUE-OF-RICH-INTERACTION-APPLICATIONS-IN-INDIA.pdf>.

² ITU Submissions on ‘*Economic impact of OTTs on national telecommunication/ICT markets*’, Page 6, available on: https://www.itu.int/dms_pub/itu-d/oth/07/23/D07230000030001PDFE.pdf.

³ ITU Submissions on ‘*Economic impact of OTTs on national telecommunication/ICT markets*’, Page 5, available on: https://www.itu.int/dms_pub/itu-d/oth/07/23/D07230000030001PDFE.pdf.

2. TSPs and OTT platforms operate on different layers:⁴ TSPs control and operate the underlying network infrastructure that essentially enables the internet. OTTs, on the other hand, offer their services on the application layer, that functions on top of the network layer. Simply, TSPs provide the internet access that OTTs are dependent on to provide their services to customers. Thereby, creating a clear technical and operational distinction between the two.
3. TSPs can provide OTT services but OTT providers cannot easily offer TSP services: TSPs can offer services on top of their networks and earn additional revenue due to the low entry barriers in the OTT market. In fact, certain conglomerates that operate traditional telecom services already operate OTT services that provide a host of rich communication functionalities from video and voice calls, instant messaging, file sharing, content sharing, etc. However, the converse is not practically feasible for OTT players due to the licensing regime and high barriers to entry in the telecom market.⁵
4. TSPs provide interconnection between networks: Interconnection is the linking of telecommunication networks so that the customers of one network can communicate with those of another. For example, a Jio user can communicate with an Airtel user. However, a WhatsApp user cannot call another user on Google Meet. OTT applications are closed do not provide interconnection services.
5. OTTs and TSPs functionalities differ: In comparison to TSPs who generally provide only SMS, voice call and data services, OTTs provide a wide range of functionalities in addition to telephony and messaging services including video streaming, audio recording, group chats, payments, and file sharing, among others. These functionalities are distinct to OTTs and constitute essential components of the services they offer.
6. OTT platforms provide device synchronicity while TSPs do not: OTT services can be accessed through multiple internet-enabled devices simultaneously whereas TSPs connect to specific individual handsets via a SIM card.

Our recommendation: We are of the view that a rigid definition of OTT services is not feasible, since the functions of OTT services are constantly expanding. But if the term must be defined, the definition should only relate to the way OTT services are made available, i.e. “over the top of an existing data network connection”⁶ or “over the top of the public internet”⁷ and should not limit or define OTT

⁴ The Telecom Regulatory Authority of India (“TRAI”) has recognized the separation of layers; TRAI in its 2020 recommendations with respect to OTT communications services acknowledges that the network and application layers are distinct, Page 2, available on https://traai.gov.in/sites/default/files/Recommendation_14092020_0.pdf.

⁵ CCI, *Market Study on Telecom Sector*, para 59, available on: <https://www.cci.gov.in/images/marketstudie/en/market-study-on-the-telecom-sector-in-india1652267616.pdf#page=28>.

⁶ Mobile Call Termination Market Review 2015-18, Office of Communications (Ofcom), United Kingdom, Page 5, available on: https://www.ofcom.org.uk/_data/assets/pdf_file/0025/74257/annex_15_glossary.pdf.

⁷ Report on “Over The Top (OTT) Applications & Internet Value Chain by Commonwealth Telecommunication Organization (CTO), Page 13, available on <https://cto.int/wp-content/uploads/2020/05/CTO-OTT-REPORT-2020.pdf>.



services in terms of the functionalities they provide. Particularly, the definition should not link OTT services to TSPs in terms of their functions.

Q2. What could be the reasonable classification of OTT services based on an intelligible differentia? Please provide a list of the categories of OTT services based on such classification. Kindly provide a detailed response with justification.

Q3. What should be the definition of OTT communication services? Please provide a list of features which may comprehensively characterize OTT communication services. Kindly provide a detailed response with justification.

Q4. What could be the reasonable classification of OTT communication services based on an intelligible differentia? Please provide a list of the categories of OTT communication services based on such classification. Kindly provide a detailed response with justification.

Q2, Q3 and Q4 are cumulatively answered.

We believe that classifying OTT services into sub-categories, including as OTT communication services, would be an artificial and impractical exercise, due to the following reasons:

1. OTT services cannot be straight-jacketed: OTT services often offer a host of functionalities on a single application that are interlinked. Most gaming, e-commerce and health applications provide integrated communication channels that are used to enhance the consumer experience. Similarly, an OTT application that offers communication services can offer/ evolve to offer multiple other services such as payment services, social networking, video streaming services, e-commerce, among others. Thus, creating a distinction between OTT providers and OTT communication providers is practically flawed.
2. No reliable criteria for intelligible differentia: OTT providers' offerings are not static and constantly evolve. If criteria are set out to differentiate communication OTT services from non-communication OTT services, they will be based on identifying whether the communication features are substantial or ancillary to the application/service. For the above reason – i.e., the features/services provided by OTT providers are constantly evolving and expanding in response to technological advancements and consumer preferences, this distinction will not be based on reliable criteria and may end up treating similarly placed OTT services differently.
3. Disincentivize investments and lower economic growth: Imposing onerous obligations on OTT services that offer messaging and chat features could disincentivize investments into these services and ultimately lead to slowdown in their growth. Since OTT services have become an increasingly popular means of personal and business communication, this could also directly impact the ease of doing business. A study by Broadband India Forum and WIK, a leading research institute for communication services estimated that for the year 2017, the investment in Rich Interaction



Applications (RIA) was a significant amount of Rs 6.3 lakh crore.⁸ And each 10% increase in usage of RIAs led to an average increase of US\$5.6 trillion in global GDP from 2000 to 2015.⁹

Our recommendation: We recommend OTT services should not be classified into different categories at this stage, as it is practically difficult to distinguish them as OTT communication services and OTT services.

Q5. Please provide your views on the following aspects of OTT communication services vis-à-vis licensed telecommunication services in India:

1. **Regulatory aspects;**
2. **Economic aspects;**
3. **Security aspects;**
4. **Privacy aspects**
5. **Safety aspects;**
6. **Quality of service aspects;**
7. **Consumer grievance redressal aspects; and**
8. **Any other aspects (please specify).**

Kindly provide a detailed response with justification.

Response:

Regulatory aspects:

1. Differences between OTT services and TSPs: As set out in our responses above, TSPs and OTT platforms operate in different layers of the network, target different market segments, and operate using different technologies. Most importantly, TSPs have access to the public spectrum while OTT platforms do not have such access.
2. Considering these differences, OTT services and TSPs have been subject to different regulatory frameworks: OTT services are already regulated by existing laws, including the Information Technology Act 2000 (“IT Act”) and allied rules. These include security provisions, privacy and safety obligations, and due diligence obligations, among others. OTTs are also subject to competition laws under the Competition Act, 2022, consumer protection obligations including grievance redressal and quality of services for paid services under the Consumer Protection Act, 2019, and corporate compliance under the Companies Act, 2013, among others.

⁸ WIK and Broadband India Forum, *The Economic and Societal Value of Rich Interaction Applications in India*, November 2017, Page 13 available on: <https://broadbandindiaforum.com/wp-content/uploads/2020/12/THE-ECONOMIC-AND-SOCIETAL-VALUE-OF-RICH-INTERACTION-APPLICATIONS-IN-INDIA.pdf>.

⁹ WIK and Broadband India Forum, *The Economic and Societal Value of Rich Interaction Applications in India*, November 2017, Page 14, available on: <https://broadbandindiaforum.com/wp-content/uploads/2020/12/THE-ECONOMIC-AND-SOCIETAL-VALUE-OF-RICH-INTERACTION-APPLICATIONS-IN-INDIA.pdf>.

3. OTT services are better regulated by the Ministry of Electronics and Information Technology (MeitY), instead of the Department of Telecommunication (“DoT”) or TRAI: Under the Government of India (Allocation of Business) Rules 1961,¹⁰ DoT has been entrusted with policy matters relating to communication services including voice, video and data services. This allocation is based on the traditional modes of communication that rely on the usage of a scarce natural resource – spectrum – and the network infrastructure created to optimally utilize it for communications. A licensing regime that exercises control over this resource and its application is entrusted to the DoT. Separately, MeitY has been entrusted with policy matters relating to IT, electronics and the internet, and the administration of the IT Act (which is currently being revamped into the Digital India Act), with the objective of promoting an open and accessible digital ecosystem. OTT services fall under this. Imposing an additional regulatory framework on OTT services will create regulatory overlaps and confusion.

Economic aspects:

1. OTT platforms and TSPs are in a virtuous cycle: The popularity of OTT services has only led to an increase in data usage and revenue for telcos. According to the Broadband India Forum report, OTT providers are responsible for more than 70% of the growth in data traffic on the telcos’ networks. TSPs supply the transmission capacity, OTT providers offer content to stimulate people’s demand for this capacity. The consumption of online content and services is at an all-time high.¹¹ On average, Indian users spend approximately 70 minutes a day on OTT platforms, with each session lasting 40 minutes.¹² India also has the highest data traffic per smartphone worldwide, which is projected to grow from 25 GB per month in 2022 to 54 GB per month in 2028 – a CAGR of 14 percent.¹³ The surge in data consumption has created lucrative revenue opportunities for telecom operators, primarily in increased consumption of higher data packages.¹⁴ OTTs also undertake substantial investments in content delivery network, data centres, subsea cables, among others that improve network infrastructure.¹⁵ Further, it is important to note that all service providers, including OTTs, within the telecom ecosystem, pay for the infrastructure, in this case the internet, they utilize.
2. OTT is a competitive industry and has contributed largely to India’s growth: The OTT industry is governed by intense competition and low barriers to entry. Onerous compliance burdens on OTT

¹⁰ The Government of India (Allocation of Business) Rules, 1961, DoT- Page 36, MeitY- Page 56,

available on https://cabsec.gov.in/writereaddata/allocationbusinessrule/completeaobrules/english/1_Upload_3540.pdf.

¹¹ S. Saini, *OTT platforms one of the key drivers of demand for smartphones*, July 2022, available on: <https://www.exchange4media.com/marketing-news/ott-platforms-one-of-the-key-drivers-of-demand-for-smartphones-rajiv-bakshi-zeel-121592.html>

¹² Nokia, *India Mobile Broadband Index*, 2020, available on: https://www.nokia.com/sites/default/files/2020-02/Nokia_MBiT_2020_Report%20%28web%29.pdf.

¹³ Ericsson, *Ericsson Mobility Report*, November 2022; available on: <https://www.ericsson.com/4ae28d/assets/local/reports-papers/mobility-report/documents/2022/ericsson-mobility-report-november-2022.pdf>.

¹⁴ Financial Express, *The Telco’s Golden Goose*, July 2023, available on: <https://www.financialexpress.com/opinion/the-telcos-golden-goose/3171491/>.

¹⁵ BEREC Report, *BEREC preliminary assessment of the underlying assumptions of payments from large CAPs to ISPs*, October 2022, Page 11-13, available on: https://www.berec.europa.eu/system/files/2022-10/BEREC%20BoR%20%2822%29%20137%20BEREC_preliminary-assessment-payments-CAPs-to-ISPs_0.pdf



services will hurt users and the industry. It will create a new barrier to entry by raising the cost-of-service provision.¹⁶ It will create a situation of licensed OTT platforms v. non-licensed OTT platforms, leading to market fragmentation and regulatory arbitrage. Further, the Consultation Paper acknowledges¹⁷ the contribution of OTT services to India's growth. From 2021 to 2022, India witnessed a 20% growth in OTT audience. Some data points to show OTT's contribution to India's economic growth are:

- Total mobile data traffic in India is estimated to grow from 18 EB/month in 2022 to 53 EB/month in 2028 – a compound annual growth rate (CAGR) of 19%.¹⁸ This increase in data traffic due to usage leads to an increase in the GDP itself.
 - As per reports, every 10% increase in the use of OTT apps leads to an average increase of USD 1 billion in additional global GDP daily.¹⁹ Further, as per a report by telecom company Ericsson, growth in mobile traffic is among the foremost economic drivers of next-generation wireless networks.²⁰
 - As per TRAI's analysis in the Consultation Paper, TSP data revenues have gone up from Rs10.02 per user to Rs 125 per user an increase of 12-fold from 2013 to 2022.
3. Over-regulation will increase costs for businesses and eventually users: The Consultation Paper²¹ points out that improvements in the efficiency of delivering data have lowered data costs helping consumers. As per a study conducted by the Indian Council for Research on International Economic Relations (ICRIER),²² an increase in OTT services also increased consumer surplus to USD 98 billion (Rs 7 lakh crore) in 2017 in India. Additional regulations will increase barriers to entry, reduce competition and stifle innovation by raising the cost-of-service. Start-up OTT players will be deterred from entering the market. This will present a threat to India's start-up ecosystem.²³ Most importantly, this will also harm consumers because OTTs will inevitably pass costs down to end-users.
 4. OTT market and TSP market are both parallelly growing: TSPs argue that that there has been a decline in their revenue. Statistics suggest otherwise. The Consultation Paper refers²⁴ to the growth in access segment (TSP) revenues in the last 10 years. From the year 2012 to 2022, the quarterly Adjusted Gross Revenue (AGR) of access service segment grew by about 86% from Rs. 274.55

¹⁶ Broadband India Forum, *BIF response to TRAI CP on Regulatory framework for OTT communication services*, January 2019, Page 9-10., available on: <https://traigov.in/sites/default/files/BIF08012019.pdf>.

¹⁷ Page 18, Paragraph 2.21.

¹⁸ Ericsson, *Ericsson Mobility Report*, November 2022, available on: <https://www.ericsson.com/4ae28d/assets/local/reports-papers/mobility-report/documents/2022/ericsson-mobility-report-november-2022.pdf>.

¹⁹ WIK, *The Economic And Societal Value Of Rich Interaction Applications In India*, November 2017, available on: https://www.wik.org/fileadmin/files/migrated/news_files/WIK-BIF_Report_-_The_Economic_and_Societal_Impact_of_RIAs_in_India.pdf

²⁰ Ericsson, *Understanding the Economics of 5G Deployments*, June 2020, available on: https://www.ericsson.com/496678/assets/local/ericsson-blog/doc/paper_5geconomics-digital.pdf.

²¹ Page 34, Paragraph 2.62.

²² Hindu Businessline, *OTT platforms are blooming*, October 2021, available on: <https://www.thehindubusinessline.com/opinion/ott-platforms-are-blooming/article36759919.ece>.

²³ India TV, *Telcos should also pay OTT platforms, BIF urges govt*, November 2022, available on:

<https://www.indiatvnews.com/technology/news/telcos-should-also-pay-ott-platforms-bif-urges-govt-2022-11-30-827726>.

²⁴ Para 2.64.



billion (in Quarter Ending December 2012) to Rs. 510.23 billion (in Quarter Ending December 2022). The telecom sector is set to grow at a compound Annual Growth Rate (CAGR) of 9.4% from 2020 to 2025.²⁵ Therefore, there is no need to burden OTT services and slow their growth to keep pace with telecom services.

Security, Safety and Privacy aspects:

As noted above, OTT services are already regulated by a host of data security, safety, and privacy related regulations. These include:

1. Digital Personal Data Protection Act, 2023 (DPDP Act)²⁶: The new data protection law aims to protect individual's privacy and governs the way entities handle personal data of individuals. It requires such entities to obtain the consent of individuals before processing their data and imposes a host of obligations on them regarding data protection, security, erasure of data etc. It also provides individuals with certain rights over their personal data, including withdrawal of consent and erasure of data.
2. Information Technology Act and Allied Rules: While the DPDP Act is being operationalised, there exist regulatory frameworks under the Information Technology Act and its allied rules such as the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011²⁷ (“**SPDI Rules**”) that ensure the protection and privacy of users’ information.

Under the SPDI Rules, intermediaries must obtain informed consent for the collection and use of sensitive personal data or information (SPDI). They are required to have a clear and accessible privacy policy for the processing of personal information and sensitive personal information. They must also comply with data minimization and retention obligations. Section 43A²⁸ of the IT Act read with the SPDI Rules requires entities handling sensitive personal data or information to implement reasonable security practices and procedures, and to pay compensation for any loss caused if such practices and procedures are not adopted.

²⁵ Invest India, *Telecom industry in India crosses a milestone*, September 2022, available on: <https://www.investindia.gov.in/team-india-blogs/telecom-industry-india-crosses-milestone#:~:text=Growth%20in%20India%27s%20Telecom%20Industry&text=The%20Indian%20telecom%20tower%20market.Bn%20between%202023%20and%202040>.

²⁶ Data Protection Act, 2023, Sections 4, 5 & 6, available on: <https://www.meity.gov.in/writereaddata/files/Digital%20Personal%20Data%20Protection%20Act%202023.pdf>.

²⁷ Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011, available on: https://www.meity.gov.in/writereaddata/files/GSR313E_10511%281%29_0.pdf

²⁸ Information Technology Act, 2000, Section 43A, available on: https://www.indiacode.nic.in/show-data?actid=AC_CEN_45_76_00001_200021_1517807324077§ionId=13058§ionno=43A&orderno=49.



The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021²⁹ (**IT Rules 2021**) also mandates due diligence to be done by intermediaries to ensure that user safety is maintained.

4. IT Act and IT Rules for national security: The IT Act empowers the government and its agencies to:
 - intercept, monitor, and decrypt any information transmitted, received, or stored on a computer resource, on grounds such as national security and public order (Section 69, IT Act read with the Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009).³⁰
 - block any content available on a computer resource, from public access, on grounds of national security, public order etc. (Section 69A, IT Act³¹ read with the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009).³²
 - monitor and collect traffic data available on a computer resource for cyber-security purposes (Section 69B, IT Act read with the Information Technology (Procedure and Safeguard for Monitoring and Collecting Traffic Data or Information) Rules, 2009).
5. CERT-IN Rules: The Information Technology (The Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013³³ (the “**CERT-In Rules**”) and the directions under section 70B(6)³⁴ of the IT Act (“**CERT-In Directions**”) require OTT service providers (among other types of services and entities) to comply with cyber-security requirements and protocols - like reporting cyber-security incidents, information security practices, prevention of cyber security incidents etc.
6. OTT security features: A critical aspect of OTTs offering is to ensure safe and secure communication in its services. As OTTs operate across international jurisdictions with varying regulatory frameworks, they have largely adopted safety and security obligations that generally comply with international standards. Commonly adopted features include two-step account verifications, reporting/blocking of user accounts, privacy controls, and filtering of spam/fake

²⁹Information Technology Rules 2021, available on: <https://mib.gov.in/sites/default/files/IT%20Intermediary%20Guidelines%20and%20Digital%20Media%20Ethics%20Code%29%20Rules%2C%202021%20English.pdf>.

³⁰ Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009, available on: <https://cis-india.org/internet-governance/resources/it-procedure-and-safeguards-for-interception-monitoring-and-decryption-of-information-rules-2009>.

³¹ Information Technology Act, Section 69A, available on: https://www.indiacode.nic.in/show-data?actid=AC_CEN_45_76_00001_200021_1517807324077&orderno=89.

³² The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009, available on: <https://www.meity.gov.in/writereaddata/files/Information%20Technology%20%28%20Procedure%20and%20safeguards%20for%20blockin%20for%20access%20of%20information%20by%20public%29%20Rules%2C%202009.pdf>

³³ CERT-In Rules, available on: https://www.meity.gov.in/writereaddata/files/G_S_R%202020%20%28E%292_0.pdf.

³⁴ Section 70B, IT Act, available on: https://www.indiacode.nic.in/show-data?actid=AC_CEN_45_76_00001_200021_1517807324077§ionId=13102§ionno=70B&orderno=93.

communications, among others. Further, given the highly competitive market, OTTs are constantly innovating, with many now adopting emerging technologies, to enhance user safety and security.

Quality of service (QoS) aspects:

QoS obligations are applicable to TSPs as they control the public network infrastructure and provide access to the internet on which OTT services are provided. On the other hand, the highly competitive nature of the OTT market ensures QoS as OTTs must constantly innovate and invest to provide a superior experience for users and prevent them switching services.³⁵ Thus, the market structure itself ensures that the quality of service offered by OTT service providers remains high.

In our view, imposing additional QoS obligation on OTTs would be onerous, restrict innovation and not serve a legitimate purpose.

Consumer grievance redressal aspects:

Existing laws like the Consumer Protection Act, 2019 (for paid online services) and the IT Rules 2021 subject OTT communication services to grievance redressal measures. Thus, there is no need for additional obligations in this regard.

Our recommendation: OTT providers are sufficiently regulated under a well-regulated framework. Therefore, there is no need to impose an additional regulatory framework. Security, privacy and safety, quality of service and consumer redressal are already regulated, and the economic aspects should be left to be determined by market forces.

Q6. Whether there is a need to bring OTT communication services under any licensing/regulatory framework to promote a competitive landscape for the benefit of consumers and service innovation? Kindly provide a detailed response with justification.

As noted in our responses above, OTT providers already operate in a competitive landscape, and are subject to regulations which enable fair competition and promote growth. The imposition of a licensing framework meant for TSPs that utilize a material public resource that is under the ownership of the government will have severe negative consequences on the OTT market. Not only will it subject OTTs to onerous licensing terms and conditions but will also bring about financial burdens in the form of license/entry fee, that will increase the barrier to market entry and hamper innovation and investment. This will particularly affect smaller companies and startups that will not be able to compete with established players. Eventually, this will impact users' choice and access as additional costs will be passed on to them.

³⁵ The Fast Mode, *Consistent Testing is Essential for OTT Platforms to Redefine Quality of Experience*, March 2022, <https://www.thefastmode.com/expert-opinion/23617-consistent-testing-is-essential-for-ott-platforms-to-define-quality-of-experience>



Q7. In case it is decided to bring OTT communication services under a licensing/ regulatory framework, what licensing/ regulatory framework(s) would be appropriate for the various classes of OTT communication services as envisaged in the question number 4 above? Specifically, what should be the provisions in the licensing/ regulatory framework(s) for OTT Communication services in respect of the following aspects:

- 1. lawful interception;**
- 2. privacy and security;**
- 3. emergency services;**
- 4. unsolicited commercial communication;**
- 5. customer verification;**
- 6. quality of service;**
- 7. consumer grievance redressal;**
- 8. eligibility conditions;**
- 9. financial conditions (such as application processing fee, entry fee, license fee, bank guarantees etc.); and**
- 10. any other aspects (please specify).**

Response:

As noted in our responses above, OTT providers are already subject to existing regulatory frameworks that adequately cover the regulatory needs of the ecosystem. Further additional regulations, if any, must only be considered within the jurisdiction of these frameworks. Imposing regulatory frameworks designed for legacy telecom regulations on OTTs will be arbitrary, counter-productive and excessive.

Q8. Whether there is a need for a collaborative framework between OTT communication service providers and the licensed telecommunication service providers? If yes, what should be the provisions of such a collaborative framework? Kindly provide a detailed response with justification.

OTT platforms and TSP are already in a symbiotic relationship. The collaborative framework between TSPs and OTT services is effectively determined by free-market forces. Some key points in this regard are highlighted below.

1. TSPs invest in transmission capacity while OTT platforms invest in increasing demand for content: As mentioned earlier, OTT platforms generate consumer demand for their services, which in turn increases demand for more data consumption/bandwidth. This mutually beneficial relationship has also seen many TSPs, and OTT platforms enter partnerships to offer services.³⁶ These arrangements are dictated by market forces. A mandated framework for

³⁶ Reliance Jio had partnered with ALT Balaji for a strategic content sharing deal³⁶. Airtel entered a strategic partnership with Hotstar to bring Hoster's content portfolio to Airtel customers. Airtel also bundled its voice service with free subscriptions to OTT platforms including Netflix,



collaboration between TSPs and OTTs is likely to skew the power balance as it will entrench TSPs role as gatekeepers to the internet.

2. ITU's recommendations are already in place: The Consultation Paper highlights the ITU's findings in its report on 'Collaborative framework for OTTs.'³⁷ ITU in its findings has emphasized that a collaborative framework to promote competition, consumer protection and benefits, innovation, investment, etc, is important. The current regulatory framework already advances these factors.
3. OTT platforms also invest in transport, content delivery and hosting infrastructures to improve the internet infrastructure: As per findings of Analysys Mason,³⁸ from 2011 to 2021, Content and Application Providers (CAPs) increased their investments to about USD 120 billion in creating huge data centres, transport infrastructure to haul data between these locations including terrestrial fiber networks and submarine cables. Moreover, they are driving investment in delivery networks to support quality of service by bringing content as close as possible to end users. In view of the data explosion, it is expected that, going forward, CAPs' investment in infrastructure would be double the above level i.e about USD 150 billion a year. This investment has helped reduce costs and improve efficiency in content delivery. OTT platforms have also invested in India and Asia-Pacific and have announced plans to invest USD 12.7 billion in the cloud infrastructure in India by 2030. Small OTT platforms can use this investment to innovate and grow.
4. TSP and OTT providers jointly invest in improving network infrastructure: Many tech companies have announced a collaboration to invest in telecom infrastructure, given the rising demand of high-speed data,³⁹ OTT platforms have invested in undersea cable infrastructure. OTT platforms own or co-own nearly 1,00,000 km of cable each.⁴⁰ They have developed state-

Disney Plus Hotstar and Amazon Prime. Airtel has planned to integrate Meta's WhatsApp within its CPaaS, to allow businesses to use WhatsApp to provide omnichannel customer engagement to enterprises.

36 Vodafone Idea collaborated with Hungama to launch a pay-per-view model for premiering digital films from Hollywood and other regions. 36 Vodafone partnered with Netflix to offer free subscriptions to post-paid customers. In fact, Bharat Sanchar Nigam Limited announced a partnership with Amazon Prime to offer free subscription for its broadband and post-paid customers.

³⁷ ITU-D recommendations, *Collaborative framework for OTTs*, Pages 1-3, available on: https://www.itu.int/rec/dologin_pub.asp?lang=e&id=T-REC-D.262-201905-I!!PDF-E&type=items.

³⁸ Analysys Mason, *The impact of tech companies' network investment on the economics of broadband ISPs*, October 2022, Page 18, available on: <https://www.analysysmason.com/contentassets/b891ca583e084468baa0b829ced38799/main-report---infra-investment-2022.pdf>

³⁹ 1. Meta to jointly invest with Airtel in telecom infrastructure, December 2022, available on: <https://timesofindia.indiatimes.com/business/india-business/meta-to-jointly-invest-with-airtel-in-telecom-infrastructure/articleshow/96000592.cms>;

2. Google partners with Airtel to improve India's digital journey January 2022, available on:

3. AWS partners with Airtel to improve India's cloud infrastructure, August 2020, available on: <https://www.airtel.in/press-release/08-2020/airtel-and-aws-join-hands-to-accelerate-digital-transformation-of-business-in-india#:~:text=New%20Delhi%2C%20India%20%E2%80%93%20August%2005,enterprise%20and%20small%20and%20medium>

⁴⁰ Wired, J. Ball, *Facebook and Google's New Plan? Own the Internet*, October 2021, available on: <https://www.wired.co.uk/article/facebook-google-subsea-cables>.

of-the-art cloud computing infrastructures, with 33% of all daily internet usage coming from websites operating in these centres. This has also improved the efficiency of services.

Our recommendation: Market-based collaborative frameworks already exist and there is no need for a formal collaborative arrangement.

Q9. What could be the potential challenges arising out of the collaborative framework between OTT communication service providers and the licensed telecommunication service providers? How will it impact the aspects of net neutrality, consumer access and consumer choice etc.? What measures can be taken to address such challenges? Kindly provide a detailed response with justification.

A collaborative framework in the form of a revenue-sharing model (RSM) will be detrimental for India's digital economy for the following reasons:

1. **RSM can impact competition:** Startups may not be able to afford an RSM/any fee imposed as a result, making it difficult for them to compete with larger players who can afford to pay.⁴¹ This may particularly impact India's digital economy which is a hub of constantly growing startups.⁴² This will also disincentivize other OTT providers to stay in the market, impacting competition.
2. **Detrimental to open internet:** According to several experts, introducing an RSM model would have a detrimental effect on the open internet.⁴³ Consumers would be harmed by less choice, lower quality services and higher prices with content providers passing the network fees to consumers, or by some services simply not being available to Indian consumers any longer. South Korea is the only country to have introduced such a regime for domestic traffic, and the impact⁴⁴ of this decision was that South Korea experienced a decline in the diversity of online content and deteriorating quality (latency) for users. South Korea is now among the countries where consumers pay the highest rates for mobile data in the world.⁴⁵ BEREC has also concluded that imposition of such a fee may lead to price hikes for consumers, reduce

⁴¹ Allied for Startups, *How does introducing Network Fees endanger Startup Ecosystems?*, April 2023, available on: <https://alliedforstartups.org/2023/04/05/how-does-introducing-network-fees-endanger-startup-ecosystems/>.

⁴² Financial Express, *Are telcos indirectly charging customers more?* June 2023, available on: <https://www.financialexpress.com/opinion/are-telcos-indirectly-charging-customers-more/3146981/>.

⁴³ Google Blog, *Network fees are a solution in search of a problem*, May 2023, available on: <https://blog.google/around-the-globe/google-europe/network-fees-are-a-solution-in-search-of-a-problem/#:~:text=If%20network%20fees%20are%20introduced,to%20European%20consumers%20any%20longerr>.

⁴⁴ WIK Consult, *Competitive conditions on transit and peering market*, February 2022, available on: https://www.bundesnetzagentur.de/EN/Areas/Telecommunications/Companies/Digitisation/Peering/download.pdf;jsessionid=30D84132334A14B0C260A62AF64A57A9?_blob=publicationFile&v=1.

⁴⁵ Disruptive Competition Project, *South Korea's Internet Traffic Tax: An Example for Europe To Follow? (Spoiler Alert: It Isn't, Here's Why)*, September 2022, available on: <https://www.project-disco.org/european-union/091422-south-koreas-internet-traffic-tax/>.



investments into OTT services and breach EU net neutrality rules.⁴⁶ In line with BEREC's findings, many of the EU nations have officially rejected the TSP's demand for RSM.⁴⁷

3. Fragmented internet and impact on net neutrality: RSM will lead to market dominant TSPs, throttling access to content on the internet from OTTs that do not/cannot enter into these arrangements. A two-tiered system may be created on the internet in which only those who could pay the fees would be able to offer their services and products. Preferential network access to a specific OTT service has the potential to enhance the popularity of that provider. This would necessitate TSPs to enhance the bandwidth allocation for transmitting this service, while also giving them the opportunity to charge consumers extra for its delivery. Additionally, TSPs might introduce varying prices for distinct OTT platforms, showing preference for those that have established such agreements with them. This will disproportionately affect smaller players with fewer resources, such as startups. It will also adversely impact both consumer choice and access as the increased price will be passed on to consumers and access to certain OTT platforms may also be restricted or limited.

Our recommendation: A collaborative framework in line with the RSM model is likely to splinter the internet, with smaller OTT services unable to compete. It will have severe implications for users and is likely to fall foul of net neutrality principles.

Part II: SELECTIVE BANNING OF OTT SERVICES

Q10. What are the technical challenges in selective banning of specific OTT services and websites in specific regions of the country for a specific period? Please elaborate your response and suggest technical solutions to mitigate the challenges.

Q11. Whether there is a need to put in place a regulatory framework for selective banning of OTT services under the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 or any other law, in force? Please provide a detailed response with justification.

Questions 10 and 11 are answered together.

Before an exploration into the technical challenges associated with selectively blocking OTT platforms is undertaken by regulatory authorities, it is important to highlight the practical and legal challenges

⁴⁶ BEREC, *Preliminary assessment of the underlying assumptions of payments from large CAPs to ISPs*, October 2022, available on: https://www.berec.europa.eu/system/files/2022-10/BEREC%20BoR%20%2822%29%20137%20BEREC_preliminary-assessment-payments-CAPs-to-ISPs_0.pdf.

⁴⁷ Financial Express, *Are telcos indirectly charging customers more?*, June 2023, available on: <https://www.financialexpress.com/opinion/are-telcos-indirectly-charging-customers-more/3146981/>.

associated with such a decision. Selective banning is just another form of internet shutdown and has significant economic, social and constitutional consequences.⁴⁸

1. Lack of guardrails and legitimate goals: The Supreme Court’s judgement in *Anuradha Bhasin v. Union of India*⁴⁹ propounded the proportionality principle, under which the State can restrict fundamental rights to achieve a legitimate goal provided that the said restrictions are minimum, and the State has no better alternatives. There is currently no established basis to contend that adopting selective banning of OTT platforms as a policy, is a proportionate step or the best alternative.
2. Arbitrary internet shutdowns: Since 2018, India has shut down the internet more often than any other country in the world and was responsible for the most shutdowns in 2022, for the fifth consecutive year, with 84 shutdowns out of 187 globally.⁵⁰
 - *Internet shutdowns in 2023*: In 2023 itself, India has seen multiple internet shutdowns. In March 2023, the entire state of Punjab had been placed under a three-day mobile internet blackout to track down a separatist leader. In May, the internet was completely blocked on both mobile and fixed line services in Manipur state for weeks following violent ethnic clashes.
 - *Internet shutdowns in 2022*: In 2022, the Rajasthan government ordered restrictions on mobile internet services. Earlier the same month, the Bihar government reportedly⁵¹ suspended mobile internet connectivity in 20 districts across the state when demonstrations against the Centre’s Agnipath scheme turned violent. That month, on 10 June 2023, internet services were also restricted across three states– parts of Jammu and Kashmir, Ranchi, and West Bengal – after protests erupted against BJP politician Nupur Sharma’s remarks on the Prophet Muhammad.⁵²
 - *SCIT observations*: The Parliamentary Standing Committee on Communications and Information Technology (SCIT) also made some observations on the arbitrary state of internet shutdowns in India noting that “*internet shutdowns have been used regularly for routine policing and administrative purposes such as preventing cheating in exams,*

⁴⁸ Carnegie Endowment for International Peace, *Government internet shutdowns are changing, how should citizens and democracies respond has recognized selective banning conducted on the basis of platform-based banning*, March 2022, available on: <https://carnegieendowment.org/2022/03/31/government-internet-shutdowns-are-changing.-how-should-citizens-and-democracies-respond-pub-86687> .

⁴⁹ Global Freedom of Expression, *Anuradha Bhasin v. Union of India*, January 2023, available on: <https://globalfreedomofexpression.columbia.edu/cases/bhasin-v-union-of-india/> .

⁵⁰ Human Rights Watch, *India: Internet Shutdowns Hurt Vulnerable Communities*, June 2023, available on: <https://www.hrw.org/news/2023/06/13/india-internet-shutdowns-hurt-vulnerable-communities> .

⁵¹ Economic Times, *Agnipath protest: Bihar suspends Internet services in 20 districts*, June 2022, available on: <https://economictimes.indiatimes.com/news/india/agnipath-protest-bihar-suspends-internet-services-in-20-districts/articleshow/92332013.cms> .

⁵² MediaNama, *Internet Access Has Been Shut Down In Kashmir, West Bengal And Ranchi After Violent Protests Calling For Arrest Of BJP Politician*, available on: <https://www.medianama.com/2022/06/223-internet-access-has-been-shut-down-in-kashmir-west-bengal-and-ranchi-after-violent-protests-calling-for-arrest-of-bjp-politician/>.



which do not amount to large scale public safety concerns and certainly do not amount to a ‘Public Emergency’”.⁵³

3. Lack of public databases and review of shutdown orders: In the Action Taken Report⁵⁴ released by the government, the SCIT noted that government agencies have not attempted to track internet shutdowns in India. SCIT also noted that a specific database on internet shutdowns would help to evaluate if shutdowns have complied with safeguards under the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 (Telecom suspension Rules) and the Supreme Court directions in *Anuradha Bhasin v. Union of India* and *Ghulam Nabi Azad v. Union of India*. Before examining the practice of internet shutdowns, it would be futile to explore the alternatives like selective banning.
4. Chilling effect on freedom of speech: According to reports,⁵⁵ the first challenge during the communications shutdown is the inability to share or access information, leading to a brewing ground for rumours. This further jeopardizes the safety of citizens while also imposing a chilling effect on free speech. Many users use OTT platforms as their primary mode of communication. They will be deprived of basic communication if it is selectively banned.
5. Selective banning cannot deter misinformation: Selective banning is also not a solution to curbing the spread of misinformation, as a shift to smaller and open source-based means of communication is easy. Further, the use of VPNs to circumvent the ban may also render the exercise futile. On the contrary, government agencies may find it tougher to reach out to smaller platforms to implement intermediary guidelines as they may not have the designated Grievance Officer, Chief Compliance Officer or even Nodal Contact Person to provide assistance.
6. Access to public welfare: Under the Prime Minister’s Digital India Mission, most essential services such as government welfare schemes are offered through the internet. Many rural workers use WhatsApp and other social media apps to access information to government schemes. Any ban on social media will impact their access to welfare schemes, as well. Consequently, a restriction of OTT services is likely to deprive citizens from accessing government welfare schemes, affecting them substantially.⁵⁶

⁵³ SCIT, *Suspension of telecom services/internet and its impact*, December 2021, available on: https://sflc.in/wp-content/plugins/pdfjs-viewer-shortcode/pdfjs/web/viewer.php?file=https://sflc.in/wp-content/uploads/2021/12/Standing-committee-on-IT-on-internet-suspension.pdf&attachment_id=0&dButton=true&pButton=true&oButton=false&sButton=true#zoom=auto&pagemode=none&wponce=839e056189.

⁵⁴ Ministry of Communications, *Action Taken by the Government on the Observations/Recommendations of the Committee contained in their Twenty-sixth Report (Seventeenth Lok Sabha) on ‘Suspension of Telecom Services/Internet and its impact’*, February 2023, available on: https://loksabhadocs.nic.in/lsscommittee/Communications%20and%20Information%20Technology/17_Communications_and_Information_Technology_37.pdf.

⁵⁵ Human Rights Watch, *India: Internet Shutdowns Hurt Vulnerable Communities*, June 2023, available on: <https://www.hrw.org/news/2023/06/13/india-internet-shutdowns-hurt-vulnerable-communities>.

⁵⁶ Human Rights Watch, *India: Internet Shutdowns Hurt Vulnerable Communities*, June 2023, available on: <https://www.hrw.org/news/2023/06/13/india-internet-shutdowns-hurt-vulnerable-communities>.



7. Economic costs and impact on the right to carry out business:

- Researchers Samuel Woodhams and Simon Migliano have used data from the Netblocks Cost of Shutdown Tool (COST) to estimate the economic impact of network disruptions. In 2021, they estimate that fifty internet shutdowns resulted in 30,179 hours of interrupted access and \$5.45 billion in financial losses.⁵⁷
- Reports suggest⁵⁸ that small businesses rely heavily on social media for conducting their businesses. “*A business’s success is majorly assessed by the number of followers it has on social media as these enormous amounts of followers later end up becoming loyal paying customers*”. Selective banning of any social media app or OTT platform will severely impact small businesses.

We further note that provisions of the IT Act and related rules already contain provisions to address security concerns, including blocking of information in emergency situations.

- Existing provisions: Section 69A of the IT Act read with the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 also allows for the blocking of online content (including an entire OTT platform) on certain grounds, such as sovereignty and integrity of India, national security, public order, etc. This is subject to procedural and constitutional safeguards to prevent executive excesses. These provisions have also been used to block not only particular content or information but entire websites and applications.
- MeitY should be the nodal agency: MeitY is the nodal ministry for regulating the internet and all deliberations on the issue of banning OTT services/websites, as suggested by the Consultation Paper, must be undertaken by Meity. MeitY possesses the necessary expertise, knowledge, and authority to assess the implications and considerations related to banning OTT services.
- Existing framework already balances rights of various stakeholders: The IT Act ensures that all users have the right to access an OTT service and balances that right with the OTT service provider’s ability to offer its services to users without interference. While ensuring this balance, the current framework under the IT Act also empowers the government and regulatory authorities to take action against an OTT platform or against content hosted on such a platform, as and when required, subject to procedural and constitutional safeguards.

⁵⁷ Carnegie Endowment for International Peace, *Government internet shutdowns are changing. how should citizens and democracies respond has recognized selective banning conducted on the basis of platform-based banning*, March 2022, available on: <https://carnegieendowment.org/2022/03/31/government-internet-shutdowns-are-changing.-how-should-citizens-and-democracies-respond-pub-86687>.

⁵⁸ Economic Times, *In 2023, social media is one of the most reliable tools to grow your small business*, April 2023, available on: https://economictimes.indiatimes.com/jobs/hr-policies-trends/in-2023-social-media-is-one-of-the-most-reliable-tools-to-grow-your-small-business/articleshow/99630278.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.



Our recommendation: Before exploring alternatives to internet shutdowns, there is a need to revisit the intention behind imposing these shutdowns. Firstly, there is a pressing need to conduct studies to see if the blocking of websites/shutting internet has met the intended purpose. Secondly, if it has met the intended purpose, it is important to assess if the purpose justifies the economic losses incurred. In our view, the existing provisions for blocking of access (section 69A, IT Act), along with their prescribed safeguards, provide sufficient recourse to authorities for blocking content, and there is no need for selective banning of OTT services.

