

ANNEXURE-I
ACTO Response to TRAI Consultation Paper No: 2/2015
on
Regulatory Framework for Over-the-top (OTT) services

Introduction

The proliferation of IP-based telecommunication networks has facilitated the decoupling of application and network layers and enabled OTT providers to deliver their content, applications and services like voice/video/messaging directly to end users— albeit as a flat rate from the user. While the competition provided by the OTT application providers does lead to disruption, a functional market should be able to adapt to the new situation:

Regulatory Reforms to keep pace with emerging technology and innovation

A major enabler of the net’s development has indeed been the absence of regulation that it has faced to date – rightfully so. The regulator’s objectives must be to catalyze additional opportunities offered by the internet to the benefit of the consumer and to support competition. *A new regime of regulatory reforms which promotes innovation and aligns as well as embraces technological developments* is a must and need of the hour to facilitate the reduction or minimization of internet-driven risks in the areas of security and data protection – both from the consumers and from the nation’s point of view and ensure to remove regulatory discrimination exists among the telecom service providers and OTTs.

Policy makers/ regulators need to act by balancing of the pros and cons about internet and internet service regulation. Each measure must be understood and the effects of interventions weighed up. Decisions must also take time into consideration – the fast moving, and changing nature of the internet make it futile to bring about regulation, based only upon historical precedent. Future looking policies must be designed and operated so as to be ready to adapt to new technologies, trends and above all new business models.

Competitive imbalances between TSPs and emerging over the top players must be evaluated and, as far as necessary and possible, be reflected in overall regulatory framework. Further, the effects of the convergence of the ICT and broadcasting markets must be examined. A further regulatory trend is towards simplification – the maxim of regulation is that it should only be applied where necessary, and as the markets develop this is less often the case.

Like all players in the Internet ecosystem, we support an Open Internet.

During the last decade, India has witnessed rapid growth in its telecom sector. This growth could not have happened without investment from the private sector. The investment from the private sector similarly was only possible through the current process of liberalization of the regulatory regime in India. Although this growth has been rapid, we believe that there is still much potential waiting to be unlocked in the Indian market in view of the ever evolving technological developments leading to innovation in products, services and solution offerings

In less than two decades, the Internet has evolved dramatically from being a network that provided only file downloads and remote access to distant academic or government computers, to being a vibrant global commercial network that now provides countless different services to millions of content and applications providers and billions of users.

In just the last decade alone, that network investment has paved the way for an entire Internet ecosystem that offers diversity and volume of content, applications, and services delivered over these advanced

networks. Further dynamic advances will continue to occur in response to future technological change and consumer demand, spurred on by new developments, including the Internet of Things, Software Defined Networks, and Big Data Analytics.

The Government of India has a unique opportunity to set the policy agenda in a way that will support telecom sector growth and add to India's overall economic development. To see continued and accelerated investment and development in this market, India's regulatory regime must keep to its current approach of liberalizing and moving towards the creation of a light touch regulatory environment as it progresses to embrace the current and future innovative and technology driven offerings.

In assessing the issues raised in the consultation, TRAI should recommend a policy approach that will enable India to achieve its goals of increasing broadband access, penetration and build-out; stimulating investment; and promoting innovation.

This policy approach should embody high-level principles: in general policies should be:

- 1. Pro-investment and pro-innovation,**
- 2. Future-proof and flexible,**
- 3. Fit for purpose (proportionate),**
- 4. Technology neutral and service agnosticity, and should foster comparable consumer protections across sectors, where appropriate.**
- 5. Regulatory Neutrality.**

With regard to the foregoing, we believe that the best approach would be to refrain from adopting specific regulations around either net neutrality or OTTs, and instead rely on high-level principles and existing tools in competition law and consumer protection. Presence of Licensor, Regulator and Competition Commission are sufficient to protect stakeholders. The standard for intervention should be demonstrated harm to competition or to the consumer.

The Internet has become the most powerful communications medium and engine for economic growth ever, and has achieved this unprecedented growth without prescriptive regulation of the Internet that would have locked in place certain specific technologies or business models.

In considering any Internet regulation to be adopted in the future, policy-makers should optimize not only the policy of Internet openness, but also the need to maintain incentives for Internet service providers to continue investing and innovating in the rapidly evolving advanced networks that must keep pace with the diversity and volume of new services.

To the extent that any regulatory intervention is found to be necessary to protect the open Internet, it can be effective if appropriately targeted and limited to the adoption of meaningful transparency requirements, and the prohibition of blocking, degrading or otherwise unreasonably disfavoring some Internet traffic over other Internet traffic.

Beyond the core priorities to preserve an open Internet, any more invasive and prescriptive open Internet regulation is unnecessary and would reduce investment incentives for all operators that build and maintain the Internet networks.

In addition, just as other jurisdictions have recognized the merit for keeping enterprise service offerings and specialized services such as virtual private networks outside the scope of open Internet rules, India also should not prescriptively regulate these services.

In line with presence of our members, in India as a provider of communication products and enterprise solutions, predominantly to large businesses, we have focused our response in the two broad categories -- OTT services and net neutrality -- pertinent to our activities, rather than responding to all the questions individually.

1. Inputs Related to OTT Services

We believe that this consultation provides an opportunity to consider having regulatory neutrality within the telecom sector which embraces technological development and innovation. The emergence of technology has blurred the differentiation between application and service. Therefore reforms should recognize the development and embrace it for the growth. According to the most recent Telecom Subscription Data published by TRAI, the number of broadband subscribers in India is low as compared to mobile penetration. There is an urgent need to review India's present policies and initiatives to build the infrastructure necessary to boost broadband penetration in the country.

Despite intense development in urban areas around 80% of the citizens do not use the Internet at all. Internet use in India is lower than it is in South America, Ghana, Senegal, or Indonesia, Brazil, Russia, and China. These countries average more than three times the Internet adoption rate of India.

India's primary Internet issue is adoption rather than refined service details. Its policy needs to focus on practical problems. The government's role is to create conditions that encourage private sector firms to invest, improve service, reduce prices, and get more people online. Where markets haven't emerged, subsidies can help get them started.

This approach would enable the Indian government to adopt the right regulatory environment to stimulate investment, provide flexibility for differing business models and a wide range of commercial arrangements, protect consumers and promote the adoption of broadband and innovative services.

A. Need for Innovation and Investment - Broadband and Internet Penetration

TRAI's recently issued recommendations on actions required to be taken both by the Government and the service providers to accelerate the proliferation and use of broadband in the country¹ underscores the critical need for policies that enable investment and expansion of operators into new business models in the Indian ICT market. According to these recommendations, "India has a 15 per cent Internet user penetration and is ranked 142nd, way below some of its neighboring countries like Bhutan and Sri Lanka."² TRAI notes that "against a target of achieving 175 million BB connections by 2017, only 85.74 million have been achieved and that too with the current download speed definition of 512 kbps. At present, the country is nowhere near meeting the target for a service which is considered almost a basic necessity in many developed countries. There is, therefore, an urgent need to review present policies, the

¹See, TRAI Recommendations entitled "Delivering Broadband Quickly: What do we need to do?" (17th April 2015) at <http://www.trai.gov.in/WriteReadData/Recommendation/Documents/Broadband=17.04.2015.pdf>.

² Id. at ¶1.9, p. 4.

current state of implementation of building infrastructure required for penetration of Broad Band (the means) and the supporting software/applications that will provide the content.”³

TRAI had noted in its earlier consultation Paper no. 12/2014 dated 24th September 2014 that the primary elements of a proposed broadband ecosystem could be amongst other factors, an **enabling regulatory framework, a simplified licensing regime** and the development of locally relevant content and applications.⁴

Thus, there is huge potential and opportunity for further investment in increasing India’s broadband infrastructure and penetration for delivery of a host of innovative services. TRAI should recommend policies that foster further investment and innovation in this sector. Any attempt to review the regulatory framework by bringing more services under licensing regime would dampen the investor sentiment which is not conducive to the growth of the sector. One of way doing this is to further reform in the regulations on the licensed services to address the low internet penetration rate in the country and allow the masses to access high speed broadband networks in the country.

B. Remove Restrictions on the Service Offerings of TSPs

We recommend that TRAI consider regulatory reforms by adopting an approach of having regulatory neutrality. This essentially means offering the same treatment to the services offered by telecom service providers (TSPs) and OTTs. There is a case for regulatory reforms of the licensing regime further, so that TSPs and the OTTs can compete on a level playing field subject to no or minimal restrictions to drive the desired levels of broadband penetration and bring innovative services at competitive rates to end users.

There is an urgent need to review the current licensing framework to align it with emerging technology trends and remove the artificial restrictions that are imposed on the service offerings of the TSP’s. This would enable the end user to have a wider choice of newer service offerings at a competitive price and lead to further innovation and growth.

C. Light Touch Regulatory Approach for the benefit of consumers

With regard to the commercial relationship between OTTs and network operators, a light-touch approach will give businesses the flexibility they need to innovate and will promote investment. For example, compensation among and between terminating operators and OTTs for data traffic should be handled in a way that ensures full flexibility based on commercial arrangements.

OTTs are offering innovative voice and data services, which may be complementary or in direct competition with the traditional service offerings of TSPs. Under the current model, the TSPs network is leveraged for delivery of the OTT services, and TSPs are heavily regulated due to restrictive license terms and conditions, roll out obligations, security considerations, license fees and other compliance obligations.

Thus, there is a critical need to amend existing license terms and conditions and regulations to bring regulatory parity to the treatment of service offerings of OTTs and TSPs.

³ Id. at ¶1.8, p. 4.

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[<http://www.trai.gov.in/WriteReaddata/ConsultationPaper/Document/Consultation%20Paper%20on%20Broadband%2024Sep2014.pdf>]

Thus in our view there is a case for further regulatory reforms in order to maximize the public good by making available affordable, reliable and secure telecommunication and broadband services across the entire country.

D. TRAI should consider applying light touch regulation to protect Consumer Interests.

Where the market is effectively addressing public policy priorities, both consumers and competition benefit by reforming legacy regulation of communications services. In India, for example, the current telecommunications licensing regime largely does not allow providers to take advantage of technological developments to offer innovative services such as the unrestricted VoIP services that are widely available in other countries.

With the rapid convergence of services and platforms, asymmetric regulation of telecom licensees and OTT providers, can harm consumers by keeping telecommunications providers from competing vigorously and nimbly in the face of fast-changing consumer preferences, thus distorting the competitive landscape with no countervailing benefit. The preferred approach to removing such regulatory asymmetries should be to remove unnecessary regulation of all providers, by recognizing where technology and market changes have removed the former dominance of telecommunications providers, and rules originally designed to prevent the abuse of market power no longer make sense. Thus there is an urgent need for significant regulatory reforms in the telecommunications sector which should be part of the TRAI's agenda, to allow service providers to have the flexibility to offer innovative services to consumers on the principle of equality.

Consistent with these overall objectives, the general policy approach for OTT services and for telecom provider services should be to refrain from prescriptive regulation. But pending the adoption of reform that would provide a symmetrical set of obligations for all providers providing substitutable services based on light touch regulation, regulators could redress some of the current asymmetries with respect to economic, social and safety policies on a targeted, case-by-base basis.

The objective should be to determine when to apply similar policies to similar services, based on the approach that best protects consumer interests. Examples of areas where similar policies could be applied include universal service obligations (where similar services that compete should have similar obligations to fund universal service), law enforcement assistance, emergency service and disability access, (where similar public safety or security obligations also should apply to similar services).

With regard to economic regulation, TRAI should in general assess the need for rate or tariff regulation by considering all competition in the marketplace in light of all substitutable services. In many instances, such assessments should lead to regulators removing or reducing legacy regulation by recognizing the effects of technology and market changes and allowing telecommunications licensees additional flexibility as described above. Such policies will further stimulate competition and the associated benefits to consumers and the wider economy.

2. Net neutrality - From an Enterprise Data Service Provider's Perspective

ACTO fully supports an open Internet and is committed to ensuring that consumers can access any lawful content, services, and applications, regardless of their source. Further, TSP/ISP may be committed to safeguarding the principle of the best-efforts public internet, accessibility to all.

As TRAI correctly notes in its consultation paper, the Internet is one of the most remarkable success stories in history. In less than two decades it has become a ubiquitous presence in our daily lives and a

key driver of the global economy. Given that the Internet ecosystem consists of a large range of interrelated actors who cooperate and compete with one another in myriad ways to meet consumers' needs — device manufacturers, application providers, over-the-top VoIP and video providers, search engines, content delivery network providers, telecom network providers and many others, the Internet should remain open, driven by informed consumer choice, and exist in an environment that allows innovation and investment to continue to flourish. The market and industry have continued to develop new services and capabilities, and there is little call for regulators to intervene in this working marketplace at this time.

In this environment, prescriptive rules would distort the market and harm consumers. An open Internet by its nature benefits consumers and the Internet ecosystem generally and creates a virtuous circle of incentives. Consumers clearly benefit from an open Internet because they can access whatever lawful content, applications, and services they choose. Ensuring such access makes sense for broadband Internet access providers because that is what consumers expect and demand. A broadband provider that blocked lawful content, applications, or services would quickly harm its reputation in the marketplace and lose customers.

Therefore, we urge TRAI to recommend a policy approach that would maintain the Internet ecosystem that has flourished in the past 20 years. The Internet is one of the greatest successes of modern times, and it will continue to thrive under a light-touch approach.

Net Neutrality from an Enterprise Provider's Perspective

Regulators should also continue to exempt enterprise services from any open Internet rules. Enterprise services, also sometimes called specialized services or business services, are typically offered to larger organizations through customized or individually negotiated arrangements. An example of such a service would be virtual private networks. Various jurisdictions that have reviewed open Internet policies have proposed to exempt such enterprise or specialized services from open Internet rules. In the United States, for example, both the FCC's open Internet rules adopted in 2010 and the additional regulation adopted by the FCC in 2015 apply only to mass-market retail broadband Internet access service, with the capability to transmit and receive data from all or substantially all Internet end-points. The definition for the scope of the open Internet rules excludes enterprise service offerings and specialized services such as virtual private networks.

A similar approach was taken in the UK where the voluntary code of practice as well as the OFCOM's statement on Net Neutrality, both refer to consumers only

BSG Open Internet Code of Practice (<http://www.broadbanduk.org/wp-content/uploads/2013/06/BSG-Open-Internet-Code-of-Practice-amended-May-2013.pdf>) which refers out to OFCOM's November 2011 statement on NN (<http://stakeholders.ofcom.org.uk/binaries/consultations/net-neutrality/statement/statement.pdf>).

As per international best practices, TRAI should also consider avoid imposing net neutrality regulation on these enterprise or specialized services. ACTO members and other telecommunications and Internet providers throughout the world have long provided IP-based services to enterprise business customers. These services include enterprise-grade Internet access and Internet Protocol services, with the capability to prioritize packets associated with performance-sensitive applications. This is provided to a wide range of business customers and the market of services that merit different network performance requirements is expanding with Smart Grid, healthcare, emergency-response, and a variety of other services that may involve or require packet prioritization capabilities. These services indirectly benefit consumers and are

indispensable to key social objectives. Just as other jurisdictions have recognized the merit for keeping these services outside the scope of open Internet rules, India also should not prescriptively regulate these services.

The debate around the Open Internet typically focuses on consumer protection and consumer access to the Internet. Considering the specificities of business service providers (different contract provisions and business needs), net neutrality provisions make little sense in this context and create the substantial risk of disproportionately impacting innovation and investment if applied to business service providers.

There are compelling reasons for viewing the needs of consumers and high end enterprise customers. Most importantly, the key difference is contractual in nature. High-end business services present various specificities that differentiate them from mass-market services which are significantly more complex [telecom services provided across multiple locations and across countries, different access technologies, bundle of services, very demanding Service Level Agreements (SLAs), etc.

Further, high-end enterprise users typically have sophisticated knowledge of the technology and economic implications of telecommunications services. From a consumer protection perspective, terms relating to the required quality levels, detailed service transparency, technical characteristics, and penalties for noncompliance, are already addressed in large part under a contract. Thus, the extension of net neutrality obligations to the high-end enterprise market is unnecessary and irrelevant.

Final Recommendations/Conclusions

- Create an environment in which communication providers in all parts of the Internet ecosystem continue to have the incentives to invest and innovate.
- Recommend adoption of a principles-based framework based on industry best practices focused on consumer choice, competition, innovation and transparency
- Consider introducing regulatory reforms in the form of review of existing licensing regime to bring parity in the service offerings of OTT and TSP's.
- For net neutrality, consider principles rather than prescriptive, detailed regulations, as principles will achieve consumer protection without the risk of incurring unintended harmful consequences for investment and innovation.
- Enterprise Services / specialized services like VPN should be outside the scope of open Internet rules and there should not be any prescriptive regulation of these services.
- Consult with industry and other stakeholders to develop a set of high-level, self-regulatory principles and establish mechanisms to identify and address any anti-competitive behavior that might occur in the market (to supplement existing enforcement mechanisms).