



Counter-Comments on TRAI Consultation Paper on OTT Services

Submission by the Broadband India Forum

Introduction

Broadband India Forum (“BIF”) welcomes the opportunity to present its counter comments based on the submissions that have emerged from the TRAI consultation on Regulatory Framework for OTT Services.

In our review of the comments, it appears that the key argument raised by TSPs and telecom industry bodies are twofold:

- a. That OTT and TSPs offer similar or substitutable services, and;
- b. That they utilize internet access services without having to incur costs for the same (that is, they are free riders).

Based on this, different regulatory approaches have been recommended by different participants in the TRAI Consultation. In this counter comment, we seek to provide responses to the key recommendations raised in the comments, and have provided reasons for why TRAI may want to refrain from taking steps towards implementing several of these recommendations.

a. Argument: OTT and TSPs offer similar / substitutable services, therefore: same rules should apply for the same services

Certain respondents have stated that OTT Communication Service Providers are able to offer voice, video, and data services without being required to comply with the Indian Telegraph Act to offer the telecom services in India. COAI has classified this as an “anomaly.” Similarly, several TSPs have stated that the principle of “Same Service, Same Rules/Protection” need to be applied so as to address the “*glaring licensing, regulatory and security asymmetries between the two sets of services.*”

Counter Comments:

- *OTT and TSPs are not substitutes:*

While various comments to the Consultation Paper have argued that internet services that provide for voice texting or messaging (such as WhatsApp or Viber) are perfect substitutes for legacy TSP services such as voice calling and SMS, this is not the case. As BIF has pointed out in its comments in response to the Consultation Paper, these players do not compete in the same market.

The market for Internet *access* in which TSPs operate is fundamentally different from the market for Internet *content*. One is dependent on the other – which automatically means that they are not market substitutes. It is not possible to access the market for internet content without first subscribing to the market for internet access. Thus, these are distinct services where one acts as the enabling infrastructure service for the provision of another service – enjoying a symbiotic rather than a competitive relationship.

Consumers also recognize that Internet apps may be qualitatively different from legacy TSP services, and may choose to use both types of services concurrently, or in the alternate only use legacy TSP services. In particular, OTT applications that do not interconnect with the public telephone network and provide any-to-any connectivity cannot be considered the “same or similar” to interconnected TSP services. Furthermore, OTT services have to compete with each other in order for a consumer to choose to download a specific app in lieu of another – whereas SMS or voice services effectively come pre-loaded on devices. Thus, both from a technical and consumer point of view, Internet communications services are fundamentally different from TSPs’ legacy services.

- *Substitutability is not a criterion for regulation:*

Further, even if these services were to be regarded as similar or substitutable, this does not necessarily establish the need for regulation or licensing. If similar services are provided by different technologies, even then there would be case for intervention only if disruptive technologies were proven to be harmful, and their adoption was having a negative impact on consumers. This is certainly not that case as a recent study conducted by WIK-BIF found that that “rich interaction applications” like WhatsApp, Facebook Messenger, Google Hangouts and Hike created a consumer surplus of US\$98 billion (INR 6.3 lakh crores) in India.¹ To undermine this impact would be detrimental to the Indian population at large. Therefore, unless the regulator can identify any distinct harms that are caused by one mode of providing services, that must be addressed through regulatory intervention, there is no case for such intervention.

Thus, BIF would like to emphasize that it would not be the correct regulatory approach to design any laws, rules or recommendations around the fundamentally flawed assumption of TSPs and OTTs need to be regulated under the same legal framework.

b. Argument: OTTs are free riding on TSP infrastructure

It has been argued that TSPs incur heavy costs in terms of license fee, spectrum, telecom equipment and security apparatus, and are therefore on an unequal footing with OTT operators that are offering similar communications services without incurring any regulatory cost, in the form of license or spectrum charges. This has been stated to be detrimental to the country’s telecom infrastructure. Some of the comments also suggest that this will further impede the efforts being made by TSPs to upgrade their networks for greater consumer benefit.

Counter Comments:

The key problems that we would like to highlight with the assumption that OTTs are “free riding” are as follows:

- *Providing new services over the internet is a legitimate use of the internet as a service, and does not constitute a “free rider” problem*

The case for regulatory intervention arises in the event of a market failure, and a “free rider problem” can be characterized as a market failure which occurs when parts of the market are able to utilize a good or consume more than their fair share without paying, or by paying less than their fair share of the cost of a shared resource.

¹ “The Economic and Societal Value of Rich Interaction Applications in India,” <https://www.wik.org/index.php?id=934&L=1>

This is not the case in the present situation, as providing services across the internet is a legitimate use of the internet, not “free riding.” Internet users pay for access to the internet as per the prices set by telecom operators. If the prices per unit of data are not earning adequate revenue, then the market conditions within the market for internet access may need to be reviewed, instead of regulated a different market which has great potential to benefit consumers.

In any case, regulators do not intervene in a market simply to safeguard revenue or ensure profits in a given sector – their role is to address market failures. TSPs choosing to request regulatory intervention targeted at hampering Internet apps and services can be read as a clear case of rent-seeking behavior that would harm consumers by increasing prices and reducing competition, which is precisely the type of market failure that regulators are tasked with preventing.

Telecommunications regulations were designed to regulate an ecosystem that is fundamentally different from the OTT marketplace. Unlike TSPs, OTTs do not control the broadband pipeline to the consumer, and operate in highly dynamic and competitive markets with low barriers to entry. Telecommunications regulations were in part designed to ensure that the limited number of TSPs in the market do not exercise their control over critical infrastructure to harm consumers, reduce competition, or limit innovation. These regulations are not appropriate or necessary for OTTs considering that consumers can download and use different OTT communications applications (i.e. multi-homing) at will and in seconds.

Notably, even Vodafone, Jio, and Airtel agree that any regulatory framework for OTTs should be different from the regulatory framework for TSPs and should be “simple and minimalistic” and “light touch.”² To the extent that regulation for OTTs is considered necessary, regulation should be tailored to what is necessary to protect consumers, and we must be sure that any new regulation preserves innovation and consumer choice. Telecommunications regulations should not be automatically extended to OTT applications, and TRAI should consider opportunities to deregulate telecommunications services where regulations may be outmoded. Indian consumers and businesses will benefit most from an open Internet that extends across borders free of onerous regulatory barriers and provides easy access to services, content, and customers at a global level.

- *Telecom infrastructure is increasingly convergent and OTT operators increasingly contribute to the same*

While TSPs may have certain exclusive infrastructure development rights that only they can exercise, OTT players do in fact participate in investment in infrastructure at different parts of the communication chain. This may vary based on the services they provide. Such investments can include, for example, investments in cloud infrastructure, or voluntary investments in subsea cables across the world.

As stated in the ICRIER-BIF study on Digital Communications in 2018³ states, disruptive innovations in communications have led to technological convergence. This implies that eventually all voice and

² Comments of Reliance Jio at 3 (Jan. 7, 2018) (“we submit that the Authority should have a simple and minimalist regulatory framework for the OTT communication players”); *see also* Comments of Vodafone Idea at 3-4 (Jan. 7, 2019) (“In our view, the key elements of the new framework should be as below: . . . It should be light touch”); Comments of Bharti Airtel Ltd. at 1 (“we would recommend that the OTT service providers be brought under a light licensing regime, which should meet only the critical compliance requirement while providing sufficient flexibility for innovation and technological developments.”).

³ Growth Dividends of Digital Communications: The Case for India (December 2018) available online at: http://icrier.org/pdf/Digital_Communications.pdf

data services will belong to a single data stream. The National Digital Communications Policy, 2018 (“NDCP”) also mentions infrastructure convergence for IT, telecom and broadcasting.

With the advent of 5G, investments by various internet-based service providers would increase even more (such as computing power, cloud storage, various aspects of M2M communications). These technological developments will be supported through converged technical environments. They will also require OTT service providers, manufacturers of devices, and ISPs to collaborate and provide better, seamlessly connected services.

c. Specific Recommendations in the Consultation Paper Comments:

In this section of the draft, we have highlighted various recommendations for OTT regulations that have been emerged from the comments, and have sought to highlight some of the reasons for which these recommendations may be infeasible.

The recommendations include the following:

- a. Players providing OTT communications services should be licensed by introducing the OTT Communication Authorization under the Unified License.
- b. Rollout of the network and QoS obligations
- c. Data privacy / Localization requirements
- d. Traceability / Law enforcement access to information
- e. Compliance with the Companies Act 2013 by way of incorporation within India
- f. USO levy being applied on OTTs
- g. Relaxation of the licensing conditions and regulatory obligations for the telecom operators

Counter Comments:

Several of the above recommendations should not be considered by the TRAI as they may have the impact of increasing the difficulty of providing OTT services in India, and driving such services away from India. A study by ICRIER in 2017, determined that during the period 2015-16, OTTs contributed a minimum of USD 20.4 billion (Rs. 1357.6 billion) to India’s GDP. It should be kept in view that such contributions have been critical to India’s economic growth and several of the recommendations that have emerged in the comments to the Consultation Paper – individually or jointly – have the impact of completely subverting the benefits that the Indian economy has reaped from the presence of OTT services.

Some of these recommendations have been highlighted below, along with BIF’s views on the same:

- OTT services being licensed: TSPs have access to spectrum which is a limited public resource and is allocated to a specific number of players with certain preconditions geared towards its effective utilization. This is the key purpose behind it being a licensed activity, in which the licensee is selected through an auction.

If there are features of the license regime that are obsolete or oppressive to smooth operations of the TSP, this can be revisited bearing in mind the nature of the service and the level of competition in the telecom market. OTT services, which do not have exclusive rights over any public goods and do not compete for the same privileges, should not be licensed, and doing this would not address the underlying problems with the licensing framework.

It should be borne in mind that the exercise of identifying which services to license, would be fraught with difficulties. There are several OTT players which provide for communications related services in a way that makes it difficult to distinguish whether it is a primary or ancillary feature of the service. Even if such licenses were to be introduced, the wide availability of services within the market, and zero switching costs would ensure that customers immediately switch to a different service which is unlicensed. For example, if Skype is licensed as being primarily a communications service, and is thereafter unable to provide low cost efficient services, users may shift communication activities to services that are not primarily communications services but have ancillary messaging features. This may result in disparate regulatory treatment of OTT services without addressing any of the underlying issues that plague the TSPs.

Further, licensing requirements for OTT services would hurt both consumers and industry by creating a new barrier to entry for applications and service providers and raising the cost of service provision. Low barriers to entry, the open nature of the Internet, and rich interactions and experiences that OTT application and content providers enable are key to the continued growth of the digital economy. Licensing obligations for OTTs risk throttling Internet-based innovation and the nascent start-up ecosystem in India.

If the revenue for TSPs per unit of data is low, this is related to competition conditions or pricing issues within the telecom market. Bringing other services within the licensing framework is unlikely to achieve any fruitful reformation within this sector.

- QoS obligations: QoS obligations would be extremely difficult to operationalise in the context of OTT service providers as they all provide different forms of communication and it is impossible to provide technical standards for each service without regard to the nuances in service delivery and the key differences between these services. And OTTs typically do not control the underlying broadband infrastructure and the provision of OTT applications generally depends on the capabilities of the network, meaning that OTTs cannot provide guarantees or remedy any issues regarding quality of service. Moreover, any such regulatory restriction is completely unnecessary as the steep competition in the OTT market, constant innovation, zero switching cost and lack of entry barriers already serve to maintain a very high, competitive quality of such services.

Once a telecom service provider acquires said exclusive rights to part of the spectrum, those rights are no longer subject to competition. Given this notion of exclusivity and the high market entry costs, it is necessary to protect consumer welfare through QoS-related obligations and interconnection regulations. The same rationale does not apply to OTT services which do not acquire exclusive rights to any public resources. Thus, the idea of imposing the same regulatory regime on them, including QoS obligations, would be fundamentally flawed.

- Rollout obligations: Rollout of network obligations are imposed on TSPs in light of the essential nature of their services and cannot possibly be imposed on OTT services which are non-essential. It is unclear what rollout obligations would even imply for an OTT service as all OTT services are *already* available to everyone who is able to access the internet, and it is not possible for an OTT service provider to roll out such services to persons without internet access. Such obligations, by default, can only be imposed on service providers who control critical infrastructure and the access thereof, such as TSPs.

The “right to broadband” was recognized as early as the National Telecom Policy 2012, and the goal of universal internet access was reiterated in the National Digital Communications Policy, 2018 (“NCDP, 2018”). TSPs manage critical network infrastructure that controls the public’s capacity to access this

right. Hence, roll-out obligations being imposed on the players to provide access to the internet would make sense in line with India's stated policy objectives of ensuring access to internet. The same cannot be said of the market for internet content.

The only circumstance in which such regulations (QoS, universal access obligations) could be justified for any services would be if there was a recognized right to access that service and the regulator wanted to control the manner of its provision due to its critical and indispensable nature. This is the underlying logic for the regulation of major licensed services such as telecom and banking. Unless specific OTT services are thus identified as critical, indispensable, and provided with exclusive rights (which would go against the fundamental nature of the internet as a free, competitive space encouraging innovation), it is impossible to contend that the services provided by OTT service providers should be subject to similar regulation as TSPs.

- IT Act / data privacy laws: OTT services providers are already subject to data privacy laws and restrictions on data transfer as per the provisions of the IT Act and SPDI Rules. This is likely to be revised by the Personal Data Protection Bill, 2018 which is undergoing a separate process of consultation by the MEITY. As internet service providers are broadly willing to comply with a reasonable, consultative, data protection framework, and have separately engaged with the MEITY on this issue, there is no rationale for TRAI to impose parallel restrictions related to privacy and localization as this may create an uneven regulatory regime for different internet based services.
- Traceability and law enforcement: Traceability and law enforcement are already addressed in the IT Act, and their proposed amendments, for which separate consultations are underway by the MEITY. General procedures for production of records and assistance with criminal proceedings are also provided in criminal procedural law. We recommend not having overlapping regimes to address these issues. Moreover, there is no rationale for separating out a specific category of OTT communications services for the purpose of lawful interception, as law enforcement concerns would span over a much broader scope of services than what is envisaged by TRAI for the purposes of this consultation.
- Companies Act compliance / incorporation: OTT services already comply with the provisions of the Companies Act to the extent necessary – that is, India-incorporated OTT players comply with the company law provisions applicable to them, and foreign incorporated companies comply to the extent that they fall within the scope of “foreign companies” as defined and regulated in the Companies Act. There is no case for TRAI to intervene and expand the ambit of the Companies Act by making it applicable to a broader number of foreign companies than what is envisaged within its present scope.

Mandating incorporation for the purpose of providing communications services would serve to balkanize the internet in addition to being hard to operationalize (on account of there being no clarity on who exactly constitutes a communications service provider). Further, it would have the obvious impact of driving OTT service providers away from India.

- USOF obligations: Universal Service Obligation Fund (“USOF”) contributions have traditionally been imposed on TSPs with the intention of assisting in correcting a lack of market incentive to expand networks to rural and sparsely populated areas. Financial support from this fund is used for the purpose of meeting the net cost of providing specified services under law, which include: provision of public telecom and information services, operation of village public telephone, provision of rural community phones, provision of household telephones in rural and remote areas as specified by the government, etc. None of these are services that are provided by OTT players, and hence there is no rationale for OTT players to contribute to the USOF which is a service specific fund designed to correct a lack of market

incentive in a specific service sector. If the fact that OTT communications services use the internet is seen as sufficient reason for them to contribute to this fund, then any entity providing services across the internet – be it banking or medicine, may be imposed with similar obligations. In fact, given that there have been complaints of underutilization of USOF, and the use cases provided for the fund refer to several technologies that are obsolete in a modern IP based network, the USOF framework itself may be revised and brought up to date – instead of transposing it on an unrelated service sector.

Conclusion:

A licensing and heavy regulation oriented framework will hamper Internet innovation and increase cost of doing business in India, without providing any additional benefits to consumers. In fact, imposing a cost-intensive regulatory regime could have the impact of passing additional costs on to consumers and reducing their choice in accessing a wide variety of communications services.

The relaxation of licensing regime being requested concurrently with the expansion of the licensing regime under the UL to OTTs makes it extremely unclear whether TSPs are viewing the licensing regime as a hindrance to business or as a supportive framework. If it is seen as a hindrance, it should be reviewed accordingly so that some of the regulatory burdens imposed by it can be removed, and be replaced with a more supportive framework. There is certainly no case that has been made for expanding the same framework to another service sector.

Licensing of OTT services would also reduce incentives for global companies to do business in India. The historically borderless nature of the Internet also means that imposing a domestic regulatory framework risks creating a “Balkanized Internet” by raising a “digital border” around India, which would make India a far less attractive market for doing business than other countries without similar frameworks, both for potential foreign investors, and for Indian entrepreneurs and Internet companies.

Further, several of the requests made by TSPs contain issues that cut across various regulators or governing bodies, such as MEITY, CCI, DOT or GST Council. Regulatory streamlining – where each regulator stays within clearly defined scopes of regulation – is the first step to a harmonious, predictable and investment-friendly legal regime. Thus, TRAI should not expand its ambit to cut across issues that are dealt with by other government bodies and regulators.

Any regulatory intervention should only take place pursuant a policy that: (a) streamlines regulatory approaches to OTT services in India, and does not leave different regulators / ministries to engage in overlapping interventions; (b) comprehensively considers the implications of any intervention in light of its potential impact on the Indian digital economy, so that it does not result in negative unforeseen consequences.