From: jmchale@ccianet.org
To: "Akhilesh Kumar Trivedi" <advmn@trai.gov.in>
Cc: anasr@ccianet.org, rstelly@ccianet.org
Sent: Thursday, September 28, 2023 11:05:01 PM
Subject: CCIA Counter Comments for TRAI proceeding on Regulatory Mechanism for Over-the-Top Communication Services

Dear Mr. Akhilesh Kumar Trivedi, Advisor:

On behalf of the Computer & Communications Industry Association (CCIA), please find our counter-comments in TRAI's Consultation on Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services.

Also attached are our original comments, submitted August 18; they do not appear posted on the TRAI website. We respectfully request that these also be made part of the official record.

Thank you for providing the opportunity to provide our views into this consultation, and your efforts to incorporate stakeholder input. Please do not hesitate to contact us if your office should have any further questions on our submission or views.

Best regards,
--
Jonathan McHale
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Computer & Communications Industry Association
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Mr. Akhilesh Kumar Trivedi,
Advisor (Networks, Spectrum and Licensing),
Telecom Regulatory Authority of India (TRAI) New Delhi, India
Via electronic mail: advmn©trai.gov.in

29 September 2023

Re: Consultation Paper on Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services.

To whom it may concern:

The Computer & Communications Industry Association (CCIA) submits the following counter comments regarding the Telecom Regulatory Authority of India (TRAI) "Consultation Paper on Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services." CCIA is an international, not-for-profit trade association representing a broad cross-section of communications and technology firms.

CCIA appreciates the opportunity to provide its views in this consultation and supports TRAI for undertaking a detailed analysis of, and seeking stakeholder inputs on, the opportunities and – more specifically – the challenges arising from establishing a new regulatory framework specific to OTT services.

To assist with the consultation process, CCIA wishes to provide, in addition to our original comments, counter-comments to several of the issues raised by stakeholders after examining their inputs published by the TRAI in response to the Consultation Paper.[1]

I. COUNTER-COMMENTS TO ISSUES RELATING TO REGULATORY MECHANISMS FOR OTT COMMUNICATION SERVICES

A. Definition of OTT services

Some stakeholders highlighted that OTT services are a category of 'digital content delivery systems' that operate on the internet.[2] Such a term has been used broadly to refer to the *manner* in which the services are being provided rather than the *nature* of services being provided.

CCIA disagrees with this approach to define OTT services as the focus should be on the *nature* of services being provided. Such a definition circumvents the principle of technology neutrality and fails to ensure a future-proofed approach. OTT services are not just any service that freely flows over the network layer. Rather, they are specific content and application-based services. OTT services may be defined as application or content-based services that are provided on the application layer over the internet or network layer provided by telecommunication service providers (TSPs.)

In addition, CCIA disagrees with the position taken by some stakeholders that OTT services can operate over the internet and TSPs have no control over the dissemination of these services.[3] OTT services require a TSP's network to provide their services to end-users. As per the regulatory licensing framework under

[1] Available at: https://ccianet.org/wp-content/uploads/2023/08/Comments-of-CCIA-TRAI-Consultation-on-Regulatory-Mechanisms-for-Over-The-Top-Comunication-Services.pdf
[2] Vodafone p. 16.
[3] ACTO at p.4, Airtel p. 7.

the Telegraph Act 1885 ("**Telegraph Act**"), only TSPs have control over the operation and deployment of network services in India. OTT services cannot operate a network. Therefore, TSPs have the ability to determine if OTT services reach their end users or not.

Lastly, certain stakeholders have suggested a separate definition to categorize OTT services which may be functionally similar to the services provided by the TSPs under a common definition of 'OTT communication services'. Such stakeholders have also placed reliance on the 'same service, same rules' principle. However, OTT communication services cannot be defined based on presumed functional similarity with traditional telecom services. No functional similarity can be assumed between the services offered by OTT service providers and TSPs. This is on account of the following reasons:

- TSPs operate and control the network layer whereas the OTT services operate on the application layer.
- Unlike OTT service providers, TSPs enjoy exclusive rights under the Telegraph Act which gives them added economic benefits like high entry barriers, reduced market competition, and exclusivity in business operations.
- Operational differences exist between telecom services and OTT services. In fact, the pricing conditions, the devices used to access these services, etc. are different.
- OTT services are provided in a bundled manner which extend beyond the traditional communication services provided by TSPs (further explained below). As a result, an end-user do not perceive them as inter-changeable services.

B. Classification of OTT Services

A few stakeholders suggested classifying OTT services based on the nature of services provided.[4] This includes sub-categorising OTT services into, for instance, OTT communication services, OTT broadcasting services, OTT application services, OTT media services, etc.

CCIA emphasizes that any such sub-classification of OTT services based on the nature of the service lacks any intelligible differentia. OTT services are generally provided in a bundled manner where several services are interlinked to each other. For example, many bundled OTT services have both communication as well as non-communication features. Similarly, sub-classification of OTT services between OTT media services and OTT application services would create the same effect as OTT application services often include digital content.

Further, any attempt at regulating OTT services, especially OTT communication services, based on such sub-classification would lead to regulatory overlap. Telecommunication authorities may seek to only regulate OTT communication services. However, and as noted above, in most cases, they are bundled with various OTT services such as e-commerce platforms, online gaming platforms, etc. Such OTT platforms are already regulated under sectoral and horizontal regulations. If TRAI seeks to regulate them further due to any communication service being provided, the same will lead to regulatory hurdles and impact the ease of doing business. This will hamper both the viability of existing OTT platforms and the entry of new participants in the OTT market.

Some stakeholders noted a lack of regulatory oversight for OTT communication and broadcasting services.[5] This is not accurate. OTT services are already subject to a myriad of regulations under the IT Act. They are also now subject to the recently enacted Digital Personal Data Protection Act, 2023 ("DPDP

[4] Reliance at p.12, Vodafone at p. 3.
[5] Airtel at p. 9.

Act"). In any case, due to the bundled nature of OTT services, any further regulation (if needed) should be implemented horizontally under the existing frameworks of the IT Act, DPDP Act, etc.

C. Regulatory aspects of OTT communication services vis-a-vis licensed telecommunication services

TSP stakeholders advocated for the application of the Unified License – Internet Service Provider Authorization and Access Service Authorization ("Unified License") under the Telegraph Act to OTT platforms.

CCIA emphasizes that a unified framework for OTT services and TSPs (whether under Unified Licence or otherwise) is not tenable. As noted above, the services provided by TSPs and OTT platforms are not substitutable in nature. Further, the Unified License framework seeks to regulate the exclusive rights of operating and developing network infrastructure that are available to TSPs under the Telegraph Act. In order to ensure proper exercise of such rights, the TSPs are subject to stringent requirements under the Unified License framework. None of these requirements can be applied to OTT service providers, as they do not have access to these exclusive rights.

In addition, the argument that OTT platforms are not sufficiently regulated is also unfounded. OTT platforms are subject to existing regulations that cover different aspects under the Unified License framework for TSPs. For instance, certain OTT platforms are required to: (i) Employ appropriate methods for customer verification under the Intermediary Guidelines; (ii) comply with interception and traffic monitoring laws as per the rules made under the IT Act;[6] (iii) identify first originator of messages in their communication services under the Intermediary Guidelines, irrespective of any encryption models that might be employed; (iv) adhere to various reasonable security obligations under the IT Act and the DPDP Act in addition to the requirements imposed by the Computer Emergency Response Team of India ("CERT-In"), etc.

D. Revenue Sharing Agreements and Financial Contribution

A few stakeholders have pushed for revenue sharing agreements ("RSAs") between TSPs and OTT service providers. They have also asked for OTT service providers to contribute towards the spectrum user charges ("SUCs"), which are currently paid by TSPs or pay certain network usage fees ("NUF") to TSPs.

The requirement to pay NUF / SUCs or enter into RSAs will not only negatively impact the growth of the OTT sector but will also be detrimental to end-users of OTT services, as discussed in detail below.

First, TSPs in their comments have argued that OTT service providers 'free ride' over the telecom services provided by TSPs. CCIA reiterates our comments that TSPs and OTT services enjoy a mutually dependent relationship. High-quality content and application services that are provided by the OTT platforms lead to increased usage of data services by end-users and, therefore, higher revenue for TSPs. In return, increased network connectivity offered by the TSPs increases the customer base / subscription base for OTT platforms and enables OTT service providers to generate high quality content and digital services. In addition OTT services have made complementary investments in terms of developing network infrastructure (to improve connectivity and reduce transport costs for TSPs) across the world, including in India. Charging OTT service providers a NUF, would likely be reflected in the form of higher subscription costs for users, and result in end-users paying twice.

[6] For example, please refer to the interception requirements under the Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009.

Second, there is no rationale for OTT platforms to bear the burden of SUCs as OTT platforms do not enjoy the same exclusive rights over the deployment of network infrastructures (including the exclusive right to purchase spectrum from the Government) as TPSs enjoy. The burden of SUCs paid by TSPs is ultimately borne by their end-customers in the form of higher data charges for 4G/5G connections. Alternatively, if such charges are further imposed on the OTT platforms, the same will trickle down to end-users in the form of paid online or digital services. The increased regulatory costs due to the incidence of SUCs would not only affect the ease of doing business in the OTT sector but (as noted above regarding NUFs) would also be reflected in the form of increased subscription costs for users. The quality of services provided by OTT platforms would also be hampered as their investments would now be diverted towards tackling increased regulatory costs whether in the form of SUCs and/or NUFs. This will, ultimately, impact the welfare of end-users in the long run.

I. COUNTER-COMMENTS TO ISSUES RELATING TO THE SELECTIVE BANNING OF OTT SERVICES

A. Selective blocking through TSPs.

Most of the stakeholders, including a few TSPs,[7] have acknowledged that selective blocking of OTT platforms and websites in specific regions is an ineffective solution. CCIA emphasizes three main concerns with selective blocking of OTT services.

First, at the network layer there is no differentiation between different OTT services that pass over a TSP's network, making selective blocking difficult. Since OTT services are generally provided in a bundled and interlinked manner, it will be difficult to selectively block one OTT service without inadvertently blocking another.

Second, inherent features of OTT platforms (dynamic IP addresses) makes selective blocking difficult Since many OTT service providers rely on cloud services for hosting their respective OTT platforms, these services tend to be hosted on dynamic IP addresses. As a result, it may be difficult for TSPs to identify such IP addresses and effectively block OTT services, while ensuring that they do not accidentally block unintended OTT services that are hosted on the same cloud service and use the same dynamic IP address. This technical barrier may be circumvented using deep packet inspection but if pursued, it will lead to grave net neutrality, free speech and data privacy concerns.

Third, the availability of technological solutions like virtual private networks, tunnelling etc. are effective workarounds to any selective banning. In respect of any method that might be involved to selectively block any OTT platform, these options would always be available, rendering selective blocking ineffective.

A few stakeholders advocated for network level selective blocking by TSPs. This will, however, require proper identification of OTT services by the government (i.e., name of the service provider, its web address and IP address, the specific service or content to be blocked etc.) while it passes blocking orders. These details of identification would then be shared with the TSPs for selectively blocking specific OTT platforms at specific locations. Such proper identification cannot be easily provided for OTT services, considering the fact that they are hosted on dynamic IP addresses.

As a workaround to the issue of dynamic IP addresses, a few stakeholders have called for specific regulations directing OTT services to mandatorily share their IP addresses with TSPs to execute blocking orders and to maintain constant IP addresses. Any such regulation, would not only create market

[7] Airtel at p. 23.

restraints in the OTT sector but also not be technically infeasible, given that most OTT platforms are hosted on cloud services. Further, mandatory disclosures of IP addresses to TSPs would raise concerns for breach of privacy and other cyber security concerns.

B. Selective blocking through OTTs.

Some TSPs stressed that even though selective blocking cannot be easily carried out at the network layer by TSPs, it can be done at the level of OTT platforms. CCIA emphasizes that implementing blocking measures at the level of OTT platforms would require them to gather location-based data from users, which can lead to privacy concerns, particularly following the DPDP Act. Additionally, such specific blocking at the regional level cannot be carried out quickly, keeping in mind the overall technical complexity involved in the process.

A few stakeholders have proposed that content filtering can be carried out at the level of OTT platforms, as an alternative to selective blocking.[8] However, content filtering is not a feasible solution. It would require OTT service providers, who are also likely to be intermediaries as per the IT Act, to determine the legality of content being published or transmitted through their platforms. Such an action by an OTT platform (as an intermediary) would, if pursued, violate the fundamental rights of freedom of speech and expression, and go against the 'actual knowledge' standard laid down by the Supreme Court in *Shreya Singhal v Union of India.*[9] In any case, the option of platform and/or content blocking through orders from courts or concerned governmental authorities is already available under Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 and the Intermediary Guidelines.

C. Selective blocking of specific classes of OTT services.

Some stakeholders suggested that only certain classes of OTT services should be subject to selective blocking based on factors such as nature and number of subscribers, provision of interpersonal communication at mass level, etc.[10] At the outset, any such regulation would be discriminatory considering the overlapping nature of bundled OTT services. It would be difficult to segregate specific classes of OTT services to be banned.

Additionally, any attempt at selectively banning only a specific class of OTT services would require the Government to dynamically determine the classification of a service based on its 'core' features before passing the blocking order. As noted above, this is not a feasible exercise.

[8] Reliance at 26-27.
[9] Shreya Singhal v Union of India, AIR 2015 SC 1523.
[10] Vodafone at p. 42.