

Indian Digital Media Industry Foundation’s (“IDMIF”) response to Telecom Regulatory Authority of India’s “Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services”

This is in reference to the Telecom Regulatory Authority of India (TRAI) ’ss Consultation Paper (CP) on **“Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT”** issued pursuant to DoT’s letter dated 07.09.2022 requesting TRAI to reconsider its recommendations dated 14.09.2020 and to suggest a suitable regulatory mechanism for OTTs including selective banning of OTT services during periods of unrest/crisis.

Since its establishment in 1999, IBDF (*earlier know as Indian Broadcasting Foundation*) has worked relentlessly to represent television broadcasters. In Oct 2021, IBDF constituted Digital Media Industry Foundation to represent the digital platforms as well. IBDF comprises of broadcasters of both news and non-news channels (such as General Entertainment, Sports, Music, Movies, Infotainment, etc.). Members of IDMIF include digital curated content providers. IDMIF members provide online content related service(s), namely, online curated content. For ease of reference, we have collectively referred to these online services as Online Curated Content Services (“OCCS”).

By way of the present response, we are making certain preliminary submissions and raising objections to the consultation exercise being conducted by TRAI. Each of the submissions and objections are being made in the alternative, independent of and without prejudice to one another. We believe that these issues go to the root of the matter, and ought to be decided first before TRAI proceeds with the matter further.

Preliminary submissions –

At the very outset we would like to submit fundamental threshold issues on the consultation paper and the remit of the TRAI in respect of the issues presented.

1. Before deliberating on whether there is a need for prescribing a regulatory framework applicable for OTT services, it is essential to consider that –
 - a. the OTT sector is growing rapidly under the present regulatory conditions, and comprises of various different services, that are made available over the top of the internet.
 - b. there has been an exponential growth in the data traffic and revenue of Telecom Service Providers (“TSPs”) with the increased use of OTT Services and the OCCS.
 - c. regulatory intervention in the absence of any market failure will have an adverse on the growth of the OTT services, competition (elimination of smaller players), choice available to users and even on the TSPs revenue (as users of OTT services require internet access).
 - d. The services provided by OTTs are not like or similar to services provided by TSPs.
 - e. OTT services are evolving fast and the scope of the same cannot be limited.
 - f. OTT services and OCCS, are already regulated presently under the Information and Technology Act, 2000 (“IT Act”) and the various Information Technology Rules (“IT Rules”).

- g. Online Curated Content Services (“OCCS”), are a distinct subset within the ecosystem of the Over the Top Services (“OTT Services”), and cannot be clubbed together with or treated similarly to other OTT Services.

The adverse impact of regulatory intervention on the growth and future of OTTs will be far reaching. The fact that there is no need for regulatory intervention has been acknowledged by TRAI in its Recommendations dated September 14, 2020 on Regulatory framework for OTT services. TRAI has recommended that “..Market forces may be allowed to respond to the situation without prescribing any regulatory intervention...”.

2. Inapplicability of Consultation to OTT Services and OCCS

- a. We welcome TRAI’s observations in paragraph 2.38 of the Consultation Paper, where TRAI has categorically recorded that:
“2.38 Keeping the above in view, **the present consultation is focused on** the following:
(a) Identification of a **suitable regulatory mechanism for OTT communication services**,
and
(b) Examination of the issues related to **selective banning of OTT communication services.**”
- b. It is pertinent to note that OTT Service include a variety of services varyingly available over the internet, and the OCCS is a distinct subset providing online curated content service within the larger ecosystem of the OTT Services.
- c. Paragraphs 39 and 40 of TRAI’s explanatory memorandum to the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order 2017 dated 03.03.2017, clearly state the TRAI’s position in respect of OTT Services¹. It has always been TRAI’s own understanding that it does not exercise jurisdiction over OTT, and that the OTT operators are not covered under any license or permission granted by the Government.
- d. it is clear that the present Consultation Paper (including paragraph 2.38 referred above), is inapplicable to the OTT Services or the OCCS, and that neither are substitutable or alternate service when compared with services of TSPs (calling, messaging and data). Further, OTT Services and OCCS are not susceptible of being misused by terrorists, anti-national elements, etc. during period of unrest amongst themselves, and/or to spread of misinformation.

¹Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order 2017, 39. “Some stakeholders are of the view that definition of ‘distribution platform’ should include OTT and Doordarshan. They further suggested that definition of ‘distribution platform operators’ should include OTT operator, Doordarshan or any platform that distributes channels to the subscriber.”
40. “In this regard, this tariff order is applicable to only those distribution platforms and distribution platform operators for which any permission or license is granted by the MIB. Since OTT operators and Doordarshan are not covered under any permission or license granted by the MIB, the Authority is not in agreement with these suggestions of stakeholders as they are not covered under present framework.”

- e. It is submitted that the Ministry of Electronics and Information Technology notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (“IT Rules”), which deal with all relevant aspects relating to OTT Services and OCCS respectively. The IT Rules further provide that the stipulations in respect of OCCS being online content services shall be administered by MIB and there is no regulatory vacuum in respect thereof.
- f. We would like to point out that neither the OTT Services, or OCCS as an OTT, fall within the definition of “telecommunication services” under the TRAI Act. Therefore, we understand that the present consultation paper and proposed recommendations go beyond the functions of the TRAI as envisaged in Section 11 of the TRAI Act since, *inter-alia*, the consultation exercise is with respect to matters not envisaged within the scope or ambit of Section 2(1)(k) read with Section 11(1)(a) of the TRAI Act.
- g. OTT Services, and the OCCS, are neither made available pursuant to any license granted under Section 4 of the Indian Telegraph Act 1885 (as amended) (“Indian Telegraph Act”) nor do entities providing OTT Services or OCCS maintain or work telegraph within the meaning of the Indian Telegraph Act. Further, the activities and functions of entities making available OTT Services or OCCS do not fall under any specified public telecommunication services covered under Section 4(1) of the Indian Telegraph Act, which empowers the Government to grant a license on appropriate conditions to any person to: (a) establish, (b) to maintain or (c) work a telegraph within any part of India.

3. Consultation Paper is unwarranted & premature.

- a. It is submitted that the present Consultation Paper is unwarranted and premature, given that in Para 3.1 of TRAI’s recommendations on regulatory framework for OTT communication services dated 14.09.2020 (“2020 Recommendations”), TRAI had itself recommended that:

“3.1 The Authority recommends that:

 - i. Market forces may be allowed to respond to the situation without prescribing any regulatory intervention. However, developments shall be monitored and intervention as felt necessary shall be done at appropriate time.*
 - ii. No regulatory interventions are required in respect of issues related with Privacy and security of OTT services at the moment.*
 - iii. It is not an opportune moment to recommend a comprehensive regulatory framework for various aspects of services referred to as OTT services, beyond the extant laws and regulations prescribed presently. The matter may be looked into afresh when more clarity emerges in international jurisdictions particularly the study undertaken by ITU.”*
- b. On 01.11.2022, TRAI reasserted and reaffirmed its 2020 Recommendations. This being the case, it was not appropriate for the TRAI to have initiated the consultation process or to have communicated about the initiation of the same to the Department of Telecommunications (“DoT”). The current consultation exercise is in the teeth of the TRAI Act, including the fifth proviso to Section 11 and Section 11(4). It would be in the interest

of a transparent consultation and appreciated by all stakeholders if TRAI would kindly share a copy of its 01.11.2022 communication for reference.

- c. in view of the ongoing legislative developments (including laws like the Digital Personal Data Protection Act 2023, the ongoing discussions on a Telecommunication Bill, the upcoming Digital India Act, etc.) and the fundamental issues raised by stakeholders in response to ongoing consultations like the TRAI's consultation on 'Regulating Converged Digital Technologies and Services - Enabling Convergence of Carriage of Broadcasting and Telecommunication services', it is untimely and unfitting to conduct this present consultation exercise. We believe that the present Consultation Paper is premature since, *inter-alia*, the consultation is being conducted at a time when there is a need for clarity and consistency in view of the emerging legislative and regulatory landscape. It is submitted that this is bound to lead to ill-considered and ill-conceived responses since stakeholders are unable to deal with all relevant and material issues, and consequently, unable to respond fully. This vitiates the present consultation exercise necessitating the need to revisit the issue in the future.

Without prejudice to our threshold submission on issues related to OTT Services and the OCCS , we would like to submit some preliminary observations which are essential to be considered to set the context of our responses on the incorrect premise that OTT services can be regarded as the same or similar to services offered by Telecom Service Providers ("TSPs"). The CP while raising issues and seeking comments regarding regulatory mechanism for OTT communication services omits to consider the fact that even "*communication based OTTs typically differ in a number of ways from traditional telecommunication services*"². Accordingly, the OTTs cannot be subjected to the same regulations as TSPs. Besides, OTT services, including communication services, are already subject to regulations. Further, we strongly believe that OTT Services that are OCCS are fundamentally different, under the jurisdiction of a different regime, and cannot be treated similarly to TSP or even other OTT Services and thus cannot be subject to the same regulations as TSP's, or even the same regulations as other OTT Services. Please find below our preliminary submissions to put forth the position that OTT services cannot be compared with and are distinct from services provided by TSPs -

4. Difference between "OTT service" and "Telecommunication service":

- a. OTTs and telecom operators operate in fundamentally distinct and separate markets and to compare them/treat them similar or substitutable would be a mischaracterization or a misguided attempt to draw similarities and/or equivalencies, which does not exist.
- b. Apps and telcos have fundamentally different technical and economic characteristics. Apps typically provide a wider set of features than traditional telecom services and are accessible only in an internet capable device and thus operate in a different layer. 'OTT Services' and

² ITU-D's Report 2021 - source: <https://www.itu.int/en/ITU-D/Study-Groups/2018-2021/Pages/Publications.aspx>

‘OTT communication services’ are not only totally distinct from telecommunication services but are also totally different sectors of the broadcast/digital media in themselves.

- c. OTT service providers do not own or control critical infrastructure – and they merely offer services by relying on such infrastructure provided by TSPs. Further, unlike TSPs that operate in a market with high entry barriers and limited competition, OTT service providers operate in a market with low entry barriers and unlimited competition. OTT products have a different lifecycle, and a licensing regime or regulatory intervention may impact their ability to innovate. OTT services are dynamic and need to constantly innovate to keep pace with evolving and emerging technologies. This is also a function of the fact that OTT services operate in a highly competitive market, where they may be easily superseded by other innovative and futuristic services. While a licensing regime (that typically extends to 20 years) may be appropriate for TSPs given that their services take a prolonged duration to develop and stabilize, the same cannot be extrapolated to OTT service providers. Doing so may prevent them from innovating and changing on account of restrictive or onerous compliances.
- d. The prima-facie similarity/commonality in the services of voice and text offered, does not make them comparable or substitutable and the same exists only as a supplement. There is no uniquely attributed mobile number, and the consumers cannot switch to these OTT services as a full and effective replacement to traditional mobile services.
- e. OTTs also offer diverse functionalities like gaming, photo editing, etc. which may also help users to communicate like messaging/calls in Paytm, gaming apps (Call of Duty), rental apps, Airbnb, Zomato, etc. It would be highly incorrect if these apps are regulated as telcos merely because of the commonality in the functions with voice and text services offered by telcos. The OTTs thus provide expansive experiences to consumers that go beyond conventional messaging and communication options provided by telco. Clearly there is a distinction both technologically and functionally, and thus instead of drawing a regulatory parity, it would be better to regard them as belonging to different layers with different market business models, inputs, entry barriers and costs. Further, regulatory barriers to innovation in the internet sector may detract from its benefits to the Indian GDP and overall economy.³ It may deter OTT service providers from investing in the development of passive internet infrastructure (such as data centres,⁴ and submarine cables⁵). It may also impinge on OTT service providers’ ability to contribute to revenues generated by TSPs by driving the broadband demand amongst the general public.

5. The principle ‘same service, same rules’ does not apply for OTT services and services provided by TSPs.

³It may be noted that as per [Indian Brand Equity Foundation](#), out of the internet sector’s 16% contribution to India’s GDP in 2020, applications / OTT services contributed 8% of this.

⁴It may be noted that tech companies like [Amazon](#) and [Microsoft](#) have leased land to make investments in the development of data centres.

⁵Similarly, as per [news reports](#), Google, Microsoft and Meta have all made investments in relation to the development of undersea cables.

- a. Different services provided and the exclusive rights enjoyed by TSPs – It is incorrect to suggest that there is a natural parity or similarity between OTT players and TSPs. The services provided by TSPs (i.e. fixed and mobile telephone services (including internet connectivity), and data transmission services) and the exclusive rights (for eg. acquiring and exploiting scarce natural resources like telecom spectrum, right to obtain telecom numbering resources, right of way to set up infrastructure) enjoyed by the TSPs are not available to OTTs. Such exclusive rights provide TSPs economic advantages like high entry barriers, reduced competition, and exclusivity in business operations. On the other hand services provided by OTTs are delivered over the internet that is provided by TSPs which include online buying and selling, OTT communication and messaging services, OTT video streaming services, digital news, search services, navigation services, ride hailing services, dating services, delivery and logistics services delivered over the internet. Further, the exclusive rights available to TSPs such as acquiring & exploiting the telecom spectrum, obtaining and setting up telecom infrastructure are not available to OTTs and digital services. Not to mention the highly competitive market alongwith the low entry barriers that the OTTs work in. In fact, TSPs are providers of internet and the OTTs ride on top of the internet provided by the TSPs leaving OTTs with no control over the telecom infrastructure or development/deployment of the same. Rather the OTTs are dependent on TSPs for the growth and existence. The underlying broadband access infrastructure is controlled by TSPs and not by OTTs.

- b. Separate network layers of operation - The TSPs and OTTs operate on different layers. While the TSPs operate primarily on the “network layer”, they can also operate on the application layer. The OTTs on the other hand can operate on the “application layer” only. The network layer essentially operates and connects different networks, including the internet whereas, the services on the application layer ride on the network layer and use networks to transfer data.

- c. Dependency of OTTs on TSPs as internet access is provided by TSPs – The TSPs provide internet access which is required for provisioning all OTT services making the OTTs dependent on TSPs. In the absence of internet access, services provided by OTTs cannot be accessed by users. A network operator can offer services on top of their network, but application/content service providers cannot offer network connectivity⁶. Moreover, as mentioned in ITU-D’s report of 2021, “*..OTT applications drive the demand for Internet connectivity services, thus increasing traffic and, consequently, the revenue of telecommunication service providers.*” Therefore, it is evident that TSPs earn revenue by carrying OTT services since users of OTT services use and pay for internet access for consuming the same whereas, the OTT services are entirely dependent on TSPs for their revenue.

⁶ CCI Market Study on Telecom Sector, para 59, available at: <https://www.cci.gov.in/images/marketstudie/en/market-study-on-the-telecom-sector-in-india1652267616.pdf#page=28>

- d. Different relevant markets – OTTs and TSPs do not form part of the same relevant market as the intended use is different for both the services. Consumers use telecommunication services for basic voice and SMS services and OTT applications for rich interactive content and multiple features. As per section 2 (r) of the Competition Act 2002 “relevant market” means the market which may be determined by the commission with reference to the relevant product market⁷ or the relevant geographic market⁸ or with reference to both the markets. To determine whether a service forms a part of the relevant market it is essential that the said service (s)/ product is interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use. Since, the services provided by OTTs are neither interchangeable nor substitutable with the services provided by TSPs therefore do not form part of the relevant market hence the principle “same service, same rules” cannot apply. Further, switching costs payable by consumers while switching between telecommunication networks results in consumers having limited choice whereas services on the communication network such as OTTs are highly competitive, often cost-free, and there are no limitations on using multiple services at the same time. The CCI in *Vinod Kumar Gupta Vs. Whatsapp Inc* noted that instant communication applications like WhatsApp are not in the same relevant market as traditional electronic communications⁹, citing key differences in functionalities enabled by OTT communication services and traditional communication networks, pricing conditions (OTT communications are generally free), and device used to access either (any phone for traditional communications vs. smart devices for OTT communications).
- e. Different approach adopted for regulating traditional telecommunication services & OTT communication applications internationally – The fact that traditional telecommunication services and OTT communication applications are not perfect substitutes has been recognized by organizations like the International Telecommunication Union (ITU)¹⁰ and other jurisdictions including the European Union¹¹ and Australia¹². Considering that the two services are not perfect substitutes, differential approach has been adopted for regulating them. For example, the ITU recommends that its Member States encourage “mutual cooperation as far as practical between OTTs and network operators” while keeping in mind “the fundamental differences between traditional international

⁷ Section 2 (s) of the Competition Act, 2002 - “relevant geographic market” means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas;

⁸ Section 2 (t) of the Competition Act, 2002 - “relevant product market” means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use;

⁹ *Vinod Kumar Gupta Vs. Whatsapp Inc* [Competition Commission of India, 01-06-2017] para 11.

¹⁰ ITU-T Technical Paper ‘Economic impact of OTTs’ (2017), pg 9, available at: https://www.itu.int/dms_pub/itu-t/opb/tut/T-TUT-ECOPO-2017-PDF-E.pdf

¹¹ European Electronic Communications Code, 2018, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AAOJ.L.2018.321.01.0036.01.ENG>

¹² Telecommunication and Other Legislation Amendment (Assistance and Access) Act 2018, available at: <https://www.legislation.gov.au/Details/C2018A00148>

telecommunication services and OTTs”¹³, and suggests creating an enabling environment for voluntary commercial arrangements between telecommunication network operators and OTT providers¹⁴, and separate customer redress and consumer protection mechanisms for OTTs¹⁵.

6. Consumers drive traffic and not OTTs:

- a. The demand for data intensive activities stems from consumer choice as OTTs operate on a pull basis, meaning that consumers choose, download, and consume content based on their preferences. When users choose to watch content through a device, they send a playback request to the streaming OTT which in turn delivers the OTT the requested content over an internet connection that the consumer has already paid for. Attempting to place burden on OTTs to cover network costs or to regulate or control them would be ignoring the fact that consumer pays for internet connectivity and determine traffic volumes. It is the consumers and not the OTT providers who drive the data traffic.
- b. Further, the network-related costs have remained stable despite traffic growth. In spite of increase in global network traffic, operator cost has only seen a minimal increase. Thus, mandating any fee or regulations on OTTs would adversely affect digital ecosystem and consumers, which would restrict choice, increase prices, erode quality of services, foreclose competition, and violate “Net Neutrality”. As per Analysis Report, the annual spend of telecom operators remained stable despite a substantial increase in global internet traffic. While global traffic increased by 160% between 2018-2021, network related cost increased by only 3%.

c) Consumer:

The Consumer also buys an expensive smartphone as against the normal mobile phone in order to meet and avail the benefits of content and other services as against being limited to voice and text messages. Thus, consumers, apart from paying the data charges, are also investing in the hardware which is directly borne at the consumer's end. It would thus not be wrong to say that all the stakeholders in the value chain i.e., the network operator like telcos, the OTTs as also the Consumers, are making adequate investments to bring value to the entire set of offerings. The need & demand to have landline phones have also seen a negative trend and the overall demand for fixed telephone service has also declined.

7. Adequate regulations already prescribed for OTTs.

¹³ ITU-T Study Group 3, Recommendation ITU-T D.262 (2019/05): Collaborative framework for OTTs, available at: <https://www.itu.int/ITU-T/recommendations/rec.aspx?rec=13595>

¹⁴ ITU-T Study Group 3, Recommendation ITU-T D.1101 (2020/08): Enabling environment for voluntary commercial arrangements between telecommunication network operators and OTT providers, available at: <https://www.itu.int/ITU-T/recommendations/rec.aspx?rec=14269>

¹⁵ ITU-T Study Group 3, Recommendation ITU-T D.1102 (2021/12): Customer redress and consumer protection mechanisms for OTTs, available at: <https://www.itu.int/ITU-T/recommendations/rec.aspx?rec=14730>

The CP seeks inputs on certain aspects of OTT Services vis a vis licensed telecommunication services such as regulatory, economic, security, privacy, and safety. These aspects have already been addressed under the existing regulations as provided below -

- a. Interception, monitoring, decryption, collection of data or information – The Central Government has been empowered under relevant sections of the Information Technology Act, 2000 (“IT Act”) to (i) issue directions for interception or monitoring or decryption of any information through any computer resource¹⁶ (ii) issue directions for blocking public access of any information through any computer resource¹⁷ (iii) to authorize to monitor and collect traffic data or information through any computer resource for cyber security¹⁸. In addition to the relevant sections under the IT Act prescribing interception, monitoring and decryption of any information through any computer resource, collection of data or information can be carried out under the IT (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009) and the IT (Procedure and Safeguard for Monitoring and Collecting Traffic Data or Information) Rules, 2009. Further, data related to OTT services can also be intercepted in line with the Standard Operating Procedures for Lawful Interception and Monitoring of Telecom Service Providers.
- b. Privacy and security – The IT Act alongwith the IT (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 include several provisions that safeguard privacy and security. In addition, the OTTs will also be subject to upcoming Digital Personal Data Protection Bill and the planned Digital India Act.
- c. User safety and preventing user harm - are addressed through the obligation for OTT communications providers to undertake *due diligence* under Rule 3(b) of the Intermediary Guidelines. Illustratively, intermediaries must ensure that they do not host or publish information that is (i) invasive of bodily privacy; (ii) insults or harasses another user on the basis of gender, race, or ethnicity; (iii) harmful to children; (iv) threatens India’s sovereign or security interests. Intermediaries classified as “significant social media intermediaries” are subject to additional due diligence obligations.
- d. Services provided by OTTs are not essential services - Services provided by TSPs are subject to *economic regulations* since they are natural monopolies, make use of a natural resource (spectrum), and are essential services. OTT services, on the other hand, are highly competitive and users have access to more than one at any given time. Since OTTs do not acquire and exploit natural resources and the services provided by OTTs are carried on top of TSP networks, they do not directly make use of spectrum and do not control network infrastructure. Finally, since OTT services are dependent on TSP services, they cannot on their own be essential services as they cannot operate without the underlying network.

¹⁶ Section 69 of the IT Act, 2000

¹⁷ Section 69A of the IT Act, 2000

¹⁸ Section 69B of the IT Act, 2000

8. Need for regulating OTTs does not arise in the absence of market failure -

There is no data in the CP which shows that there has been market failure. On the contrary it has been observed by the International Telecommunication Union (“ITU”) that the OTTs contribute significantly to the revenue of the TSPs. Any attempt to regulate the sector would not only hamper the growth of the OTTs but will also have an impact on the users and the TSPs as well.

- a. In the absence of market failure, regulatory intervention will impact the industry as a whole. This has also been noted in TRAI’s Recommendations on Regulatory Framework for OTT Communication Services¹⁹. TRAI has recommended that market forces should be allowed to operate. It is suggested that the need for regulation should be weighed against the impact of such regulation on the growth and competition in the sector.
- b. A regulatory framework for services like OTT communication applications is totally uncalled for as it will not only act as an entry barrier, but will also increase compliance burdens and have an adverse impact on India’s startup ecosystem. This in turn will go against the government’s vision of Ease of Doing Business and the position in the National Digital Communications Policy 2018 where the DoT committed to “*remove regulatory barriers and reduce regulatory burden that hampers investments, innovation and consumer interest...*”²⁰
- c. Entry barriers and compliance burdens could decelerate India’s internet growth, disincentivizing the entry of new entrants (especially smaller local entrants), new offerings, and innovation.²¹ Any disruption in the governance framework for internet services is likely to have an adverse effect on the digital economy which will render MeitY’s target of 1 trillion dollar values from India’s digital economy by 2025.²² otiose. Not to mention the adverse impact on TSPs as well since OTTs drive data consumption and subscriptions.

9. TSPs’ demand for same service same rules vis-à-vis OTT Communications emanates from issues with the existing licensing regime.

The type of licensing framework in a sector has a direct impact on the growth of the sector since the same impacts market entry, competition, and availability of networks and services. The approach taken should be based on a review of international best practices that meets regulatory needs without imposing burdensome requirements that unnecessarily impede entry. Presently,

¹⁹ Note 14, para 2.4. “any regulatory intervention may have an adverse impact on the industry as a whole”

²⁰ 8, Preamble to the National Digital Communications Policy 2018, available at:

https://dot.gov.in/sites/default/files/2018_10_29%20NDPC%202018_0.pdf

²¹ OECD, Broadband Networks of the Future (July 2022), available at: <https://www.oecd-ilibrary.org/docserver/755e2d0c-en.pdf?expires=1689860012&id=id&accname=guest&checksum=464420A2D01B72335EA57EC1680E8FEE>

²² MeitY, India’s Trillion Dollar Opportunity, (February 2019), available at: https://www.meity.gov.in/writereaddata/files/india_trillion-dollar_digital_opportunity.pdf

TSPs are facing issues in the manner that telecommunication services are being regulated. The current regulatory framework applicable to TSPs which requires a TSP to acquire a Unified license (with multiple authorizations) prior to provisioning of telecom services involves onerous compliances and the process itself is long and tedious. Besides, the present approach of ‘License Raj’ still remains applicable for the telecommunication sector despite liberalization and relaxation accorded in other sectors. In recognition of these issues, the Department of Telecommunications (DoT) introduced a Draft Indian Telecommunication Bill in September 2022. The Bill seeks to replace the Telegraph Act of 1885, recognizing “the need for a new legal framework that is future-ready”²³. Therefore, as we understand the resolution of issues does not lie in applying the same legacy regulations on OTTs, rather it would best serve the purpose if the present regulatory framework applicable to TSPs is overhauled and simplified.

10. Recognition of the distinction between services provided by TSPs and OTTs by the existing regulatory frameworks.

There are separate regulatory frameworks for services provided by TSPs and OTTs since the services provided by both are distinct and besides there are further distinctions within OTT services on the basis of the type of service being provided such as social media, gaming, online curated content, or intermediary services. Certain services provided by TSPs and OTTs may overlap and may be considered similar to/like the service provided by either, however considering the underlying technological differences, the interdependency and the kind of use the particular service is being put to requires different regulations for TSPs and OTTs. For example, “transportation services” are provided by planes, trains, and cars. Although the purpose/principle remains the same all modes of transportation are regulated differently. Safety regulations appropriate for airplanes when made applicable for trains will be meaningless due to the technological differences.

11. International position:

Many jurisdictions have already determined that OTT apps are not equivalent to traditional telecom operators:

- a. **EU:** BEREC, while rejecting many arguments of ETNO a preliminary assessment of fair contribution debate observed that there was no evidence that large OTTs were free riding on telecom networks. It was observed that any fee or demand of fair contribution would violate net neutrality.
- b. **Thailand:** The NBTC withdrew after consumer and industry experts said that proposal of revenue sharing framework would increase cost and hinder economic growth. The experts warned that OTTs would then pass on the cost to consumers and several players would exit

²³ DoT, Explanatory note to the draft Indian Telecommunication Bill, 2022, available at: <https://dot.gov.in/sites/default/files/Explanatory%20Note%20to%20the%20draft%20Indian%20Telecommunication%20Bill%2C%202022.pdf>

the market if the regulator implemented the revenue share mechanism. The same would be the case in the event any licensing obligations are imposed.

- c. **Australia:** In Apr'2018 ACCC found that there is no basis for requiring equivalent regulatory treatment of OTT and traditional voice services. They even found OTT services not to be fully substitutable for voice services and found OTT services as positive development for consumers and considered these developments as pro-competitive. In so far as blocking of illegal website is concerned and as already detailed hereinbefore, there are ample legislations available in India which are used for the purpose of take-down and blocking of websites. Like Australia, India also has legal provisions and the judicial route to seek orders in cases of blocking of copyright infringing websites or the websites engaged in child pornography / extreme materials, and which are also actively used wherein directions are issued to the ISPs to take-down and block by complying to the orders of Court, Enforcement agencies, etc.
- d. **UK (Ofcom):** There is no sufficient close substitutes for termination of calls to mobile numbers to widen the market definition.
- e. **Austria:** With respect to the definition change of 'number based inter-personal communication services' and 'number independent inter-personal communication services' the same is only w.r.t. communication services and not for OTT in general. As submitted hereinbefore, the voice and text services are mostly an additional feature of most of OTTs and not the main feature of their services.
- f. **Bangladesh:** The examples of the regulatory approach adopted in Bangladesh (163) which is two steps below the rankings of Press Freedom Index compared to India (161) would be highly inappropriate to adopt or to follow and if OTTs were to have commercial negotiation with infrastructure provider, the same would be highly unfair and retrograde.
- g. **Brazil & USA:** Countries where OTTs are not regulated and in Brazil the same are classified as "Value Added Services" which are neither telecommunication services or broadcast services. Similarly in the US which also believes in the policy to preserve vibrant and competitive free market that presently exist in the internet and other interactive services unfettered by any federal / state legislation. Also there have been no instances of internet shutdowns except certain cases of specific websites having been blocked or restricted on grounds of national security or during emergency. Clearly, the freedom of press & freedom of expression has been given the paramount place in the scheme of things. India must also consider following this model.

RESPONSES – ISSUES FOR CONSULTATION

A. Issues Related to Regulatory Mechanism for OTT Communication Services

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

Presently the terms “digital services” and “OTT services” are used interchangeably and include various services such as online buying and selling, OTT communication and messaging services, OTT video streaming services, digital news, search services, navigation services, ride hailing services, dating services, delivery and logistics services etc. with a wide range of functionalities. Prescribing a definition of OTT services would mean limiting the scope of the said term to include services existing at the time of defining the term and in the said context only. The meaning and definition of the term OTT services has changed over the years due to technological advancement and innovations in using those advancements. TRAI in the CP has rightly noted that “...changes in network technology have supported the creation of an *ecosystem of online applications* including over-the-top (OTT) services...” (emphasis added). The range of services provided by OTTs and the technology being used is evolving each day, making it unviable to prescribe a definition which includes all present and future services that may be provided by OTTs alongwith the technology being used. Historically, the term “OTT” was used to describe services which bypassed traditional gatekeepers, particularly the provision of content directly to consumers. While this disintermediation value of OTTs is still relevant, “OTT” is now used to mean practically all services provided via the public internet and includes the entire app ecosystem. Any attempt to include all OTT services, digital services, and apps under one definition will result in a classification that is simply too broad to be meaningful for any regulatory purpose.

2. 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.

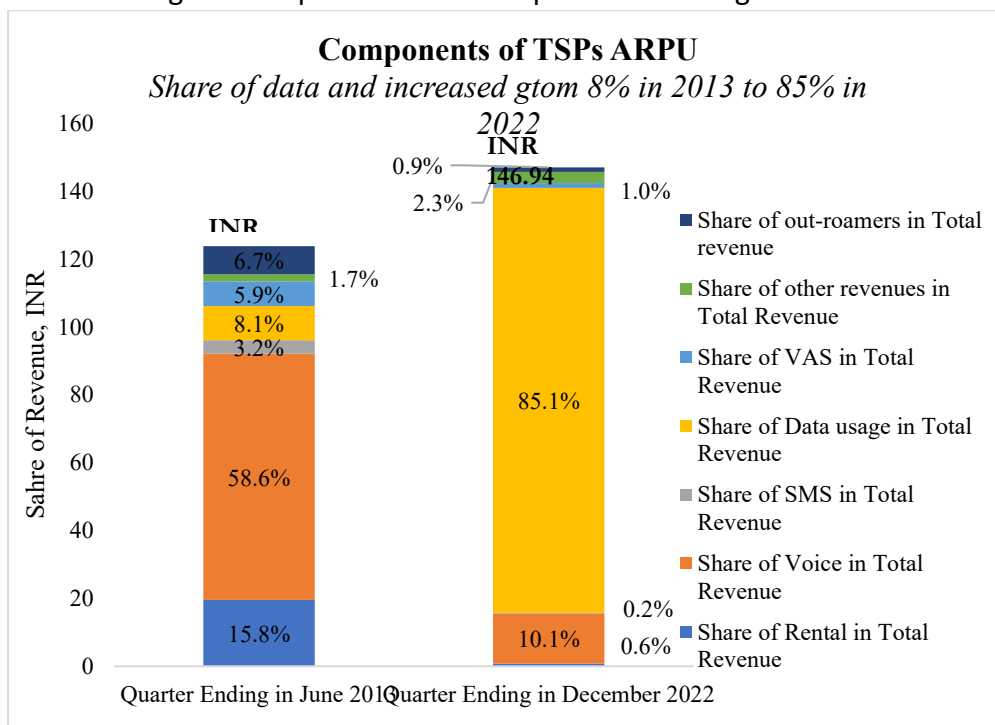
It is not possible to classify OTT services on the basis of an intelligible differentia since an OTT application can have multiple functionalities/features in the same application that cannot be considered independently as the same are linked in an intricate manner. Such functionalities are embedded in the application providing OTT services which allow the user to use all features of the OTT service. For example, applications for renting cars for travel purposes have functionalities which connect drivers and passengers, allow communication between drivers and passengers, plan routes, enable various modes of payments, provide rating to the driver or lodge complaints etc. For the application to function and provide all the requisite services to the user, it is imperative that all these features work in tandem. Any attempt to delineate any of the above features such as communication, from such applications would be artificial as it would not enable drivers

and passengers to communicate and could lead to market fragmentation and even market failure for such car renting applications.

3. 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.

Communication is an integral part of any OTT service and since all OTT services involve an element of interactivity and communication, therefore defining “OTT communications” separately is not viable. Any attempt to provide a definition for OTT services or OTT communications will not only lead to market fragmentation/market failure for the OTT service in question (as detailed in our response to question 2) but will also impact the TSPs adversely as OTT services are driving data consumption, which accounted for 85.1% of the TSP revenues as on December 2022. The TSPs’ demand for “same service same rules” will be detrimental to the TSPs themselves as “... OTT companies and telecommunication service providers engender benefits for each other in a symbiotic, complementary and mutually reinforcing manner.”²⁴

The following chart depicts data consumption accounting for 85.1% of the TSP revenues -



Source: TRAI

It is reiterated that OTTs ride on top of the internet provided by the TSPs and since OTTs are dependent on TSPs and that they are not a part of the same relevant market.

²⁴ As stated in ITU -D’s report of 2021. Source: <https://www.itu.int/en/ITU-D/Study-Groups/2018-2021/Pages/Publications.aspx>

Accordingly, it would be incorrect to mandate imposition of the same regulation on OTTs since the services provided by OTTs cannot substitute the services provided by TSPs. Imposition of regulations applicable to TSPs on OTTs would result in impacting OTTs adversely and benefitting TSPs to the detriment of the OTT services market.

- 4. 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.**

Please refer to our response to Issue no. 3.

- 5. Please provide your views on the following aspects of OTT communication services vis-à-vis licensed telecommunication services in India:**
- a. regulatory aspects;**
 - b. economic aspects;**
 - c. security aspects;**
 - d. privacy aspects;**
 - e. safety aspects;**
 - f. quality of service aspects;**
 - g. consumer grievance redressal aspects; and**
 - h. any other aspects (please specify).**

Kindly provide a detailed response with justification.

The IT Act and the relevant IT Rules include provisions that safeguard privacy, security, and safety aspects of OTT communications services. The said aspects are also likely to be covered under the Digital Personal Data Protection Bill and the Digital India Act.

The need for economic regulation of OTT communication services does not arise since the market for OTT communication services is highly competitive allowing the user to choose from multiple OTTs along with the option to use/consume/switch between more than one service at any given time, which is not the case with TSPs. Additionally, OTT services do not acquire and exploit scarce natural resources (spectrum) but run on top of existing TSP networks.

OTTs are delivered over the public internet provided by TSPs and hence their quality of service depends on the underlying network infrastructure deployed by the TSPs. The application layer upon which OTTs operate does not control the underlying network infrastructure which is already regulated by TRAI. Other quality of service aspects like consumer choice are determined by market forces in cases of OTTs. The very nature of

OTT services allows consumers to easily download, delete, and move/switch to other OTT communication applications that offer the similar service.

The present regulatory conditions have enabled the market to grow organically which in turn has provided multiple choice to consumers. Low switching costs and availability of alternatives enable consumers to download and use multiple OTT communication services and to migrate between them easily. Any regulatory intervention will have an adverse impact on the growth and will negate these advantages by imposing entry costs. The TSP market is an example of how burdensome regulation could result in limited consumer choice, with only two or three alternative service providers and high switching costs.

6. 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.

There is no need to bring OTT services under any licensing or additional regulatory framework as the same are adequately governed and regulated by the IT Act & Rules, and other relevant legislations. The landscape is highly competitive which benefits consumers by providing multiple alternatives and encourages service innovation. Regulatory intervention on the behest of certain stakeholders will have an adverse impact on competition which in turn will lead to market fragmentation.

As detailed in our preliminary submissions, the services provided by OTTs are distinct from the services provided by TSPs which means that the said services are not substitutable however the relationship between them is symbiotic. For example, TSPs have the ability to provide content and application services, however OTTs cannot provide network connectivity. TSPs earn revenue from OTT services (as users are charged for the data they consume while consuming OTT services), whereas OTTs do not earn revenue from TSP services. Additionally, OTT services are not interoperable like the TSP services (a subscriber of one network operator can call a subscriber of another network operator, but a user of an OTT app/service can generally only interact with users of the same OTT app/service).

The existing regulatory framework applicable to TSPs requires the TSPs to acquire a Unified License with multiple authorizations and onerous compliances. The need for such regulations for TSPs arises from the fact that the TSPs are granted exclusive rights (as detailed in our preliminary submissions) including but not limited to the right to acquire and exploit spectrum, and the right to obtain numbering resources. The issues raised by TSPs with regard to OTT communications have cropped up as a consequence of issues being faced by TSPs with the present licensing framework. It is essential that the issues of TSPs be addressed by making suitable amendments to the existing licensing regime rather than imposing the existing licensing regime on OTT communications.

- 7. 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:**
- a. lawful interception;**
 - b. privacy and security;**
 - c. emergency services;**
 - d. unsolicited commercial communication;**
 - e. customer verification;**
 - f. quality of service;**
 - g. consumer grievance redressal;**
 - h. eligibility conditions;**
 - i. financial conditions (such as application processing fee, entry fee, license fee, bank guarantees etc.); and**
 - j. any other aspects (please specify).**

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

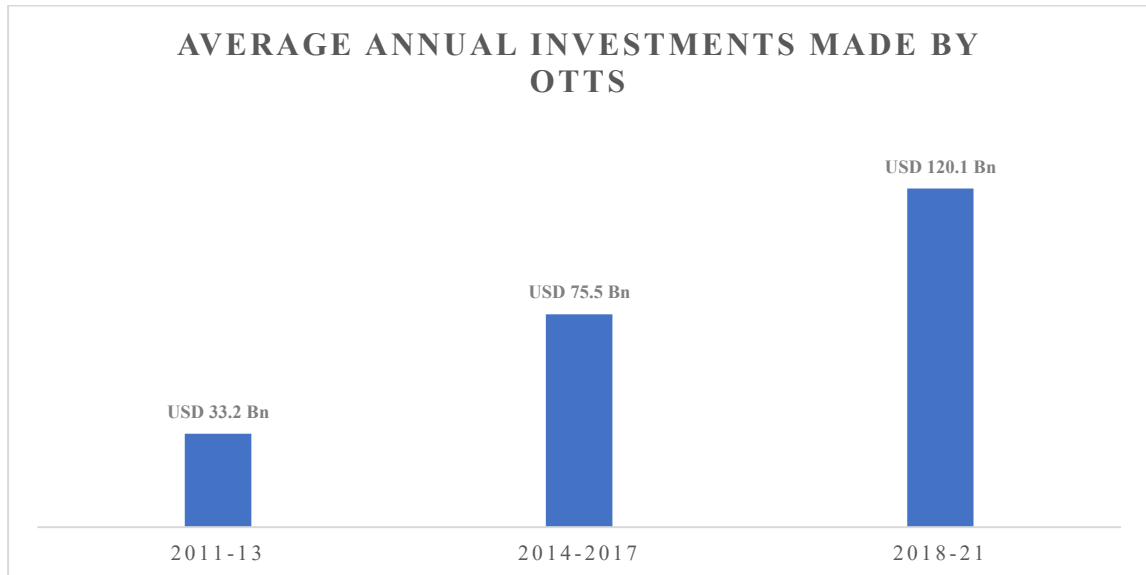
Please refer to our response to Issue no. 6. It is reiterated that there is no need to bring any OTT services under a licensing/additional regulatory framework. The existing laws applicable to OTTs including the IT Act and IT Rules adequately provide provisions that prescribe/safeguard interception, monitoring, decryption of any information, privacy and security, and other aspects. Any additional regulatory measures should be introduced by making suitable amendments in the existing laws.

- 8. 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.**

As demonstrated above, OTTs and TSPs have a symbiotic relationship, therefore any collaborative framework between them should involve mutually agreed commercial terms, and not regulatory measures such as mandating network usage fees (NUF).

For example, OTTs are already contributing towards infrastructure expansion through the development of Content Delivery Networks (CDNs) and projects to lay deep-sea cables, among others. From 2011 to 2022, OTTs have invested almost USD 900 billion into network

infrastructure, with an average spend of about USD 120 billion a year from 2018 to 2021²⁵. These investments are only increasing with the rise in consumption.



Source: Analysis Mason [Report](#) on The Impact of Tech Companies' Network Investment on the Economics of Broadband ISPs dated October 2022

The ability to transmit (provide network connectivity) lies with the TSPs and content that boosts user demand for use of such network connectivity is provided by the OTTs making TSPs and OTTs mutually interdependent. In the absence of good content to boost user demand, building transmission pipes/providing connectivity will not be viable, similarly creating content in the absence of the ability to transmit the same is not viable either. Further, TSPs and OTTs have a symbiotic relationship which allows the OTTs to ride on the internet provided by TSPs and the OTTs in turn boost the revenue of the TSPs (users consuming OTT services require internet access) by driving the demand for the transmission capacity provided by TSPs.

As the need for more bandwidth-intensive OTTs arises (such as video streaming services), consumers are willing to pay for higher-tiered services that provide faster speeds and greater bandwidth. These high tiered services are provided by TSPs to consumers at a premium. In other words, TSPs are using OTTs (users consuming OTT services require internet access) to increase their revenues, which in turn would enable lead to higher investments in the TSPs' networks. As demonstrated in the CP, TSPs' average revenue from data usage has increased tenfold, from 8.10% in June 2013 to 85.1% in December 2022 driven by content consumption on OTT services.

²⁵ Esya Center, Regulation of OTT Communications Services: Justified Concern or Exaggerated Fear?, available at: <https://www.esyacentre.org/documents/2023/1/31/regulation-of-ott-communications-services-justified-concern-or-exaggerated-fear>

- 9. 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.**

Introduction of a network usage fee may have severe ramifications which may have a significant impact on the present mode significantly and may irreversibly change the fabric of the internet and its core elements of success. The internet is a network of networks connecting private as well as state-owned entities for the free flow of communications. Agreements governing the exchange of traffic between networks rely upon voluntary, commercial negotiations and are the foundation of the internet's networking model.

The requirement to pay network usage fee will defeat the principle of net neutrality which provides for equal, non-discriminatory treatment of content by internet access providers/TSPs. Safeguarding net neutrality, we believe, is vital to ensure development of the internet and to ensure that the users derive maximum benefits. Net neutrality ensures that all data on the internet is treated equally by ISPs and governments, regardless of content, user, platform, application, or device. In India, the regulatory framework on Net Neutrality prohibits discrimination, restriction, or interference in the treatment of content by way of blocking, degrading, slowing, or granting preferential speeds or quality to any content. Payment of network usage fee may result in preferential treatment to a select few, while discriminating the others. Further the imposition of network usage fees may have an adverse impact on competition and freedom of choice for users as it may act as a deterrent for smaller players in the market. The inability of the smaller players to pay network usage fee will result in elimination of the smaller players as they will not be able to compete with larger players who would have the ability to pay.

Internationally, in South Korea, it was observed that imposition of a network usage fee impacted the future of data and internet use in the country adversely with the foreign and domestic OTTs choosing to suspend/degrade their services, or simply exit the market rather than pay high interconnection charges to the ISPs²⁶. South Korea may also witness a decline in network investment. There are concerns that the new submarine cables such as Google Apricot, Facebook's Echo, and Bitfrost will no longer land in South Korea because of the introduction of the network usage fee and the latency problems it caused. It is observed from South Korea's experience of imposition of network usage fees that interference in voluntary negotiations between networks, without evidence of market failure, can result in adverse consequences on business as well as consumers.

²⁶ See WIK-Consult, Competitive conditions on transit and peering markets, available at: https://www.bundesnetzagentur.de/EN/Areas/Telecommunications/Companies/Digitisation/Peering/download.pdf?__blob=publicationFile&v=1

B. Issues Related to Selective Banning of OTT Services

- 10. 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.**

- 11. 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.**

While the consultation paper is titled “*Regulatory Mechanism for Over-the-Top (OTT) Communication Services and Selective Banning of OTT Services*”, the scope of banning has been extended to all types of OTT services. In the capacity of a content platform or a digital news content platform, it is submitted that there are adequate regulations and laws in place which are capable of addressing all concerns instead of bringing in the content platforms/digital news platforms or content OTTs or any kind of other digital services which are capable of being offered through OTTs whether education, healthcare, online publication, social media websites, or any other OTT hosting content.

We would like to highlight the already existing legislative and regulatory landscape that already governs the content, digital news and/or the generic OTT services:

- a. First and foremost, the FDI infusion can only be done by way of prior approval of the Central Govt. for all digital media companies including the ones which are in the business of uploading, streaming of news and current affairs through digital media under the applicable FDI policy. These digital news websites/portals, news aggregators and news agencies operating through digital media are also required to submit details such as shareholding patterns, names, and addresses of shareholders, promoters, and significant beneficial owners to MIB.

- b. Further, all the media entities are covered under several statutes like Cable TV Act 1995, Indian Penal Code 1860, Emblems and Names (Prevention of Improper Use) Act 1950, Indecent Representation of Women (Prohibition) Act 1986, SC & ST (Prevention of Atrocities Act) 1989, Protection of Children from Sexual Offences Act 2012, Copyright Act 1957, etc.

- c. The media entities are also bound by various guidelines issued by the respective Ministries and self-regulatory bodies like NBDSA, BCCC, DMCRC, DPCGC, who have been mentioned by the Supreme Court in several judgements.

In any event globally it is accepted that internet-based services should not be statutorily regulated but the content thereof should be subject to self-regulation. Making OTT subject to stringent regulation will only lead to the growth story of the OTT services being

brought to a grinding halt, reduce the number of players offering digital services and negatively impact service quality. The digital content and digital news must be governed by principles of self-regulation and the same is what is even contemplated and structured in the IT Rules 2021 which are currently a subject matter of challenge.

Any attempt to selectively ban under a separate procedure or even to consider bringing them under the scope and ambit would be highly detrimental to free speech which is guaranteed under the Constitution and upheld by the Supreme Court in various judgements. It is further imperative to note that Selective banning of OTT services could also have economic impact as it could lead to a decrease in foreign investment and a negative impact on trade relations with other countries. Additionally, it could harm the reputation of the country as a destination for business and innovation. Ultimately, the decision to selectively ban specific websites must be based on a careful analysis of the potential benefits and drawbacks. If the primary motivation is to suppress dissenting voices or limit access to information, then such measures may be viewed as an infringement on civil liberties and could have unintended consequences.

Thus, there is no requirement for putting in place a regulatory framework for selective banning of OTT services. The provisions of the IT Act and IT Rules adequately prescribe provisions that address concerns relating to security including the power of the Central Government to issue directions for blocking of information for public access of any information through computer resource in case it is necessary or expedient to do so, in the interest of sovereignty and integrity of India, defence of India, security of the state, friendly relations with foreign states or public order or for preventing incitement to the commission of any cognizable offence relating to the above (Section 69A of the IT Act). Requisite action such as blocking of content/information alongwith blocking of entire websites and applications is already being taken under the provisions of the IT Act. In case there are any gaps/shortcomings, the same should be addressed by making suitable amendments in the existing legislation. It is also highlighted that internet shutdowns or suspensions can have a cascading effect (as observed in the CP as well²⁷) and banning specific services can have severe implications on civil liberties including free speech. Not to mention the significant economic costs. The loss caused by internet shutdowns crossed INR 187 billion in 2022²⁸ as per estimates from the Internet Society.

²⁷ CP – Point 3.14 on Page 66 -

“Shutdown of telecommunications or the internet can have significant ramifications for a country’s economy. It also disrupts critical services such as education and healthcare.”

²⁸ See BQ Prime, The Economic Cost of Small Internet Shutdowns, available at: <https://www.bqprime.com/opinion/the-economic-cost-of-small-internet-shutdowns>

- 12. In case it is decided to put in place a regulatory framework for selective banning of OTT services in the country, -**
- a. Which class(es) of OTT services should be covered under selective banning of OTT services? Please provide a detailed response with justification and illustrations.**
 - b. What should be the provisions and mechanism for such a regulatory framework? Kindly provide a detailed response with justification.**

Please refer to the response to Issue no. 11.

- 13. Whether there is a need to selectively ban specific websites apart from OTT services to meet the purposes? If yes, which class(es) of websites should be included for this purpose? Kindly provide a detailed response with justification.**

Please refer to the response to Issue no. 11.

- 14. Are there any other relevant issues or suggestions related to regulatory mechanism for OTT communication services, and selective banning of OTT services? Please provide a detailed explanation and justification for any such concerns or suggestions.**