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Sent: Thursday, August 17, 2023 1:16:47 PM

Subject: Comments/recommendations on the Consultation Paper on Regulatory Mechanism for Over-The-Top ("OTT") Communication Services, and Selective Banning of OTT Services

Dear Sir,

Please see attached our comments, pursuant to the Consultation Paper released by Telecom Regulatory Authority of India ("TRAI"), inviting comments on the Paper on Regulatory Mechanism for Over-The-Top ("OTT") Communication Services, and Selective Banning of OTT Services.

This submission is made on the behalf of Luthra & Luthra Law offices, a full- service law firm, as well as one of the leading law firms in India.

The Consultation Paper on Regulatory Mechanism for OTT Communication Services, and Selective Banning of OTT Services, is undoubtedly a welcome initiative for the Indian telecom sector, and as a part of the consultative process, we hereby put forward these recommendations, as an attempt to contribute towards making the legal framework more appropriate and contextual.

Please feel free to reach out to us, should you require any clarifications, or if anything else is required from our side.

Warm & Kind Regards,
Somya



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RESPONSE TO THE TRAI CONSULTATION PAPER ON REGULATORY MECHANISM FOR OTT COMMUNICATION SERVICES AND SELECTIVE BANNING OF OTT SERVICES

INTRODUCTION

Through a notification dated July 7, 2023, the Telecom Regulatory Authority of India (“**TRAI**”), released a consultation paper on Regulatory Mechanism for Over-The-Top (“**OTT**”) Communication Services, and Selective Banning of OTT Services (“**Consultation Paper 2023**”). The Consultation Paper 2023 mainly discusses the scope and issues regarding regulating OTT communication services vis-à-vis OTT platforms.

There were various previous attempts at regulating these OTT communication services before, but these never fructified. TRAI issued its first consultation paper on OTT in 2015 followed by Department of Telecommunication’s (“**DoT**”) report in 2015. Subsequently, TRAI released another consultation paper on Regulation of OTT communication in 2018 followed by recommendations in 2020. Again, based on the request of the DoT, TRAI has issued the Consultation Paper 2023. It is important to note that the Government had in 2021, issued the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (“**Intermediary Guidelines**”) under the Information Technology Act, 2000 (“**IT Act**”) which significantly governs the regulation of OTT services.

The issues raised by TRAI seeking comments on framing a suitable framework for OTT communication services, along with our corresponding recommendations are listed down below.

Our analysis and recommendations are as follows:

- 1. What should be the definition of OTT services? Kindly provide a detailed response with justification. AND**
- 2. What could be the reasonable classification of OTT services based on intelligible differentia? Please provide a list of the categories of OTT services based on such classification. Kindly provide a detailed response with justification.**

The jurisdictions have not reached to a common consensus on the definition of ‘OTT services’. However, International Telecommunication Union (“**ITU**”) in its recommendation (D.262) (“**ITU Recommendation**”) titled ‘*Collaborative Frameworks for OTTs*’ defines an OTT service as ‘*an application accessed and delivered over the public internet that may be a direct technical/functional substitute for traditional international telecommunication services*’. Further, various organizations have defined OTT services basis the objective that they intended to achieve. For instance, the Commonwealth Telecommunications Organization (“**CTO**”) in their report entitled ‘*Over-The-Top Services: Understanding the Challenges and Opportunities*’ (2018) defines OTT services, ‘*as online services which can potentially substitute traditional telecommunications services such as voice telephony and messaging (SMS) services*’. The Body of European Regulations for Electronic Communications in their report on ‘*OTT Services*’ (2016) defines OTT service as ‘*content, a service or an application that is provided to the end user over the public Internet*’.

Recommendation:

Telecoms and internet and services platforms play complementary roles in delivering Internet services, content, and applications to end users. Such platforms encompass a wide range of services, including voice communication, Instant Messaging, Cloud Services, Internet Television, and Social Networking. Further, ITU-D in its report of 2021 stated that ‘communications-based OTTs typically differ in the number of ways from traditional telecommunications services’. Therefore, we recommend that it shouldn’t be perceived that the internet platforms and services are substitutable to traditional telecom services. If at all required, the TRAI may adopt broad definition of OTT services as provided by ITU.

3. What should be the definition of OTT communication services? Please provide a list of features which may comprehensively characterize OTT communication services. AND
4. Reasonable classification of OTT communication services based on Intelligible differentia. List of categories of such OTT communication services. Kindly provide a detailed response with justification.

OTT communication service providers offer additional features in comparison to the services offered by the telecom service provider (“TSP/TSPs”). For instance: -

- a) Real-time features - live location tracking, read receipts (message read or delivered and not read), the typing feature, last seen feature etc.
- b) Group communication - real time group audio and video chats and calls
- c) Multimedia exchange - sharing of images, pdfs, word, audio, video, links etc.
- d) Character limit – no limit on the no. of words per message.
- e) Other features – emojis, GIFs etc.

However, a majority of OTT platforms provide such basic functionalities as mentioned above, such as payment apps (Paytm, Gpay), e-commerce (Amazon, Flipkart), food delivery (Zomato, Swiggy) provides features of placing calls or messages. Therefore, given the multiple features offered by the OTT platforms, it is difficult to create a distinction between the ‘OTT communication service providers’ and ‘OTT non-communication service providers’. For the purposes of regulating OTT communication services, if the regulators create such distinctions – it may lead to a situation where OTT platforms which provide features similar to communication OTT providers would be treated differently under the law, basis the basic functionalities offered to the end customers.

Recommendations:

- **Therefore, in our recommendation it would not be prudent to create any distinction between the ‘OTT communication services’ and ‘OTT non-communication services’ and thereby formulate any comprehensive regulation basis such distinctions.**
- **However, if at all required, the existing laws and regulations can be strengthened relating to traceability, data protection, cybersecurity, consumer grievances redressal, lawful interception and monitoring, encryption, unsolicited commercial communications (“UCC”), and both the ‘OTT communication services’ and ‘OTT**

non-communication services' should be subjected to such regulatory aspects, without any discrimination.

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 primary regulation for governing OTT communication services is the IT Act and the rules formed thereunder namely, the Intermediary Guidelines, Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 (“**SPDI Rules**”) etc. Additionally, certain aspects of OTT communication services are also subjected to various regulations such as - **security** (lawful interception – Section 69 of the IT Act), **privacy and confidentiality** (Section 43A of IT Act & SPDI Rules), **consumer grievance redressal mechanism** (IT Act & Consumer Protection Act, 2019 (“**CPA**”)), **cyber security** (CERT-In Directions), **content** (Indian Penal Code, 1861 & Indecent Representation of Women (Prohibition) Act 1986 along with the IT Act and the Intermediary Guidelines). Apart from the above regulatory framework, the OTT communication services are also subjected to sector specific regulations such as health, insurance, financial etc.

As discussed above, in our view the extant regulations for OTT services including OTT communication services suffice. The complete overhaul of regulatory regime for OTT communication services will significantly hamper the development, innovation and investment required to foster the growth of OTT ecosystem. Considering that the OTT ecosystem consists of many start-ups and early-stage companies, introduction of a comprehensive regulatory regime would not be prudent at present stage and can prove to be unduly onerous. However, in view of the large-scale adoption of the OTT services the existing laws can be strengthened or certain aspects such as ‘quality of service’ and ‘UCC’ may be regulated by either introducing ‘soft-touch regulation’ or ‘self-regulation’.

Recommendations:

- **TRAI to thoroughly examine and analyse the current regulatory framework applicable to OTT communication services along with the proposed reforms i.e., Digital Personal Data Protection Bill, 2022 (“DPDP Bill”), the Digital India Bill (“DIB”) and the cybersecurity bill. Thereafter, clearly identify the gaps in the existing regulatory regime applicable to OTT communication services.**

- *If at all any gaps are still perceived, then TRAI must consider to either strengthen and update the existing regulatory framework by way of amendments or inclusion of obligations under the DPDP Bill, the DIB and the cybersecurity bill – to plug in the identified gaps, instead of a complete overhaul of the regulatory framework.*
- *However, in view of the large-scale adoption of the OTT services, TRAI must trace the developments and intervene only if it is absolutely necessary, by regulating certain aspects such as ‘quality of service’ and ‘UCC’ either by introducing ‘soft-touch regulation’ or ‘self-regulation’.*

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.

Currently, as discussed in response to query 5 above, the OTT communication services are subjected to obligations, reporting requirements and several restrictions under various legislations.

The proposal for regulating OTT communication services is premised on the assumption that both the OTT communication service provider and the TSP offer similar services and hence should be made subjected to similar obligations. However, OTT communication services are fundamentally different in their characteristics and functionalities from that of the traditional TSPs and cannot be made subject to the same regulatory and legal framework. The service providers providing OTT communication services do not have/use their own network or spectrum, rather these services usually are in form of web/mobile-based applications that are accessed and delivered over the public internet. While their functionality may seem similar, they are based in vastly different technologies. As also noted by the ITU in its 2021 report, OTTs and TSPs rather engender benefits for each other in a symbiotic, complementary and mutually reinforcing manner. Placing dissimilar services on the same pedestal would be against the principle of level playing field as well and will be contrary to the principle of equality as well as will be discriminatory in nature. Further, in line with the above-mentioned inherent differences, for offering the OTT communication services, the OTT service providers are in fact dependent on the services of TSPs, while the converse is not the same case - in which the TSPs can operate in both the network and application layers.

OTT communication services are unregulated in majority of the jurisdictions. Although, the possibility of developing a comprehensive regulatory framework is being discussed in few jurisdictions, however such discussions are at preliminary level. For e.g.: various countries including Argentina, Chile, Israel, South Korea, South Africa, Kenya, Ghana, Thailand, Sri Lanka, Japan have not adopted any formal regulatory approach for OTT services. In *United States of America*, ‘telecommunications services’ (e.g., voice telephony) are heavily regulated than the ‘information services’ (e.g., text messaging). Similarly, the OTT services in *Brazil* are not subjected to any licensing or registration as they are categorized as ‘value-added services’ owing to the reason that these services complement and assist telecommunication activities and are considered neither telecommunication nor broadcasting services. However, in *Europe*, the European Electronic Communications Code (EECC) provides regulatory framework for new services including OTT communication services which distinguishes between the number-

independent service providers (*online messaging services that do not interconnect with the public telephone network such as instant messaging or services that use numbers as mere identifiers*) and number-based service providers (*traditional communication services that interconnect with public telephone network such as VoIP*), subjecting the former to light touch regulations.

Adopting the global approach, TRAI in its recommendations on “Regulatory Framework for Over-the Top (OTT) Communication Services” dated September 14, 2020 (“**TRAI Recommendations 2020**”) stated that ‘*TRAI recommends that 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*’. Since then, ITU’s approach and the international practices have remained unchanged. ITU has not specified any regulatory mechanism for OTT communication services, in fact it encourages voluntary commercial agreements between TSPs and OTT service providers. Further, the Consultation Paper 2023 does not examine and analyse the change in international approaches for the regulation of OTT communication services for the period from 2020 - 2023. Commercially as well, in the short time period of last three years there have not been any significant change in the manner of provision of OTT services or its impact on security, privacy and similar aspects at large. In fact, recognising the importance of such aspects from a consumer’s perspective as well as to ensure compliance with existing IT laws applicable to them - OTT service providers have built security and privacy by design into their offerings. Hence, a reconsideration of TRAI’s 2020 stance on the regulatory framework around OTT services is not yet warranted.

Recommendations:

- **Therefore, in view of the above, we recommend that the OTT communication services should not be brought under any licencing or regulatory framework. However, TRAI must track the developments in this sphere and intervene only by way of light touch regulation, if at all necessary.**
- **In the Indian context, it is important to note that the telecom operators are granted license under Section 4 of the Telegraph Act, 1885 (“Telegraph Act”) to establish, operate or maintain a telegraph. The OTT platforms will not come under the definition of ‘telegraph’ and hence will be outside the ambit of Section 4 of the Telegraph Act.**
- **Further, the National Digital Communication Policy (“NDCP”) 2018 envisages to ensure “a holistic and harmonized approach for harnessing Emerging Technologies” by promoting “innovation in the creation of communication services and network infrastructure by developing a policy framework for ‘Over the Top’ services” as a strategy to achieve the goals of the Propel India Mission. The focus of NDCP is to evolve a policy to meet its objectives rather than bring it under the licensing framework which will defeat the objectives of innovation or Propel India Mission.**

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 guarantee etc.); and
 - j) any other aspects (please specify).

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

As discussed in response to query 5, there are adequate legislations which govern majority of the aspects of the OTT communication services. For instance, *lawful interception* is governed under Section 69 of the IT Act and the rules formed thereunder; *privacy and security* are governed under Section 43A of the IT Act, SPDI Rules formed thereunder and the CERT-In Directions; *consumer grievance redressal* is governed under IT Act & CPA. Further, as discussed in response to query 2&3, the distinction between the ‘OTT communication service providers’ and ‘OTT non-communication service providers’ for the purposes of regulating ‘OTT communication services providers’ is flawed and incorrect.

Additionally, with respect to *emergency services*, as mentioned in response to query 6, there exist inherent differences between the OTT communication service providers and TSPs. Hence, imposing similar obligations on OTT communication service providers regarding emergency services would be impractical. TSPs own the network and have access to geo-location of the customers however OTT communication service providers are dependent upon various factors such as device permissions for accessing geo-location, Wi-Fi etc. This is in line with the TRAI recommendations on Internet Telephony (2017) where it was discussed that ‘*accurate identification of geographical location of subscriber is a must for availing emergency services and it may be a challenge to accurately map position information while originating the emergency call*’. Therefore, imposing such obligations on OTT communication service providers is not recommended.

Recommendations:

- *TRAI should introduce light touch regulatory framework without imposition of obligations such as license fee, customer verification or eligibility conditions, to address the regulatory imbalance and thereby easing the regulatory and licensing compliances for OTT services.*

- For the purposes of regulation, TRAI should not make any distinction between the ‘OTT communication services’ and ‘OTT application services’ to the extent that it relates to the aspects mentioned above including data protection laws, consumer grievances etc.
 - However, after careful examination of the present regulatory framework and the risks involved, TRAI may, if at all required, provide soft touch regulations on the aspects such as UCC in view of the tremendous increase in the adoption of OTT communication services by the service providers such as brands or e-commerce platforms, in line with the Telecom Commercial Communication Customer Preference Regulation, 2010 and may provide minimum quality of service (QoS) requirements.
8. Is there a need for a collaborative framework between OTT communication service providers and licensed telecom service providers? If yes, what should be the provisions of this collaborative framework? AND
9. Potential challenges arising out of collaborative framework between OTT communication service and Licensed TSP. How will it impact the aspects of net neutrality, consumer access and consumer choice? What measures can be taken to address this?
- a) Need for a collaborative framework between OTT communication service providers and licensed TSPs

TSPs and OTT communication service providers have a symbiotic relationship i.e., mutually reinforcing relationship where they are collaborating and leveraging this relationship by developing commercial partnerships with one another. Further, OTT communication services in collaboration with TSPs are directly investing towards the network infrastructure.

Evidently, there exist a voluntary collaborative framework between the TSPs and OTT communication service providers. This is in line with the ITU Recommendations on collaborative frameworks for OTTs which among other provides for adoption of enabling policies and regulatory framework for regulating OTT, mutual co-operation between the TSPs and OTTs and reduction of regulatory burden on the traditional TSPs.

- b) Potential challenges arising out of collaborative framework between OTT communication service providers and licensed TSPs

The imposition of mandatory collaborative framework by TRAI between the TSPs and the OTT would legitimize the demands of the TSPs to have in place mandatory collaborative frameworks such as ‘cost sharing arrangements’ or ‘revenue sharing arrangements’ or ‘infrastructure sharing agreement’ (“**Arrangements**”). The demands of implementation of the such Arrangements are not reasonable because of the reasons manifold, which are detailed out below:

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1. Impact on net neutrality: Such Arrangements would negatively impact the principle of net neutrality which requires the TSPs to treat all content equally, without prioritizing

access to any one platform either by creating fast lanes or by blocking or throttling access to others. It may empower TSPs to block/slow down content by OTT players who don't enter into a cost-sharing arrangement or may deny users access to products or services like communication and e-commerce apps.

2. *Impact on consumers:* Subjecting OTT communication service providers to usage fee would be detrimental to consumers as it is very likely that such costs would pass on to end consumers which may lead to higher expenditures or degraded quality content. Additionally, such mandatory Arrangements would likely compel OTT service providers to compete on procuring a beneficial deal and would certainly take away their current consumer centric focus i.e. is to be competitive on the quality of services, accessibility to consumers and diversity of content.
3. *Uneven negotiating power between telcos and OTT services:* As mentioned in response to question 6 above, while OTT service providers are dependent on the services of TSPs, the converse is not the case - in which the TSPs can operate in both the network and application layers. Thus, the negotiating power in business interactions between telcos and OTT service providers is already skewed in favour of telcos and any mandatory Arrangements would tip the scale. Hence, voluntary partnerships built on the basis of inherent strengths of both players and market forces would be commercially more appropriate.
4. *Entry barrier to start-ups:* Such Arrangements would create hindrance for the growth of startups or small/medium sized companies as they would be at a disadvantageous position in negotiating deals with the TSPs, in comparison with large sized OTT communication providers.
5. *OTT Communication service providers are drivers of investment:* OTT communication service providers are contributing towards expansion of network infrastructure by collaborating with the TSPs. This is evident from the example of partnership between Telco and OTT player as existing in the market.

Recommendations:

- *TRAI should not come up with and implement any mandatory collaborative framework between the TSPs and OTT communication service providers as such a step would put onerous obligations/ restrictions on the OTT communication service providers.*
- *In line with the ITU Recommendations, TRAI should allow such voluntary partnerships with such terms and conditions as mutually agreed between them, to develop through voluntary commercial agreements (perhaps even partnerships between TSPs and OTTs), and not necessarily a change in the regulatory framework.*