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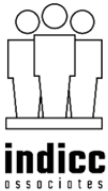
Sent: Friday, September 15, 2023 8:23:44 PM

Subject: Counter-comments on the Consultation paper on Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services dated 07.07.23

To,
Shri Akhilesh Kumar Trivedi, Advisor (Networks, Spectrum and Licensing), TRAI

Dear Sir, This is with reference to the TRAI's CP on "Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services" issued on 07th [July 2023](#). In this regard, please find enclosed herewith New Indian Consumer Initiative's (NICI) response to the Consultation Paper. We hope that our submission will merit your kind consideration and support.

Warm Regards,



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Response to TRAI’s Consultation Paper on Regulatory Mechanism for Over-the-Top (OTT) Communication Services and Selective Banning of OTT Services dated 07.07.23

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The New Indian Consumer Initiative (NICI) is a community-owned platform that facilitates open discussions about the various challenges and opportunities faced by consumers in the rapidly evolving New Economy. It serves as a space for community-led capacity building, empowering consumers to comprehend and actively lead in matters concerning the public interest. NICI curates inclusive conversations on topics relevant to people from diverse sectors, aiming to enhance citizens' awareness as consumers and actively seek their valuable opinions for well-informed policy development.

New Indian Consumer Initiative by Indicc Associates welcomes the TRAI consultation on Regulatory Mechanism for Over-the-Top (OTT) Communication Services and Selective Banning of OTT Services. TRAI has been a trusted regulator for Indian consumers to rely on to safeguard citizen freedoms on a consistent basis while ensuring fair market competition.

The ‘New Indian Consumer Initiative’ (NICI), aims to look at regulations on Over-the-Top (OTT) services as important for several reasons such as consumer welfare to safeguard the interests and rights of consumers.

OTT services run over the internet, and regulations can play a crucial role in upholding net neutrality principles. NICI advocates for rules that prevent internet service providers and regulators from discriminating against or favouring specific OTT services, ensuring a level playing field for all providers and a free consumer environment.

Well-designed regulations can foster a competitive market for OTT services, promoting innovation and a wider range of options for consumers. We call for rules that encourage new players to enter the market and prevent anti-competitive practices.

By engaging in discussions about regulations on OTT services, consumer organizations can together play a vital role in shaping policies that promote consumer welfare, protect rights, and foster a fair and competitive digital environment.

A. INTRODUCTION:

NICI firmly believes that OTT (Over-the-Top) and TSP (Telecom Service Providers) operators offer distinct services and face unique challenges. Thus, it is essential to carefully examine how to maintain fair and healthy competition in their respective markets. The emergence of OTT services has been a disruptive and innovative force, with Indian consumers readily embracing these technologies. India leads the world in data consumption, showcasing the popularity of OTT-delivered content. This trend has led to significant investments in the OTT sector, benefiting both consumers and providers and the TSPs who facilitate access to these services. Embracing the innovation brought by OTTs can lead to growth in consumer bases and increased revenues for all stakeholders, including TSPs.

In the past, voice was the main product of the telecommunications sector. However, with the development of Internet Protocol (IP) based telecom networks, data has become the main product. The growth in mobile services has outpaced fixed-line services, and the internet has replaced voice as the staple business. Telecommunications companies have transitioned from analogue to digital communication and have introduced new products such as the cloud to create more efficient forms of communication.

Regulation in the telecommunications industry primarily revolves around promoting competition due to the sector's high fixed costs, economies of scale, and barriers to entry, which may lead to monopolistic tendencies. The Telecom Regulatory Authority of India (TRAI) and the Competition Commission of India (CCI) play crucial roles in ensuring fair competition. While TRAI initially had the mandate to regulate competition-related issues, the Competition Act of 2002 expanded CCI's authority in overseeing and promoting competition across various sectors, including telecommunications. A recent ruling by the Telecom Disputes and Settlement Appellate Tribunal (TDSAT) clarified the roles of TRAI and CCI, emphasizing the need for both regulators' methodologies to align when considering competition and substitutability of services in the telecom and internet sectors.

B. SUMMARY OF RESPONSE:

Q1. What should be the definition of over-the-top (OTT) services? Kindly provide a detailed response with justification.

Our Response:

The definition of Over-the-Top (OTT) services is a critical issue in the discussion of their regulation. The definition of OTT services by regulators will determine which entities are regulated and which are not. This is a global issue, and regulators worldwide are trying to define these services to regulate them, whether from the perspective of taxation, fake news, or regulation of intermediaries.

As also rightly indicated by ITU, there is no single universally agreed definition of an Over the Top (OTT) service, and a variety of definitions are used by different bodies and in different forums. But in essence, an OTT service is a service or application which is provided to a user over the internet, in most cases without a network operator being involved. This covers a wide range of services which are provided “over the top” of the internet, including communication

and messaging services and audio and visual broadcasting services. Accordingly, OTT services can be defined as any service provided over the Internet that bypasses traditional operators' distribution channels.

ITU-T in its Recommendation D.262 (05/2019) defined OTT as follows:
“an application accessed and delivered over the public Internet that may be a direct technical/ functional substitute for traditional international telecommunication services”.

The European Commission defines an OTT service as an interpersonal communication service, which is a service that allows direct interactive interpersonal exchange of information via an electronic communications network between a finite number of people, where the persons initiating/participating in the interaction determine its recipients. The issue of defining OTT services is also relevant to debates surrounding the protection of the rights and privacy of consumers using OTT services, given that the regulatory framework for these services is still evolving.

Alternatively, the definition of over-the-top (OTT) services as suggested by OFCOM can be adopted in India as well:

“Over-the-top or OTT services refers to a type of service provided “over the top” of an existing data network connection such as a fixed or wireless broadband connection.”

[Annex 20 of the Mobile Call Termination Market Review 2015-18]

This, however, is an incomplete understanding of OTT communication services as they are not complete substitutes for traditional telecommunication services as how these services are delivered and the infrastructure, they use are different. OTT services use the internet to deliver content and bypass traditional operator networks, while telecommunication services use traditional operator networks to deliver content.

OTTs, or Over-The-Top services, do not operate a network or lease network capacity from a network operator/TSP for the provision of their services. They are not free riders as they do not merely ride on top of the TSPs networks as the name OTT suggests. In fact, they should be named as ‘Content & Application Providers’ or CAPs, as correctly pointed out by BEREK in its report dated October 2022. OTT services are delivered over the TSPs’ network and therefore can only be provided by TSPs to their end-customers. The OTT service providers make huge investments to bring the content as close as possible to the end customers. More importantly, the OTT services are significant revenue generators for the TSPs, without which the network pipes would be virtually empty. The characteristics of OTT services are such that TSPs realize revenues solely from the increased data usage of the internet-connected customers. OTT communication services compete with conventional communication services, such as fixed-line telephony or short messaging services (SMS). However, OTT communication services are not a substitute for the traditional voice and messaging services offered by TSPs as they cannot connect. These apps offer more than just text messaging, providing users with features such as voice calling, video calling, and file sharing.

Q2: 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.

Our Response:

Based on an intelligible differentia, a reasonable classification of OTT services could be based on the type of service they provide. OTT services can be classified into the following categories:

1. **Communication Services:** These services enable real-time person-to-person telecommunication over the Internet, utilizing the network infrastructure of licensed telecom service providers (TSPs).
2. **Media Services:** This category includes OTT services that provide broadcasting and gaming services. These services utilize the network infrastructure created by TSPs but don't directly compete with the services offered by TSPs under their licensed operations governed by the Indian Telegraph Act, 1885.
3. **Trade and Commerce Services:** This category includes OTT services that provide e-commerce and radio services.
4. **Cloud Services:** This category includes OTT services that provide data hosting and management platforms/applications.
5. **Social Media:** This category includes OTT services that provide intermediary applications like Facebook, YouTube, and other social media platforms.

However, the overlaps between these services are such that it is hard to categorise one service into one category for various applications that offer multiple services simultaneously. For example, applications like Google Docs, OLX, Bumble and others of the likes have chatting features, where people can interact with each other via messaging. It is important to see how the regulator is going to look at the interactivity feature of these applications.

The twin features laid down by DoTs Committee Report on Net Neutrality, 2015 may be the guiding principles for defining OTT Communication services:

- i. It is accessed and delivered through an application over the public Internet, using the network infrastructure of the Telecom Service Provider (TSP).
- ii. It is a direct technical/ function substitute for traditional telecommunication services provided by the TSPs.

Q3: 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.

Our Response:

In 2017, the Competition Commission of India (CCI) made a determination that instant communication applications like WhatsApp are not in the same relevant market as traditional electronic communications. The CCI cited key differences in functionalities between OTT communication services and traditional communication networks, pricing conditions, and devices used to access either (any phone for traditional communications vs. smart devices for OTT communications). Additionally, the CCI found that consumers have limited choice in switching between telecommunication networks because of associated switching costs, while services on the communication network such as OTTs are highly competitive, often cost-free (however, a consumer is still required to pay data charges as per plan), and there are no limitations on using multiple services at the same time. This determination is relevant to debates surrounding the regulation of OTT services, as it highlights the differences between OTT communication services and traditional communication networks. It also suggests that the regulatory framework for OTT services should be different from that for traditional communication networks, given the differences in the relevant market.

In lieu of this argument, we need to understand that OTT communication services are not a substitute for the traditional voice and messaging services offered by TSPs as they cannot connect to a traditional PSTN/switched voice network. In fact, OTT providers depend on the physical infrastructure created by TSPs to deliver services to their consumers. All broadband access is controlled by the TSPs alone and OTTs are a dependent industry and not equal. A consumer cannot even access OTT services without first purchasing internet access from a network provider.

Therefore, while defining OTT communication services we need to look at three primary aspects of how these services are different from traditional telecommunication services and how the

1. technology,
2. functionality, and
3. operation

of OTT services are different from that of TSPs. From a technical point of view, telecom networks operate in different layers, have distinct business models, and use different technologies to handle data compared to OTT apps.

From a functional standpoint, OTT communication apps provide a different set of features than TSP services. From an operational perspective, unlike the services provided by TSPs, OTT apps provide device synchronicity, i.e., they can be accessed through multiple internet-enabled devices simultaneously.

OTT communication services cannot be singled out because of their multifunctional nature and due to the rich interactive applications and services they provide to TSP's customers, including voice and messaging services over the Internet.

Thus, it is not necessary to distinguish between different types of OTT services. We have accordingly not proposed a definition for OTT communication services. Please refer to our justification below for further details.

Q4: 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.

Our Response:

In the case of Shri Vinod Kumar Gupta vs. Whatsapp Inc, the Competition Commission of India (CCI) used a market characteristics approach to differentiate between instant messaging applications like WhatsApp and traditional telecommunications services. The CCI observed that instant communication applications like WhatsApp could not be equated with traditional electronic communication services such as texting and voice telephony as provided by Telecom Service Providers (TSPs).

The following are the key differences between instant communication applications and traditional telecommunications services:

1. Dependence on the Internet: Instant communication applications depend on the Internet and provide several additional functionalities. For example, instant communication applications allow you to see when your contacts are online or if they are typing you a message.
2. Devices used: Instant communication applications generally only operate on smartphones, and now some feature phones, whereas traditional telecommunications services may operate on all mobile phones.
3. Interoperability: Instant communication applications are not interoperable, whereas traditional communications services are.

Based on these differences, the CCI determined that the relevant product market for instant communications applications was "the market for instant messaging services using consumer communication apps through smartphones". This determination is relevant to debates surrounding the regulation of OTT services, as it highlights the differences between instant communication applications and traditional communication networks. It also suggests that the regulatory framework for OTT services should be different from that for traditional communication networks, given the differences in the relevant market.

Q5. 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.**

Our Response:

a.) Regulatory aspects (Licensing):

Telecom Service Providers (TSPs) require a license because they use scarce spectrum to set up a network. The government licenses TSPs as the public trustee of spectrum, and TSPs obtain the right to acquire spectrum when they obtain a license. In contrast, Over-the-Top (OTT) communication applications have no such right. TSPs can decide the services that may operate on their network and essentially gatekeep an OTT application's connectivity. The government imposes obligations on TSPs in the form of license conditions, which cannot be separated from the right to acquire spectrum. A licensing framework for OTT communication services would impose duties without the concomitant right to acquire, own, or control spectrum. Therefore, the 2018 Australian Competition and Consumer Commission (ACCC) report found that there is "no basis for requiring equivalent regulatory treatment" for OTT services. The Telecom Regulatory Authority of India (TRAI) has also recognized the separation of the network layer and the content/application layer in its 2020 Recommendations on 'Regulatory Framework for Over-the-Top (OTT) Communication Services'. This is consistent with the TRAI's position in its 2015 Consultation Paper on OTT Regulation and the Department of Telecommunications' position in 2012 and 2018. It is important to note that several TSPs provide OTT services and have an advantage because barriers to entry in OTT markets are low. TSPs have large subscriber bases that they can leverage to boost subscriptions in OTT markets.

As previously mentioned, it is essential to recognize that various existing laws and regulations already govern different aspects of Internet services, including competition laws, consumer protection laws, and information technology laws. Hence, it would be inaccurate to consider the Internet services market as unregulated. In fact, OTT service providers are subject to a wide array of laws and regulations, which vary based on the nature of the services they offer.

Attempting to impose additional regulations from unrelated industries onto specific OTT players could lead to inconsistent and confusing regulatory governance. It is crucial to strike a balance by applying appropriate regulations that address the specific characteristics and challenges of the OTT sector, rather than burdening it with regulations intended for other industries. This approach ensures that the regulatory framework remains coherent and effective while fostering innovation and competition within the OTT market.

Cloud services are regulated under the IT Act, 2000, which means they are not entirely unregulated. However, the Telecom Regulatory Authority of India (TRAI) has argued that cloud services are not monitored for their performance in the same way as telecom services. TRAI has highlighted this as a problem because people are transitioning from services offered by regulated providers to unregulated ones, and such transitions impact consumers.

b.) Quality of Service:

The best way to deal with quality of service issues is to leave it to market competition. A telecom service provider may have a reason for why its service is poor, but it will have to deal with the perception of its service quality when there is competition in the market. Similarly, many unregulated services continue to improve in quality because the company is not worried about regulation but worried about the perception of its quality of service and the effect on its market share. No one will hire a cloud service provider whose downtime is very high. It is important to note that several telecom service providers provide cloud services and have an advantage because barriers to entry in cloud markets are low. Telecom service providers have large subscriber bases that they can leverage to boost subscriptions in cloud markets.

Ensuring quality control and holding OTT service providers accountable can be achieved without resorting to stringent regulations. Stringent regulations often come with costs that may be passed on to consumers, putting them in a difficult position. Therefore, it is essential to explore less intrusive options that promote both market development and consumer welfare.

Market-based incentives and self-regulation are viable approaches that should be encouraged. These methods can effectively balance the interests of consumers and industry players without imposing heavy regulatory burdens. By fostering a cooperative approach, these measures can ensure responsible practices while promoting growth in the market.

c.) Redressal Mechanism:

Notably, some OTT players have already expressed willingness to adopt a voluntary censorship code. This code includes provisions to remove unlawful content and establish a redress mechanism for users to report violations. This voluntary approach demonstrates a commitment to address concerns without the need for stringent regulatory measures.

This is an overview of the three-tier grievance redressal mechanism used by OTT players:

Level I: Self-regulation by broadcasters: OTT platforms are expected to have a self-regulatory framework in place to address grievances. This includes setting up internal processes and guidelines to handle complaints and resolve them in a timely manner

Level II: Self-regulation by the self: OTT platforms are required to implement a self-regulatory mechanism to address grievances. This involves establishing an independent body or association that oversees the content and handles complaints from users. The self-regulatory body ensures that the content adheres to the prescribed guidelines and takes appropriate action in case of violations

Level III: Government oversight: In addition to self-regulation, the government also plays a role in the grievance redressal mechanism for OTT platforms. The government may intervene if there are unresolved complaints or if there are instances of content that go against cultural or societal norms.

d.) Security, Privacy and Safety:

OTTs gather lots of data on their customers. Consequently, regulation of these services generally involves instituting strict data protection norms and rules to protect user privacy. The data protection and privacy concerns are being purposefully addressed by MEITY through the

induction of a proposed Data Protection framework. OTTs are also subject to consumer protection laws and regulations. These laws provide a legal framework for addressing consumer concerns and protecting their rights. Consumers can approach consumer forums or redressal agencies to seek resolution for their grievances.

Additionally, the recently passed Digital Personal Data Protection Act, 2023 (DPDP Act) will regulate OTT services as well, from a privacy rights perspective. There is also the proposed Digital India Act (DIA) which, based on statements made by the Government, is likely to regulate OTT services from the perspective of promoting user welfare on the internet.

Given the fact that OTT services are subject to a plethora of laws, we believe that the focus should be on harmonising the existing rules and regulations governing them, rather than imposing additional onerous obligations under a telecom framework. Such a step is likely to increase costs and adversely affect the ease of doing business for OTT services.

Further, the IT Act empowers the Government and its agencies to take measures in the interests of national security, public order, etc. for:

1. Interception, monitoring, and decryption under Section 69;
2. Blocking of unlawful content available on a computer resource under Section 69A; and
3. Monitoring and collecting traffic data available on a computer resource for cyber-security purposes under Section 69B.

Q6. 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.

Our Response:

There are several key differences between Over-the-Top (OTT) communication services and Telecom Service Providers (TSPs) that negate the need for a one-size-fits-all approach to regulation. The following are some of the differences:

1. Ownership of the network: TSPs offer any-to-any services and provide interconnection. They operate in the network layer, enjoy exclusive rights, and use spectrum. In contrast, OTT communication does not provide any-to-any service (no interconnection), operates in the application layer, does not enjoy exclusivity, and does not use spectrum.
2. Connectivity: A network operator can offer services on their network, but application/content service providers cannot offer network connectivity. The technical shortfall OTT communication faces in terms of enabling any-to-any connectivity limits the substitutability of traditional communications and OTT communications.
3. Infrastructure: TSPs are governed by several critical infrastructure areas and are essentially the gatekeepers that OTTs and consumers alike need to access. OTT services are supplementary services that ride on the backs of TSP infrastructure. Heavy regulatory frameworks on OTTs will not be viable or necessary, as OTT providers do not control critical infrastructure that holds value to the public.

4. Market competition: OTT applications operate in an extremely competitive market, and OTT providers do not control critical infrastructure that holds value to the public. Thus, heavy regulatory frameworks on OTTs will not be viable or necessary.
5. Geographical constraints: OTT services are delivered via the Internet, and as such, the consideration of spectrum scarcity does not arise. Additionally, OTTs are not bound by the geographical constraints of typical TSPs and may offer services in regions beyond the borders of the nations they are headquartered.

OTT services are governed and regulated by the IT Act and its rules, CERT-In Directions, RBI tokenization mandates, and relevant sectoral legislation. There is no need to bring OTT services under any licensing or additional regulatory framework. The introduction of a telecom regulatory regime would qualify as an act of over-regulation on digital service providers and not only increase compliance but introduce a crippling financial burden. The goal of promoting a competitive landscape for the benefit of consumers and service innovation is already met in the OTT space. The basic elements of competition, entry barriers, consumer choice, and service innovation are being met in the OTT space. Any additional regulatory intervention at the behest of certain stakeholders will undermine the competitive forces in the market and lead to market fragmentation and market failure. Furthermore, any move to introduce a separate licensing regime for OTT services could conflict with the Ministry of Electronics and Information Technology (MeitY)'s legislative space and efforts to update the IT Act with the proposed DIA. The characteristics of OTT services are such that TSPs realize revenues solely from the increased data usage of internet-connected customers.

Therefore, it is not necessary to bring OTTs under any licensing/regulatory framework as they are already regulated extensively under extant laws and regulations.

Q7. 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 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.

Our Response:

OTT services in India are already regulated under several codes and provisions of the Information Technology Act, 2000 (IT Act), the Consumer Protection Act 2019, and the Consumer Protection (E-commerce) Rules 2020, among others. Additionally, OTTs are a part of self-regulatory bodies such as the Digital Publishers Grievances Council (DPCGC). Departments and ministries have effective coordination mechanisms where necessary, such as the coordination between the Ministry of Information and Broadcasting (MIB) and the Ministry of Electronics and Information Technology (MeitY) at multiple levels for framing IT Rules 2021 and briefing stakeholders about them.

Moreover, licensing requirements or other heavy-handed regulatory obligations could create barriers to entry and expansion for app providers, particularly start-ups that lack the resources to obtain a license or establish locally in every country where their applications are provided.

a.) Lawful Interception:

The Government and its agencies have powers under Section 69, 69A, and 69B, respectively, to:

- i. Intercept, monitor, and decrypt information in a computer resource for reasons such as national security and public order;
- ii. Block access to information in any computer resource for these same reasons; and
- iii. Monitor and collect traffic data or information in a computer resource for cyber security purposes. There are also relevant powers conferred to the Government under the Intermediary Guidelines. ii. For further details, please refer to the response to Question 5 on ‘security aspects’ above.

b.) Privacy and security:

- i. The SPDI Rules, DPDP Act and even the CERT-In framework impose several obligations on OTT service providers to ensure adequate safeguards against data breaches, cyber-security incidents and to maintain the privacy of individuals.
- ii. For further details, please refer to the response to Question 5 on ‘privacy aspects’ above.

c.) Emergency services:

- i. TSPs – under the Unified Licence regime - are required to provide public utility and emergency services like toll free calls to emergency departments such as fire, police and ambulances. This is to ensure that individuals are able to make these critical calls during emergency situations and they are not charged when doing so.
- ii. Attempting to impose the same set of obligations on OTT services (including vis-à-vis OTT services that allow users to communicate with one another) is problematic because OTT services require the internet to function, and there is no guarantee that internet access will be readily available during an emergency. Additionally, OTT services do not have the infrastructure to provide emergency calling services, in light of the fact that most of these services do not have interconnection functionalities. Any such obligation for OTT providers will be meaningless as they would not be

able to support the very purpose of emergency services in the absence of their ability to manage the last-mile access to the users.

- iii. Further, in order to help individuals during emergencies, it is sometimes crucial to be able to identify their specific location (such as during search and rescue operations), but OTT services may not be able to perform this function for all their users based on the privacy settings on a platform.

d) Unsolicited commercial communication (UCC):

- i. OTT services that provide users with a means to communicate on their platforms have introduced features on their platforms that allow users to report or block numbers from which they receive unsolicited messages and calls.
- ii. A few OTT services also offer users the option of unsubscribing from marketing messages as an alternative to blocking the number completely.
- iii. In addition, with the commencement of the DPDP Act, processing of personal data is only permitted under specific grounds as provided under the DPDP Act. This will also curb UCC going forward.

e) Customer verification:

- i. Users signing up to use OTT services are required to verify their identity through one-time passwords sent either to their phone number or email.
- ii. Notably, the Intermediary Guidelines require significant social media intermediaries to give users the option to voluntarily verify their accounts through appropriate mechanisms, such as a mobile number. Thus, OTT service providers that fall within the ambit of significant social media intermediaries are already subject to verification requirements. Further, CERT-In Directions only requires data centres, virtual private servers, cloud service providers and virtual private network service providers to collect specific customer information accurately, validate certain information, and maintain customer information for a period of 5 years after the suspension/cancellation/closure of customers' accounts. This indicates that mandatory customer verification has only been imposed on specific entities (meeting certain thresholds or specific kinds of intermediaries) as opposed to all intermediaries or all OTT service providers.
- iii. Lastly, we note that certain OTT services cooperate with regulatory authorities to identify situations where users continue to use OTT services with disconnected numbers, and in this regard, require users to re-verify these numbers.
- iv. Therefore, imposing additional requirements is onerous, unnecessary, and expensive serving no legitimate purpose since the TSPs already undertake a robust verification process.

f) Quality of service:

- i. Please refer to the response to Question 5 on 'quality of service aspects' above.

g) Consumer grievance redressal:

- i. Please refer to the response to Question 5 on ‘consumer grievance redressal aspects’ above.

h) Eligibility conditions:

- i. We do not believe there is a need for any additional licensing or regulatory framework for OTT services, and therefore this question is not relevant.

i) Financial conditions:

We do not believe there is a need for any additional licensing or regulatory framework for OTT services, and therefore this question is not relevant.

Q8. Whether there is a need for a collaborative framework between OTT communication service providers and licensed telecommunication service providers? If yes, what should be the provisions of such a collaborative framework? Kindly provide a detailed response with justification.

Our Response:

It bears repetition that the core thesis of a market failure and the need to correct regulatory imbalances is yet to be established, contrary to our economic analysis that shows that the economic stress is due to a period of hyper-competitiveness. We even dispute the arguments for substitutability of services between telcos and internet applications and services. Thus, we reiterate our stance that there is inadequate evidence at the moment, and therefore no need, for creating a collaborative framework between OTT communication service providers and the licensed telecommunication service providers.

At the primary level, there needs to be a streamlined collaboration between the ministries while regulating the OTT and the telecommunications sector. MIB and MeitY need to synergize in order to regulate the evolving space.

A collaborative framework between OTTs and TSPs should be looking at democratising of hotspots to provide internet access to the rural population in India.

While we look at a collaborative effort towards access, we need to address the regulatory burdens on TSPs for this is not a competition issue with the emerging concerns around OTTs acquiring more business than TSPs, it is more to do with the legacy issues being faced by TSPs. In order to create a win-win ecosystem for both we promote reducing the burdens on TSPs.

The secondary level needs to explore the bundling of OTT services by traditional telecom service providers who have now entered into the distribution business. For example, we see Airtel offering its subscribers a range of bundled OTT services. This is an emerging trend in the telecom and OTT space.

Q9. 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.

Our Response:

Previously the Asia Internet Coalition has urged the Telecom Regulatory Authority of India (TRAI) to consider reducing the legacy regulatory barriers on Telecom Service Providers (TSPs), such as license fees, spectrum usage charges, other levies, and taxes, to improve the business case for TSPs.

We believe that The Indian Telecom industry has progressed significantly in just a few decades primarily due to the progressive and market-friendly policies by the related regulators. As India continues to embrace innovation and technological advances to ensure economic growth and world standing, this is the perfect time for TRAI to take a long-term approach and develop a less regulation-heavy environment to foster growth and healthy competition. Indian consumers and industry will be the main beneficiaries of such an outlook.

The fundamental difference between OTT service providers and TSPs is in the ownership of the network, and the concomitant regulatory framework. OTT and TSPs provide different services and experience different sets of challenges, which highlights the need for them to work together to advance Digital India goals.

By relaxing the tension for TSPs, we can achieve a more neutral internet situation wherein the consumers would have access to internet services and choice towards content.

II. Issues Related to Selective Banning of OTT Services

Q10. 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.

Our Response:

Before addressing the technical issues of selectively banning specific OTT services, we need to look at the role of number-independent OTT services in emergency situations and also how these services are so amorphous that a ban on such services would lead to unintentional consequences on both; the consumer and the budding economy. The impact of such bans can be disproportionate and violative of consumer welfare.

Platforms like Facebook and Twitter are being increasingly used to inform users of emergencies, access essential services, and mark themselves safe. Such platforms have shown initiatives to help users in such critical conditions.

In the case of Anuradha Bhasin v/s Union of India, the Supreme Court of India ruled that an undefined restriction of internet services would be illegal and that orders for internet shutdown

must satisfy the tests of necessity and proportionality. The case concerned the internet and movement restrictions imposed in the Jammu and Kashmir region in India on August 4, 2019, in the name of protecting public order. The main focus was on declaring the right to freedom of speech & expression and the right to carry on any trade or business through the Internet. The court held that freedom of expression through the Internet is one of the “integral parts” of Article 19(1)(a). The court has emphasized that the internet has become an important tool for the exercise of the right to freedom of speech and expression. The court also laid out the principles of proportionality and reasonable restrictions and assessed the restriction imposed on freedom of speech online. It outright rejected the State’s justification for a total ban on the internet because it lacked the technology to selectively block internet services as accepting such logic would have given the State the green light to completely ban internet access every time. However, the Court conceded that there was “ample merit in the contention of the Government that the internet could be used”.

Q11. 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.

Our Response:

We feel the need to protect public safety at all costs. The need for Consumer Privacy upheld by the Hon’ble SC and for Data Protection and Data Security of the Consumers is important from a consumer welfare perspective. As explained earlier, since Voice Communications is now happening mostly through the Operator’s VoLTE networks, the control lies within the TSP’s Network which is already governed by lawful access to all calls. With regard to messages on an OTT network, enhanced data encryption is the best way to ensure privacy and security.

The IT Act addresses the issue of lawful interception and takedown through the following provisions: Section 69 which gives the government power to monitor or decrypt any computer resource; Section 69A dealing with takedown obligations; Section 69B empowering the government to monitor and collect traffic data or information through any computer resource for cyber security. There are various rules and regulations which further elaborate on the scope of these powers. Therefore, there is no need for any additional rules in this regard. We are of the opinion that the encryption methods and other security-related measures instituted by OTT players are critical for safeguarding the privacy of users.

Q12. 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.

Our Response:

Access Now, a New York-based digital rights advocacy group, reported that in 2022, authorities shut down the internet across 35 countries at least 187 times. India shut down the internet at least 84 times, which is the highest number of any country in the world for the fifth consecutive year. The shutdown of telecommunications or the internet can have significant ramifications for a country's economy and may affect the life and livelihood of the citizens of the country. The shutdowns are often associated with increased levels of insecurity and other restrictions, which can be a big warning sign of how the human rights situation is deteriorating. The internet shutdowns are used as weapons of control and shields of impunity by governments, which can lead to violence and oppression. The shutdowns can also affect the education sector, businesses, and the healthcare sector, which rely on the internet for their operations. The shutdowns can also lead to a loss of trust in the government and can have long-term effects on the economy. The concept of 'selective banning' is concerning and may lead to several unintended consequences. While malicious actors may find workarounds, citizens who rely on services using the internet at scale may not, and thus will be impacted. Workarounds may include using alternate applications, which may then prompt the government to continuously expand the list of banned/blocked applications. It may also include the use of means to proxy/route connections (such as VPNs), ordering restrictions on that would be disproportionate and implementation of which would be challenging, requiring onerous, unimplementable orders like the Manipur order. The use of VPNs, even for legitimate uses, may result in criminal liability. Therefore, it is worth considering the unintended consequences of selective banning. Workarounds may include using alternate applications, which may then prompt the government to continuously expand the list of banned/blocked applications. Alternatively, those seeking workarounds without any malintent may also be criminalized. We urge TRAI to issue a recommendation against the framework and reiterate our apprehension against selective banning. Instead of regulating OTTs, the Government must overhaul and simplify the regulatory framework for telecommunications. A potential license or regulatory framework for services like OTT communication applications will act as an entry barrier, increase compliance burdens, and adversely impact India's startup ecosystem. It would go against the government's vision of Ease of Doing Business, Digital India, and Maximum Governance, Minimum Government.

Q13. 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.

Our Response:

In this context, we propose TRAI embrace the adoption of Regulatory Impact Assessments (RIA) frameworks to evaluate the potential implications of regulatory interventions in light of their social and economic impact. Periodic RIAs to check regulatory inefficiencies are instrumental in reducing losses to the industry. Exemplarily, many international authorities recognise the cost accompanying any regulatory intervention and establish adequate safeguards against measures being excessively burdensome on both businesses and consumers. A key component of this cost-based analysis is the focus on RIAs that go beyond financial audits and

involve a holistic evaluation of the impact of the regulatory intervention on their individual spheres and the economy overall.

There are various laws that regulate the working of websites; the IT Act 2000, IT Rules 2009 and Specific provisions on blocking of information in cases of emergency. Hence, no further banning is required.

Banning also comes with various challenges:

1. Identifying and blocking specific OTT services and websites requires deep packet inspection, which can be resource-intensive and may lead to false positives or negatives.
2. Users can use virtual private networks (VPNs) and proxies to bypass regional restrictions, making it challenging to enforce bans effectively.
3. Selective banning may infringe upon free speech and raise concerns about censorship and surveillance.

Further, we also wish to highlight that there could be multiple technical challenges in selective banning of OTT services, the key ones are listed below:

1. Identify & Classify: Accurately identifying and classifying OTT services and websites for banning is a challenge and some new websites may use higher encryption or dynamic IP addresses to avoid getting tracked/detected easily.
2. VPN: Users can easily circumvent the ban by using proxy servers or VPN to mask their location and identity and continue using the OTT service/accessing the website.
3. Encryption – If the OTT service/website is using HTTPS connection, then it will be a challenge to inspect the content of traffic.
4. Regular updated list/database to be maintained – Constant monitoring and co-ordination amongst the different players in the ecosystem (regulators, ISPs, etc.) would be required to ensure the correct OTT services are banned and the ban is accurate and effective.
5. Load on provider networks and network performance impact – Implementing such bans at the network level can impact overall network performance of the Network service provider which will lead to potential slowness and the service and degradation of end user experience.

Q14. Are there any other relevant issues or suggestions related to regulatory mechanisms for OTT communication services, and selective banning of OTT services? Please provide a detailed explanation and justification for any such concerns or suggestions.

Our Response:

The issue that the Government should address is not the regulation of OTTs, but the manner in which telecommunication services are currently regulated. The current system of a Unified License with multiple authorizations and onerous compliances is based on more than a century-old laws. It is also the result of the post-independence ‘License Raj’ approach, which persists in telecommunications despite liberalizations in many other sectors. The Department of Telecommunications introduced a Draft Indian Telecommunication Bill in September 2022, which seeks to replace the Indian Telegraph Act of 1885, recognizing “the need for a new legal framework that is future-ready”. Rather than regulating OTTs, the Government must overhaul and simplify the regulatory framework for telecommunication. A potential license or regulatory framework for services like OTT communication applications will act as

an entry barrier, increase compliance burdens, and adversely impact India's startup ecosystem. It would go against the government's vision of Ease of Doing Business, Digital India, and Maximum Governance, Minimum Government. It also goes against the position in the National Digital Communications Policy 2018 when the DoT committed to "remove regulatory barriers and reduce the regulatory burden that hampers investments, innovation, and consumer interest". The telecommunications market is heavily regulated, with the government retaining the exclusive right to provide telecom services and to allow third parties.

C. DETAILED ANALYSIS

Definitional uncertainty around OTT Communication services:

The Department of Telecommunications (DoT) Committee Report on Net Neutrality in May 2015 categorized OTT services into two groups:

1. **OTT communications services:** These services, such as VoIP, enable real-time person-to-person telecommunication over the internet, utilizing the network infrastructure of licensed telecom service providers (TSPs). They compete with TSPs' services by utilizing their existing infrastructure. Examples of OTT communications services include video telephony services and messengers like Skype or WhatsApp.
2. **OTT application services:** This category includes other OTT services like media services (broadcasting, gaming), trade and commerce services (e-commerce, radio), cloud services (data hosting and management platforms/applications), and social media (intermediary applications like Facebook, YouTube). These services utilize the network infrastructure created by TSPs but don't directly compete with the services offered by TSPs under their licensed operations governed by the Indian Telegraph Act, 1885.

The National Digital Communications Policy (NDCP) of 2018 aims to foster a comprehensive and harmonized approach to leverage emerging technologies. It promotes innovation in communication services and network infrastructure development, with a specific focus on formulating a policy framework for Over-the-Top (OTT) services. This strategy aligns with the objectives of the Propel India Mission, ensuring a conducive environment for technological advancements and the growth of OTT services in India.

On September 21, 2022, the Department of Telecommunications introduced the Draft Telecommunication Bill of 2022, aiming to replace three outdated legislations governing the telecom sector: the Wireless Telegraphy Act of 1933, the Indian Telegraph Act of 1885, and the Telegraph Wires (Unlawful Possession) Act of 1950. The proposed bill seeks to modernize the regulatory framework and addresses various aspects, including the classification of telecommunication services and licensing requirements for over-the-top (OTT) platforms.

One significant change in the draft bill is the redefinition of "telecommunication services" as "service of any description which is made available to users by telecommunication." This change brings OTT communication services (e.g., WhatsApp, Signal, Telegram) under the

purview of telecommunication services. The government's rationale for this move is to level the playing field between traditional telecom providers and OTT platforms, as the latter's internet-based calling and messaging services impact the revenue of traditional providers.

Section 4(3) of the proposed bill mandates all entities offering "telecommunication services or telecommunication network" to obtain a license and operate within the specified tenure. However, subjecting OTT platforms to the same licensing conditions as traditional cellular service providers is impractical due to the fundamental differences in their operations, particularly the use of IP-based networks.

OTT platforms rely on telecom companies to provide the essential broadband and internet access infrastructure. While the government's intention to regulate OTTs through licensing measures is apparent, there is a lack of clarity in the provisions regarding the specific licensing regime for OTT platforms. The bill does not elaborate on whether the licensing process for OTTs will mirror the existing regime or if a separate mechanism will be established.

Given the substantial differences in the underlying framework and core fundamentals of OTT platforms compared to traditional telecom services, it is crucial for the government to provide clarifications on the licensing requirements. Determining an appropriate licensing framework for OTT platforms that considers their unique operational aspects will be vital in ensuring a balanced and effective regulatory approach.