

December 2018

Shri Asit Kadayan,

Advisor (QOS),

Telecom Regulatory Authority of India (TRAI)

Mahanagar Door Sanchar Bhawan

Jawahar Lal Nehru Marg (Old Minto Road)

New Delhi – 110012

Dear Sir:

Submission of Times Internet Limited [“TIL”] on the TRAI Consultation Paper on Regulatory Framework for Over-the-Top (“OTT”) Communication Services

TIL thanks the Telecom Regulatory Authority of India (“TRAI”) for this opportunity to participate in the consultation on a regulatory framework for Over-the-Top (“OTT”) communication services.

We attach our submission as **Annexure – I**.

Thanking you,

Yours sincerely,

Karan Bedi

[Annexure – I]

TIMES INTERNET LIMITED

Submission on the TRAI Consultation Paper on Regulatory Framework for Over-the-Top (OTT) Communication Services

1. This submission presents the comments of **Times Internet Limited**. [“TIL”] in response to the Consultation Paper on Regulatory Framework for Over-the-Top [“OTT”] Communication Services [“**Consultation Paper**”] released by the Telecom Regulatory Authority of India [“TRAI”] on 12th November 2018.

About Times Internet Limited

2. TIL is India’s foremost digital products company, with over 400 million unique visitors a month, who collectively account for 23 billion page views and 130 billion minutes spent per month across web and mobile. Today, it has a diversified set of 39+ digital consumer-facing businesses, including *Gaana.com*, *Magicbricks.com*, *Cricbuzz.com*, and other market leaders across news, entertainment, sports, local, ecommerce, classifieds, startup investments, local partnerships, and more.

Overview

3. We would like to contribute to this public consultation coming from the perspective of our experience in India’s digital economy and increasingly digitalized media and entertainment [“M&E”] sector.
4. Overall, we believe that India must develop a robust regulatory framework that can serve as the foundation for a rapidly evolving digital economy, online environments and digital communications infrastructure and services ecosystems. In order to do so, it is key for the Government of India to be guided by the right regulatory approach, one that is in tune with the impact of digitalization across various sectors, and in line with present market realities.
5. However, for reasons explained in more detail in our specific responses below, we find that the approach followed by the Consultation Paper in characterising OTT services needs to be revisited. Instead, the regulatory approach ought to be guided by the following considerations:
 - That OTTs and TSPs operate in fundamentally distinct and separate markets, and attempts to compare their services as similar or substitutable are misguided attempts to draw equivalencies where they do not exist.
 - That TSPs benefit from the demand for data that OTT services drive, and TSPs should be prevented from any opportunities to encourage ‘double dipping’ into the OTT space, particularly if network neutrality principles are upheld.

- That OTT services are themselves highly differentiated, and compete on the basis of the user experience they offer. Accordingly, efforts to draw up a regulatory classification, license OTT services or mandate requirements uniformly on them can unreasonably distort or restrict the market.
- That the challenges being faced by TSPs in realising revenues are better addressed by streamlining their regulatory environment, instead of driving up regulatory requirements for the distinct OTT market that is regulated differently.
- That the challenges posed by the OTT space must be informed by a wider consultation process, conducted by the TRAI in conjunction with other regulators who are all considering different aspects of the digital economy.

TIL's Responses to Questions in the Consultation Paper

6. This section contains our comments to the questions raised in the Consultation Paper, arranged in the order in which they appear.

Chapter 2: Definition of OTT Services in different jurisdictions and contexts

Q. 1. Which service(s) when provided by the OTT service provider(s) should be regarded as the same or similar to service(s) being provided by the TSPs. Please list all such OTT services with descriptions comparing it with services being provided by TSPs.

7. This question presumes that there do exist services offered by TSPs and OTTs which can be compared at all, and goes on to request a list of such services. TIL rejects this premise as a mischaracterization of OTT services and as an attempt to draw an equivalency between OTT services and TSP services, when no such equivalence can actually be drawn. OTTs operate in a fundamentally distinct and separate market from TSPs, and it makes little sense for regulators to compare the two.
8. Three important distinctions demonstrating this must be kept in mind. Firstly, that there is a distinction in the physicality of the delivery of such services. TSPs offer their services through physical networks and infrastructure, and enjoy a privilege over radiofrequency spectrum to do so. By contrast, OTTs offer their services only on the Internet, where such services are necessarily virtual in nature. OTTs enjoy no exclusive privilege over any public resource, and in fact, operate in a highly competitive online marketplace with comparatively far less entry barriers.
9. Secondly, that OTT services cannot be offered directly to consumers, and depend upon consumers accessing the TSPs' networks to do so. OTT services require consumers to be able to access the Internet as an additional precondition – where such internet connections are taken by consumers from the TSPs. When OTT services are used by consumers, they consume data and bandwidth offered by TSPs, directly driving the revenues of TSPs. By contrast, TSPs do not depend upon other entities to offer their services – they can offer communication services over public telephone networks, whose traffic is treated differently than data-based traffic. OTTs simply do not exercise the same level of control over how their consumers access their services that TSPs do.
10. Thirdly, that prima facie similarities in services does not imply they are comparable or substitutable from a consumers' perspective. Today, even the best OTT services offering communication functions exist as a supplement to the traditional services offered by TSPs, and not a stand-in for them. TSPs

provide access to services, while OTTs provide experiences in the form of services. For instance, instant messaging platforms offer a means of communication which can be bundled with different features, but they do not offer a substitute for a universal and uniquely attributed mobile number that comes with a TSPs' service. Consumers may use such OTT services as a supplement to legacy TSP services, but they cannot switch to these OTT services in lieu of receiving TSP services entirely.

11. For these reasons, TIL finds that this question is misguided. Instead of attempting to define OTT services in the same vein as TSPs' services, TIL believes that OTTs and TSPs must be treated separately, and accordingly, their services evaluated separately.

Q. 2. Should substitutability be treated as the primary criterion for comparison of regulatory or licensing norms applicable to TSPs and OTT service providers? Please suggest factors or aspects, with justification, which should be considered to identify and discover the extent of substitutability.

12. We find that this question continues the misguided premise underlining the preceding question. As demonstrated above, TSPs and OTTs do not operate in the same market, and their services are both technologically and functionally distinct. Accordingly, to suggest that substitutability is something to be identified and discovered is flawed, and assumes that it does exist.
13. From a regulatory perspective, we submit that instead of attempting to draw a regulatory parity between TSPs and OTT service providers, a better approach is to regard them as belonging to different layers with different markets, business models, inputs, entry barriers and cost structures.

Chapter 3: Economic Aspects

Q. 3. Whether regulatory or licensing imbalance is impacting infusion of investments in the telecom networks especially required from time to time for network capacity expansions and technology upgradations? If yes, how OTT service providers may participate in infusing investment in the telecom networks? Please justify your answer with reasons.

14. Fundamentally distinct markets ought to be regulated distinctly, as their market dynamics operate differently. Therefore, suggesting that a regulatory or license imbalance exists between such markets is an incorrect assumption to operate upon. We find that this incorrect assumption feeds into this question.
15. We submit that it is important to note that OTT services provide value for the creation and utilization of underlying infrastructure. OTTs have utilized the architecture of the Internet, which promotes computing at the edges, to offer their dynamic and innovative services. These have driven consumer demand for data, which have in turn benefitted TSPs by affording them new revenue streams.
16. Without OTT services, the need for networks to interconnect with the Internet would be significantly diminished. Further, OTT services pay their own Internet Service Providers, which is necessary to offer their services. Therefore, it is incorrect to assume that OTT services will drive down investments in network infrastructure, or that OTT service providers do not contribute for their fair share of network utilization.
17. We also submit that India's current strong position on network neutrality, which we strongly support, can only be maintained by curtailing attempts by TSPs to 'double dip' (extract revenues from both users and OTTs for using the Internet) or enter the OTT layer (which runs the risk of TSPs prioritizing their own offerings over competitors' in the OTT space). Given the robust debate around network

neutrality that has already taken place in India, and the recognition of strong network neutrality principles in India, the incorrect assumption underlining this question must be avoided.

18. Further, we also strongly reject any effort to regulate the OTT space in order to address any perceived regulatory imbalance. The competitive spheres of these two services do not overlap, and therefore, regulatory or licensing intervention to bridge a competitive gulf should not be taken forward. The introduction of licensing frameworks in the OTT space would result in a steep decline in innovation and would dissuade investments in the development of newer platforms and applications, in turn halting India's digital success story before it has time to mature and fructify.
19. To specifically address the question of any possible decline in investments in telecom networks, we submit that the challenge exists not in the absence of regulation of OTT services, but in the presence of outdated regulation of TSPs.
20. For instance, investment in network infrastructure would be benefitted from streamlining policy on spectrum management, right of way and interconnection. Easing the rules on spectrum trading, as the Department of Telecom is currently considering, would increase investment in network infrastructure. Such efforts should be encouraged, instead of attempting to increase the regulation of the OTT space.

Q. 4. Would inter-operability among OTT services and also inter-operability of their services with TSPs services promote competition and benefit the users? What measures may be taken, if any, to promote such competition? Please justify your answer with reasons.

21. We submit that the OTT space is characterized by a number of new services with strong product differentiation, and it is this product differentiation that drives innovation and competition amongst OTT players. Interoperability, emerging out of a regulatory requirement, runs the risk of stifling the market, since it would result in reduced opportunities to differentiate products. It may also end up awarding the dominant product disproportionately, in turn distorting the market.
22. Further, in terms of interoperability between OTT services and those offered by TSPs, we find that this question does not arise, given that they are fundamentally distinct from a consumers' perspective. A consumer is not constrained from migrating from one TSP service to another by virtue of any OTT service he or she may be using.
23. Moreover, given that this is a nascent and evolving market where users can often utilize multiple competing OTT services in parallel, it remains to be seen whether sufficient grounds exist to introduce such an intervention. We also submit that efforts to address 'lock-in' effects are being considered through the introduction of 'a right to data portability' under the Draft Personal Data Protection Bill of 2018 proposed by the Justice Sri Krishna Committee.
24. Any effort to introduce an interoperability mandate shall have to also acknowledge the dynamics of a data portability right, which has yet to be tested in the market. Therefore, a regulatory mandate for interoperability would be premature at this stage, given that the larger market and regulatory environment is still evolving.

Chapter 4: Factors relating to the Regulatory Framework

Q. 5. Are there issues related to lawful interception of OTT communication that are required to be resolved in the interest of national security or any other safeguards that need to be

instituted? Should the responsibilities of OTT service providers and TSPs be separated? Please provide suggestions with justifications.

25. We submit that OTT communication services are already sufficiently regulated under the framework of the Information Technology Act of 2000 from an interception perspective. We do find that additional procedural safeguards are required to be brought into the overall legal framework for interception.
26. These are especially required after taking into account the observations of the Supreme Court of India in the *Aadhaar* judgment¹, wherein the Court highlighted the importance of developing adequate and effective guarantees against abuse of interception mechanisms. Accordingly, we support a framework of judicial oversight and well-defined standards for interception requests being introduced at a system wide level, in line with the recommendations of the Supreme Court therein.

Q. 6. Should there be provisions for emergency services to be made accessible via OTT platforms at par with the requirements prescribed for telecom service providers? Please provide suggestions with justification.

27. We submit that, unlike TSP services, OTT services are not offered on the basis of a standardized architecture. Given that OTT services can only operate when TSP operations are working seamlessly, and given that TSPs have clearly stated obligations to provide for emergency services, such obligations on OTT platforms would be redundant and would result in OTT services undergoing significant technological overhaul for systems which already exist.
28. However, should it be deemed necessary to introduce such a requirement, we submit that such a regulatory mandate must be (1) appropriately and narrowly defined to apply to relevant OTT service providers; and (2) recognize the technological distinctions between TSP services and OTT services, and accordingly, impose such requirements through the appropriate instrument. This appropriate instrument, we submit, must be the Information Technology Act of 2000.

Chapter 5: Possible Regulatory and Market Approaches

Q. 7. Is there an issue of non-level playing field between OTT providers and TSPs providing same or similar services? In case the answer is yes, should any regulatory or licensing norms be made applicable to OTT service providers to make it a level playing field? List all such regulation(s) and license(s), with justifications.

29. As highlighted above, OTT services and TSPs do not operate in the same market, and offer complementary, not substitutable services. OTT services stimulate demand for network access, and network operators can and do monetize this demand through access and data, capitalising on their growing user base. Without internet-based content and applications, such monetisation is crucial towards investment in greater innovation and towards penetrating newer markets. Therefore, to reiterate, unique competitive pressures exist within the OTT ecosystem, and the aim should be towards creating a level playing field *within* that sphere and not between TSPs and OTT service providers.
30. The challenges faced in the TSP economy are restricted to their hurdles in achieving greater efficiency in monetising the traditional calling and messaging services, as well as devising ways

¹ Justice K.S. Puttuswamy v. Union of India, Writ Petition (Civil) No. 494 of 2012.

to generate further benefits by offering internet services. Further, possible costs incurred by TSPs due to licensing or regulatory requirements remain restricted to the regulatory framework for TSPs. Assuming substitutability between TSPs and OTT service providers would result in cascading impacts on a complementary ecosystem, and thus affecting user benefits and experiences generated as a result of non-intervention in this regard.

Q. 8. In case, any regulation or licensing condition is suggested to made applicable to OTT service providers in response to Q.7 then whether such regulations or licensing conditions are required to be reviewed or redefined in context of OTT services or these may be applicable in the present form itself? If review or redefinition is suggested then propose or suggest the changes needed with justifications.

31. At the outset, we wish to reiterate that licensing requirements are extremely detrimental to the growth and innovation-driven developments in the OTT space, and must not be introduced. OTT service providers often bundle different functionalities together in an integrated content offering – they offer an experience to users, and compete with their competitors on that basis. Licensing frameworks run the risk of creating artificial distinctions between similar functionalities of otherwise highly differentiated offerings, which could result in distorting the overall ecosystem
32. It is also crucial to remember that licensing requirements exist for the TSP space due to their utilization of radio frequency spectrum, and because they are deemed to be operating ‘telegraphs’ within the framework of the Telegraph Act. We submit that it is this regulatory or licensing framework that must be reviewed or redefined, instead of focusing on the regulatory framework governing the OTT space.

Q. 9. Are there any other issues that you would like to bring to the attention of the Authority?

33. We find that the OTT space is being considered differently by different regulators and government departments, which runs the risk of a divergent approach being followed by different branches of the Government of India. India’s response to digitalization must be shaped by a common regulatory approach, in order to deliver an integrated and coordinated regulatory response.
34. We submit that efforts such as this Consultation Paper would be better informed by a holistic ‘whole-of-government’ approach, where regulators attempt to understand the challenges posed by the digital economy from all possible standpoints, in order to provide regulatory clarity, predictability and stability.
