



21 January 2019

Shri. Asit Kadayan,
Advisor (QoS),
Telecom Regulatory Authority of India (TRAI),
Mahanagar Door Sanchar Bhawan, J.L. Nehru Marg, (Old Minto Road)
New Delhi - 110002, India

Subject: Industry submission of Counter Comments on the Consultation Paper on Regulatory Framework for Over-The-Top (OTT) Communication Services in India

Dear Sir,

Asia Internet Coalition ("AIC") is grateful to the Telecom Regulatory Authority of India ("TRAI") for the opportunity to submit counter comments on the Consultation Paper on Regulatory Framework for Over-The-Top ("OTT") Communication Services in India.

We have assessed the comments that have been submitted by various stakeholders and have noted that many of these are broadly in consonance with the position taken by AIC in its main submission: that OTT service providers and TSPs are different services and there is presently no need for additional regulations being imposed on OTT players. However, a few of the submissions, particularly those by the TSPs, have requested regulating both under the same legal regime – i.e. through a license and with various obligations transposed from the telecom regime to the entire digital communications regime.

We would like to draw to your attention to several key logical fallacies that underpin the request to regulate OTT service providers at par with TSPs. For this, we have made a short summary of the key arguments that have been raised by the proponents of overarching regulation:

- a. OTTs and TSPs are providing equivalent services and hence need to be regulated under the same legal paradigm
- b. OTTs need to be licensed under the UL regime
- c. Obligations such as QoS, Interconnection, Emergency Calling etc should be imposed on OTT providers
- d. There should be dedicated Law Enforcement frameworks who can access call records for OTT services

We would like to take this opportunity to express our views on why the above arguments are not informed by a firm understanding of the technological differences between OTT communications services, and TSP communications services. We would therefore like to submit that when all such aspects are taken into account holistically, the above arguments should not be supported. As such, please find appended to this letter the submission of counter comments, which we would like to respectfully request TRAI to consider.

Should you have any questions or need clarification on any of the recommendations, please do not hesitate to contact our Secretariat Mr. Sarthak Luthra at Secretariat@aicasia.org or at +65 8739 1490. Thank you for your time and consideration. We would also be happy to offer our inputs directly through meetings and discussions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jeff Paine", written in a cursive style.

Jeff Paine
Managing Director
Asia Internet Coalition (AIC)

Enclosed

Counter Comments on the Consultation Paper on Regulatory Framework for Over-The-Top (OTT) Communication Services in India

a. Equivalence of Services

The fundamental argument made by various TSPs is that since both OTT services and TSPs enable communication between individuals, they should be considered as the same service, regardless of the technological means through which they are provided.

However, analyzing the end result of an operation without the technological nuances of the same would lead to major fallacies from the perspective of regulation. An extension of the same argument could potentially be used for regulating railways and airways in a similar manner. This is naturally considered as inappropriate – because even though they constitute two modes of providing point to point connectivity, they use different technology and come with different risks.

A regulatory framework mainly concerns itself with addressing risks, especially risks of market failure and risks of harm to consumers. In a situation where the risks posed by two kinds of services are entirely different, it would make little sense to attempt to regulate them in a similar way.

This is where the importance of the underlying technology would need to be highlighted. TSPs have access to a public resource, and exclusive rights to operate a network which comes with attendant rights such as Right of Way. They also control the critical infrastructure governing access to internet, which has been recognized by India's telecom policies as a basic public right. Therefore, the licenses which grant this exclusivity would address the risks of: (i) low competition; (ii) poor quality of services due to incumbency; (iii) network effect and lack of interoperability; (iv) lack of access in remote areas.

This explains why the sector is controlled by licenses granted through a competitive bid process, and why QoS, interconnectivity and Universal Service Obligation Funds are a part of the structure. Each of these obligations addresses the risks that have been highlighted above.

The risks attendant with OTT services are different – and since each OTT service provider offers a slightly different service, it is difficult to pinpoint them. Broadly speaking, they may involve risks to user privacy and risks pertaining to the security of storage of user data. These are addressed through the Information Technology Act, 2000 ("IT Act") and the rules thereunder. Depending on the specific service being provided, there may also be sectoral regulations applicable to them. Furthermore, broad consumer protection and competition law provisions also regulate their business practices to the extent applicable.

Therefore, it is clear that the risks that should be addressed in dealing with TSPs and OTTs are entirely different and do not merit equivalent regulation.

b. Necessity of License

Governments and regulators across the world typically have a common set of objectives for licensing telecommunications operators, as identified by the ITU handbook¹ on the topic, and an assessment of these reasons would clearly indicate that they do not apply to OTT services.

¹ Telecommunications Regulations Handbook,

Common licensing objectives are:

- (i) *Regulating the provision of an essential public service* – While basic telecommunications are seen as a public good in most countries, no single OTT service is seen as a public good.
- (ii) *Allocation of scarce resource* – Spectrum, numbering resources, right of way etc are all finite public resources which need to be allocated to those competitive players who are most suitable for the purpose. No such issues arise in connection with OTT services which do not pertain to allocation of any scarce resources – and where most of the infrastructure required for the provision of the service is privately owned (e.g. data centres).
- (iii) *Expansion of networks and services* – The license helps in imposing network roll-out and service coverage obligations which are critical for TSPs, but do not make sense in the context of OTTs who do not control any critical infrastructure.
- (iv) *Increasing competition* – Giving out licenses through a competitive bid helps keep competition levels healthy and helps new entrants in the market. In markets such as those for OTT services, there is no entry barrier and no dearth of competition.
- (v) *Regulatory streamlining* – Licenses also help streamline the provisioning of the service and having various aspects of it regulated by a single regulator. Bringing OTT services under the purview of the TRAI would require significant amendments to its scope of regulatory oversight as at present it is only authorized to exercise regulatory powers over operators of a telecommunications network. However, such changes to its scope may not be desirable as it may create confusion about overlapping legal regimes being applicable to OTTs.

c. QoS / Interconnection / Emergency Services for OTTs

Several obligations that were introduced for the TSPs through the telecom policies of the early 90s rested on an assessment of the market conditions underpinning liberalization and the need to create a competitive, quality-oriented, well-connected network.

Interconnection: The context of the interconnection regulations are based on the fact that there are economic and technical advantages of an incumbent in the market, due to network externality effect. Thus, for new entrants in the market to attract subscribers, it is critical for them to have the ability to interconnect with incumbent networks. TRAI had initially explored the idea of allowing operators to mutually come up with interconnection arrangements and charges. When this failed, regulations were issued mandating the same and specifying commercial details.

Clearly, a similar issue does not arise in regard to OTT players. There is no reason to mandate interconnection as the consumer has far greater control over these services – in terms of choosing to install them, being able to use several of them simultaneously or none at all and uninstalling each app easily if they are not satisfied with the service. Consumers prefer that these services offer different functionalities (some provide stickers and filters, some provide group chats) and there is no data transfer within each disparate corporate entity that provide each service. If consumers expressed any interest in having unified profiles across platforms, the market would respond by making appropriate commercial arrangements – but as of now, no such need has arisen. In fact, opening up such channels would lead to concerns regarding data sharing that may require taking on additional data protection obligations.

Thus, at this stage, there is no need for regulatory intervention to safeguard the interest of consumers as this is not a situation where the market has failed to achieve the optimum commercial arrangement.

QoS: When several telecom players operate in the market, the QoS obligations are critical in order to maintain the overall performance of the market. The TRAI issued these regulations first in 2000, subsequently revised several times in consultation with service providers. One part of the QoS

assessment includes objective assessments including audits of various kinds. This obviously cannot be imposed on OTT service providers because there is no objective audit criteria applicable to the diversity of the services provided by OTTs. Only the subjective aspect of QoS could potentially be assessed, but even that would be extremely difficult to operationalize.

The other issue is that the quality of an OTT service largely depends on the underlying services being provided by TSPs. For an OTT offering voice call services, for example, the clarity of calls would depend to a very large extent on how strong the internet connection of both parties would be, and an OTT service provider would not be able to control that aspect. Further, in a call placed over traditional circuit switched voice telephony, a dedicated circuit is set up for the call (within control of TSPs) – whereas in the course of a WhatsApp or Viber call, the application is using the internet simultaneously with several other third parties applications, all of which impact the quality of the call (but which the calling app, again, has no control over). Thus, it is hard to design QoS obligations that would appropriately capture the precise scope of an OTT service provider's obligation in ensuring quality of calling and texting services.

In addition to calling and texting, OTT services provide a host of other features which differ so much between apps that it would be impossible to regulate them in a one-size-fits-all manner.

Emergency Services: As AIC has pointed out in its main submission, OTTs which require consumer permission for location functionality, do not always have the kind of geolocation information that is required for emergency services to locate emergency callers. Even Wi-Fi is still not a reliable substitute for the access to comprehensive caller geolocation information available to the network operator. In this context, even if OTT services were mandated to provide emergency services, they may not be able to deliver the same. Further, there is lack of PSTN connectivity with their networks that would enable seamless calling facilities to emergency help centres. Therefore, leading consumers to believe that OTT communications apps can provide access to emergency services could mislead them and leave them unable to seek appropriate channels of emergency assistance.

d. Law Enforcement Issues

Given that the TRAI closely regulates the underlying technology that governs the placement of traditional phone calls, it is possible for it to seek several functionalities to be built into these systems and certain kinds of records to be provided that assist in law enforcement. By default, these specific requirements cannot be covered under a general legal framework that is applicable to all natural and legal persons, such as the criminal procedure framework.

By contrast, OTT service providers use different functionalities for providing their services and there cannot be specific technical obligations specified in this regard, without due consideration for the existing business practices of the operator. The law enforcement obligations can only be general – and phrased in the nature of co-operation obligations.

The IT Act and Criminal Procedure Code sufficiently cover general procedures for compliance with law enforcement. We do not believe that there is any reason to single out a specific subset of communication services on whom incremental parallel obligations need to be imposed. Furthermore, law enforcement would be equally concerned whether criminal agents are using so-called TSP competitors like Whatsapp for communication (who are identified as being the sole service providers within the scope of the Consultation paper) or whether they are using the chat feature in Google Docs or Clash of Cans (which are outside the scope of the consultation). Thus, having a separate regulatory regime for only a small subset of OTT services would not serve any purpose. It is possibly far better to strengthen existing procedures by making them more robust with due process safeguards and consistent, uniform application.



In this regard it is also notable that these issues are sought to be addressed under recent amendments to the Intermediary Guidelines under the IT Act on which separate consultations are undergoing, and there is no need for parallel regimes in this regard.

Conclusion

It is interesting to note that none of the respondents who have suggested regulating TSPs and OTTs the same way have formulated a satisfactory test for isolating the subset of OTTs to be targeted. The substantial functionality test suggested by some have clear pitfalls and are extremely vague, leading to a potential risk of uneven playing field within OTT service providers themselves. This has been dealt with in detail in our main comments. We would request TRAI to take into account the issues highlighted here and in AIC's main comments, in order arrive at the natural conclusion that different services should, in fact, be treated under different regulatory regimes. We remain committed to assisting TRAI in other ways, including ways to revamp the existing telecommunications regime for maximum benefit of the TSPs and the digital economy overall.

End of Submission