

16 August 2024

Mr. Akhilesh Kumar Trivedi,
Advisor (Networks, Spectrum and Licensing),
Telecom Regulatory Authority of India,
New Delhi, India

Subject: Asia Internet Coalition (AIC) Industry Counter Comments on Consultation Paper on 'Framework for Service Authorisations to be Granted Under the Telecommunications Act, 2023'

Dear Mr. Trivedi,

On behalf of the [Asia Internet Coalition](#) (AIC) and its members, I am writing to express our sincere gratitude to the Telecom Regulatory Authority of India (“**TRAI**”) for providing us with the opportunity to submit our counter comments on the Consultation Paper on ‘[Framework for Service Authorisations to be Granted Under the Telecommunications Act, 2023](#)’ dated 11 July 2024 (“**CP**”).

The Asia Internet Coalition (AIC) is a leading industry association of Internet and technology companies that promotes the understanding and resolution of Internet policy issues in the Asia Pacific region. Our mission is to represent the Internet industry and participate in and promote stakeholder dialogue between the public and private sectors, sharing best practices and ideas on Internet technology and the digital economy.

At the outset, we would like to extend our appreciation to TRAI for undertaking a detailed analysis of and seeking stakeholder inputs on the scope and contours of the new authorisation regime envisaged for “telecommunication services” under Section 3 of the [Telecommunications Act, 2023](#) (“**Telecom Act**”).

We have reviewed the comments submitted by industry stakeholders on the CP. Here, we note that several stakeholders have – particularly in response to Q17 and Q18 of the CP – raised the issue of regulating over-the-top (“**OTT**”) communication services under the Telecom Act and subjecting them to an authorisation regime. In this regard, we have provided our counter comments in the Annexure below for your easy reference, please.

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. Furthermore, we would also be happy to offer our inputs and insights on industry best practices, directly through discussions and help shape the dialogue for the advancement of India’s digital economy.

Thank you

A handwritten signature in blue ink, appearing to read "Paine".

Sincerely,
Jeff Paine

Managing Director
Asia Internet Coalition (AIC)

Annexure

A. 'Level Playing Field' and 'Same Service, Same Rules' Arguments are Unfounded

Summary of comments:

1. [Reliance Jio Infocomm Ltd.](#), while responding to Q18 of the CP, has proposed the regulation of OTT communication services *"in order to ensure same rules for same or similar services."* This requested has been reflected in the submission of the [Cellular Operators Association of India](#) ("COAI") under Q17 as well. COAI has argued that bringing OTT communication services under an authorisation regime would ensure fair competition, address "potential biases", and foster a level playing field within the telecom industry. In fact, COAI has submitted that OTT communication services are "perfect substitutes" of voice / video call services offered by TSPs, and that OTT service providers essentially free ride on the infrastructure / investments made by TSPs to provide connectivity services to users. In this regard, OTT service providers ought to bear the same / similar regulatory burdens as that of TSPs (in terms of entry fees, tariff compliances, bank guarantees, etc.).
2. [Vodafone Idea Limited](#), while responding to Q17 of the CP, has made submissions along similar lines as well. For example, Vodafone Idea is of the view that OTT service providers *"compete directly with traditional telecom services (like voice calls and messaging) without being governed through same regulatory obligations and licensing fees. Bringing OTT-CS under the new authorization framework would create a level playing field..."* As per Vodafone Idea, this will also ensure that OTT service providers are subject to requirements on national security (such as lawful interception, trusted equipment, etc.), consumer protection (such as QoS requirements, consumer grievance redressal and data privacy), and help contribute to the national exchequer as well. Vodafone has, alternatively, also suggested that only larger OTT service providers be subject to an authorisation regime under the Telecom Act.
3. [Bharti Airtel Limited](#), while responding to Q17, has submitted that OTT communication services and traditional telecom services are similar in terms of "functionality" and "core utility". It has sought for the regulation of OTT communication services basis (a) the 'same service, same rules' principle, (b) the need to create a level playing need, and (c) national security and consumer protection considerations.
4. Lastly, [Tata Communications Limited](#) has noted that there has been a decline in international voice traffic in both the directions due to OTT voice services which has adversely impacted the revenues of NLDOS and ILDOs. In this regard, it has submitted that

it is important “to create a level playing field between licensed and un-licensed service providers in all variants of services.”

AIC’s Counter Comments:

‘Same service, same rules’ cannot apply to fundamentally different services

1. At the outset, regulation of OTT communication services under telecom laws has been a long-drawn demand of telecom service providers (“TSPs”) to create a level playing field between the two, including by relying on the ‘same service, same rules’ principle. This demand has, once again, been raised in comments to this CP. However, we would like to take this opportunity to reiterate that there are fundamental differences between the two types of services (from a technical, operational and functional perspective – as noted below). In fact, these differences have already been highlighted by several stakeholders in previous consultations to argue against the regulation of OTT communication services under telecom laws - including in [response to](#) the TRAI’s Consultation Paper titled ‘[Regulatory Mechanism for Over-The-Top \(OTT\) Communication Services, and Selective Banning of OTT Services](#)’ from July 2023 (“OTT CP”). Accordingly, we reiterate that OTT communication services – irrespective of their size, operational capacity or number of users - should not be regulated under the Telecom Act – which has been primarily framed keeping in mind the nuances and complexities of traditional telecom services.
 - a. **Technical differences:** As you will appreciate, TSPs operate on the network layer, whereas OTT providers operate on the application layer. TSPs exercise control over broadband / network infrastructure and provide internet access within India. On the other hand, OTT service providers are dependent on such internet access to provide products / services over the internet and for end-users to be able to access the same upon purchasing data packs.
 - b. **Operational differences:** TSPs have always operated in a highly restricted market, with a limited pool of players being entitled to certain rights. OTT service providers do not enjoy such rights. For example, TSPs have the right to acquire spectrum, obtain numbering resources and interconnect with the PSTN. They are also entitled to right of way to set up telecom infrastructure. It is on account of the same that TSPs have been traditionally subject to stringent statutory framework in India. That said, we are positive that the Telecom Act will undoubtedly overhaul legacy regulations (to the extent considered onerous and difficult to adhere to) and introduce an authorisation regime for TSPs that is easy to comply with and promotes their ease of doing business in the country.
 - c. **Functional differences:** To the contrary of what is being suggested by TSPs, OTT communication services *are not* substitutes of traditional telecom services. There are functional differences between the two. As noted above, TSPs provide internet access. OTT service providers rely on the internet access to offer digital services to end-users. OTT service providers also offer a wider set of services to users. OTT communication services also have

added functionalities over and above traditional communication features that TSPs offer to subscribers – such as group chat, voice notes, in-app content sharing, document sharing, live location sharing, and online payments. More importantly, users also do not view TSPs and OTT service providers as offering same / similar services. They either use both services at the same time, or *only* use traditional telecom services, such as SMS or voice calls.

- d. The differences in the services offered by TSPs and OTT service providers has also been recognized in foreign jurisdictions. For instance, the Australian Competition and Consumer Commission, in its [Communications Sector Market Study](#) (April 2018) noted that “*there is no basis for requiring equivalent regulatory treatment of OTT and traditional voice services.*” It reasoned that “*the extent of substitution from traditional voice services to OTT voice services is limited by technical shortfalls (such as any-to-any connectivity) and consequently we do not consider OTT services to be full substitutes for voice services at this time.*”

Free riding claims remain unsubstantiated

2. As noted above, certain stakeholders are of the view that since OTT service providers free ride over the telecom services and underlying network infrastructure established by TSPs, they should – at the very least – bear the same / similar regulatory burdens. Here, we would like to highlight that OTT service providers *do not* free ride on TSPs since they contribute to the revenues generated by TSPs. This is on account of an increase in number of users who have internet access and a corresponding rise in their demand for online content. Given below are statistics to support our position that a case of ‘free riding’ cannot be made out against OTT service providers.

- a. This aspect was affirmed by the TRAI in its OTT CP as well. As per this, the TSPs have gained a new source of revenue due to the widespread use of OTT services in the country and increased data consumption by subscribers to access OTT services. This Consultation Paper also highlighted data showcasing improved figures in monthly wireless data usage, ARPU for internet / data consumption, and wireless internet subscriber base.¹
- b. Such statistics support the finding made by BEREC in a paper titled ‘[BEREC preliminary assessment of the underlying assumptions of payments from large CAPs \[content and information providers\] to ISPs](#)’ (October 2022). It found that the demand from subscribers for content drives the demand for broadband access, and the availability of broadband access drives demand for content, and that there is no evidence of free riding taking place.

¹From 2012 to 2022, the monthly ARPU for wireless services in India grew from INR 98 to INR 141.14. There has also been a growth in the volume of monthly wireless data usage from 2014 to 2022 from 92.4 million GB to 14.4 trillion GB. The average revenue from data usage per wireless subscriber per month also increased about 5.6 times.

B. Telecom Act Does Not Extend to OTT Communication Services

Summary of comments:

1. We note that Reliance Jio, while responding to Q18 of the CP, has proposed the regulation of OTT communication services on the ground that the definition of “message”² and “telecommunication service”³ under the Telecom Act is broad enough to include “*all form of telecommunication services including the communication services provided over the top using the platform/ servers/ switches hosted in the public internet...*” Reliance Jio has also requested that OTT communication services accordingly be regulated under an authorisation framework designed for “access services”. This request is reflected in the submission of COAI under Q17 as well.
2. [Vodafone Idea Limited](#), while responding to Q17 of the CP, has also submitted that OTT communication services fall within the ambit of the definition of “telecommunication service” under the Telecom Act.⁴ Similarly, [Bharti Airtel Limited](#), while responding to Q17, has submitted that the definition of “telecommunication”⁵ under the Telecom Act leaves ample room for the regulation of OTT communication services under the Telecom Act.

AIC’s Counter Comments:

1. At the outset, the Telecom Act was enacted to “*amend and consolidate the law relating to development, expansion and operation of telecommunication services and telecommunication networks; assignment of spectrum; and for matters connected therewith or incidental thereto.*” The policy objective behind the Telecom Act was [the need to](#) replace colonial-era laws governing ‘telegraphs’, improve the ease of doing business in India, and implement a forward-looking and light touch framework vis-à-vis traditional telecom services that provide network connectivity and data services to consumers in India.
2. In fact, when the Telecom Act was introduced in the Parliament, Shri Ashwini Vaishnaw (the then Telecom Minister) [clarified](#) that “*OTT has been regulated by the IT Act of 2000 and continues to be regulated by the IT Act. There is no coverage of OTT in the new telecom bill passed by the Parliament.*” This is in line with the fact that as per the [Allocation of Business Rules, 1961](#), the Ministry of Communication / Department of Telecommunication’s (“DoT”) powers are limited to policy and allied matters relating to “*telegraphs, telephones, wireless...*”.

² Under the Telecom Act, “message” means “*any sign, signal, writing, text, image, sound, video, data stream, intelligence or information sent through telecommunication.*”

³ Under the Telecom Act, “telecommunication service” means “*any service for telecommunication.*”

⁴ The [PhD Chamber of Commerce and Industry](#) has raised this point as well, in its response to Q17 of the CP.

⁵ Under the Telecom Act, “telecommunication” means “*transmission, emission or reception of any messages, by wire, radio, optical or other electro-magnetic systems, whether or not such messages have been subjected to rearrangement, computation or other processes by any means in the course of their transmission, emission or reception.*”

On the other hand, it is the Ministry of Electronics that is empowered to regulate matters relating to the internet (which will subsume services that operate on the internet – including OTT communication services) and the Information Technology Act, 2000 (“IT Act”).

3. In light of this, irrespective the wording of the definitions under the Telecom Act, the policy intent of the Government ought to be respected. Moreover, even the Terms of Reference for this CP (as issued by the DoT to the TRAI) pertain to only seeking the TRAI’s recommendations on terms and conditions governing authorisation of telecommunication services. Dealing with regulating OTT communication services goes beyond the scope of these Terms of Reference. We, accordingly, request the TRAI to not delve into this issue, while issuing its recommendations under the CP.

C. No Dearth of Regulations *re* OTT Communication Services

Summary of comments:

1. Stakeholders such as Vodafone Idea and Bharti Airtel have – as part of their response to Q17 – raised concerns vis-à-vis the fact unless OTT communication services are subject to an authorisation / licencing regime, they will continue to function unmonitored, thereby hindering the processes of law enforcement. Further, exercising oversight is important keeping in mind national security, cyber-security, privacy and consumer protection measures (including in relation to quality of service, grievance redressal and KYC).

AIC’s Counter Comments:

1. At the outset, we would like to submit that OTT communication services are already regulated under a host of laws, including as ‘intermediaries’ under the IT Act and the rules and regulations issued thereunder. Thus, concerns that OTT communication services operate in an ecosystem where there is no regulatory oversight are unfounded. Over and above adhering to legal requirements, such services also always prioritise consumer welfare, as this is a key aspect for them to be able to stay relevant in a highly competitive market. We have elaborated on this below.

Intermediary regulations:

2. Under the framework of the IT Act, intermediaries are subject to national security and cyber-security requirements in relation to interception, content takedown and even incident reporting.
 - a. **Interception:** Section 69 of the IT Act read with Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009

empowers the Government to issue orders on intercepting, monitoring or decrypting any information – including where transmitted on an intermediary’s platform – on grounds of national security, public order, etc.

- b. **Blocking:** Section 69A of the IT Act read with Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 empowers the Government to issue blocking orders to an intermediary on similar grounds of national security, public order, etc. Such blocking orders ensure that the public no longer has access to the blocked information that is available on a computer resource.
 - c. **Traffic data:** Section 69B of the IT Act read with Information Technology (Procedure and safeguard for Monitoring and Collecting Traffic Data or Information) Rules, 2009 enables the Government to monitor and collect traffic data or information generated, transmitted, received or stored in any computer resource for cyber security purposes. In fact, intermediaries are required to provide technical assistance and extend all facilities to enabling such monitoring and collection to take place.
 - d. **Cyber-security:** Section 70B of the IT Act read with Information Technology (the Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013 and allied directions issued thereunder deals with the functions of the Indian Computer Emergency Response Team. As part of this, intermediaries are required to report certain mandatorily reportable cyber-security incidents within stringent timelines and designate a point of contact to communicate with the regulator, among other things.
 - e. **Due diligence:** Section 79 of the IT Act read with the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (“**IG Rules**”) create a safe harbour regime for intermediaries, subject to certain conditions. This includes adhering to due diligence obligations, such as tackling the transmission of around 11 categories prohibited content, following content takedown orders or fulfilling information requests received from the Government.
3. The framework under the IT Act is likely to be overhauled by the proposed Digital India Act. Based on [public information](#), we understand that various categories of intermediaries (including OTT service providers) will be subject to heightened obligations under this law, including in the interests of preventing online harm and generally improving security in cyberspace.

Data privacy:

4. As regards privacy regulations in India, the Parliament, in August 2023, enacted the Digital Personal Data Protection Act, 2023 (“**DPDP Act**”). OTT service providers will be regulated under the DPDP Act as ‘data fiduciaries’ – once the same is notified. Under this law, OTT service providers will have extensive obligations vis-à-vis notice and consent, data breach

reporting, implementing robust security measures to protect personal data being processed, and so on.

Consumer welfare and KYC measures:

5. As regards the issue of KYC or user verification, OTT communication services typically undertake verification of users who sign up for their services, either by way of phone number or email verification.⁶ The IG Rules also require certain intermediaries (i.e., significant social media intermediaries) to enable users to voluntarily verify their accounts *via* appropriate mechanisms (including an active Indian mobile number). To this extent, OTT communication services are already subject to KYC / verification requirements under extant law.
6. As regards consumer welfare measures, OTT communication services are subject to grievance redressal requirements under existing frameworks, including the IG Rules. Here, intermediaries are required to appoint a 'grievance officer', publish such officer's details on their platform and redress user grievances within specific timelines.

Quality of service:

7. It is a well-established fact that market competition incentivises its players to provide best quality of service to consumers. In this regard, OTT communication services generally strive to maintain a high quality of service for their users. Since all players in the OTT ecosystem face tough competition from their peers, any drop in the quality can prod its users to switch to competing services. This is complemented by the fact that India is a mobile first country; it is relatively easy for a user to switch from one OTT communication service to another due to various options (in terms of OTT platforms offering similar services) available to such users.
8. In all, this has ensured that maintaining quality of service is and will continue to remain a priority for OTT service providers.

⁶ Here, we note that few OTT service providers have entered into voluntary arrangements with regulatory authorities to prevent users with disconnected phone numbers from continuing to use an OTT communication service where they have signed up using such numbers. The same is carried out by undertaking a re-verification of such numbers.