

Re: Counter-Comments on the Consultation Paper on the Regulatory Framework for Over-the-Top Communication Services.

Date: January 21, 2019

From: Dua Consulting, Delhi.

1. Introduction

- 1.1 The comments received from the various stakeholders on the Consultation Paper dated November 12, 2018, issued by the Telecom Regulatory Authority of India (“**TRAI**”) on the Regulatory Framework for Over-The-Top (“**OTT**”) Communication Services (“**Consultation Paper**”) have been mixed, varied and in some cases conflicting. Notably, while some stakeholders (such as COAI, Reliance Jio) have contended that OTT should be brought within the scope of a regulatory framework which should be similar to what is applicable to telecom companies, others have advocated there is no need for any additional regulation for OTT Communication Services since there are adequate provisions under the existing laws such as the IT Act (Nasscom and IAMAI), OTT Communication services cannot be a substitute for services rendered by Telecom Service Providers (“**TSP**”) (Star India, Sony Pictures and Times Network).
- 1.2 The interdependency between the OTT communication services and the services rendered by TSPs is apparent as one cannot function without the other. This is reflected in the recent partnerships between TSPs and OTT service providers such as Reliance Jio with Disney, Airtel with Eros Now, Sony LIV, HOOQ and Amazon Prime, Vodafone with Discovery Communication and AltBalaji. However, the scope of services as well as their revenue models are different. In our view, OTT service providers must be encouraged to function at par with TSPs in a symbiotic manner in order to ensure the growth of technology penetration in India. However, amidst this growth, the security of data must not be compromised and there must be sufficient checks and balances both, as a responsibility imposed on the TSP in the nature of regulations to avoid the misuse of OTT services.
- 1.3 The need of the hour is therefore to adopt a progressive regulatory framework for the communications sector which would involve a reconsideration of the existing licensing and regulatory regime to accommodate the onset of convergence and the increase in the number of providers offering communication applications and services. All the regulatory obligation on its relevance, requirement, practicability, global practices and desirability should be examined while formulating this revised framework.

2. Counter-Comments

- 2.1 *Whether Services provided by OTT service provider(s), should be regarded as the same or similar to service(s) being provided by the TSPs.*
 - (a) Many stakeholders (BSNL, Bharti Airtel, Vodafone Idea, Paytm, Tata Communications, COAI, and ISPAI) have adopted the view that OTT service providers should be regarded as same or similar to the service(s) being provided by the TSPs. This view has been based on the rationale that a number of services being provided by the OTT service provider can replace telecommunication services such as VOIP and Messaging Services (Text/Video



Calling). While the end outcome of both the services provided by the OTT service provider and the services provided by the TSP is the same, which is creating a connection between two or more persons, the types of platforms used by the OTT service providers (in addition to providing the communication services) also have multiplicity of functionalities which make it difficult to segregate communication from non-communication services.

- (b) Many stakeholders have also recommended that the TRAI should recommend the adoption of the definition of “interpersonal communication services” as has been adopted by the EU.
- (c) The other view taken by stakeholders is that the argument of OTT service providers and conventional TSPs providing ‘*same or similar service(s)*’ is erroneous. This is because TSPs are allowed to interconnect with PSTN networks and ISP licensees provide only a one-way phone connection and number-independent communication services which rely on the infrastructure provided by TSPs cannot be regarded as services which are similar to TSPs.
- (d) In our view, the services provided by an OTT service provider and TSP are interdependent on each other and in some cases may or may not be the same or similar type of services. OTT is any service received over the Internet that is not provided directly by the TSP (Internet Service Provider (ISP) but are using telecommunications infrastructures/services . It may be noted, that if TSPs were to stop providing connectivity to the OTT service providers, all OTT services would be a non-starter. These services though may be similar operationally but hold a distinct form of connection and licensing norm.

2.2 *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.*

- (a) Stakeholders such as Bharti Airtel and Tata Communications agree that substitutability of service should be treated as a primary criterion for comparison between OTT provider and TSP provider. Reliance Jio also stands on similar lines stating that the ‘demand side’ of substitutability should be treated as a primary criterion. Many other stakeholders who are TSPs have stated that the onset of OTT provider is resulting in decline of demand for traditional services causing a revenue loss in voice and messaging services because the services are now being provided at almost no cost to the customer. The TSPs also defend the revenue generated through more usage of internet stating that it does not meet the required capital for investment and expansion. Another stakeholder (ISPAI) suggests that in order to ensure a level playing field, the principle of ‘same services – same rules’ should be applied to the OTT providers and according registration and licensing norms must be introduced.
- (b) As it may be seen that the scope of services provided by the TSP and an OTT service provider, do tend to overlap in some category of services, however, it cannot be contemplated to substitute one for the other. While it is recognised that OTT services are the future service model for communications and media and for a whole range of other

apps like e-commerce, m-commerce, e-health, e-education, smart grids and the digital economy in general playing a vital role in Digital India, the TSPs enjoy specific rights and privileges including interference-free spectrum and interconnection, none of which is available to OTT service providers, These can be made available to the OTT, should they wish to invest in building infrastructure which means getting into licensing regime and hence the two services cannot be compared.

- © Because OTT services are delivered over the internet, users still need an internet connection, which they usually get from their TSP or ISP. The interplay between the OTT service providers and the TSPs is evident in as much as there is interdependence for the provision of services by the OTT service provider to the user through the network connectivity provided by the TSP. It thus appears that the TSP will continue to play an important role in the growth of OTT services because they also specialize in areas that the OTT service providers don't have an expertise in, including sales, marketing and customer management.

2.3 *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.*

- (a) One stakeholder (Reliance Jio) has suggested that OTT traffic impacting the infusion of investment in telecom network may not be a conclusive affirmation, however admits the fact that OTT players have been churning revenues from TSPs through services without committing to any capital investment in the TSP. Another stakeholder (Tata Communications) supports this view and suggests that regulatory frameworks must mandate the OTT service providers who offer real time communication service to invest in telecom infrastructure as partners and only subsequently may be allowed to roll out services in India. Another stakeholder (BSNL) opines that regulatory and licensing imbalances can be fulfilled by bringing OTT service providers under a regulatory framework and by means to compensate TSPs for network use and it has been suggested by other stakeholders (Vodafone/Idea) that the methods in which OTT players can participate in infusing investment in telecom networks include sharing the Universal Service Obligation requirements and sharing the cost of licensing.
- (b) Some stakeholders (COAI) have stated that the imbalance of the services provided by the TSP and OTT is impacting the sustainability of the TSPs and measures must be taken to increase the revenue and review the taxation applicable on TSPs. One stakeholder (ISPAI) suggests that the OTT service providers that cross a specific volume of usage must be charged by operators to access.
- (c) Another view taken by another stakeholder (OLX) is that that neither do OTT services directly gain revenues from network usage, nor do customers pay the OTTs a fee for their service and OTT service providers mostly earn revenue through third party investments and the TSPs mainly gains from making investments in network capacity expansions as that earn money out of user growth and data consumption of OTT services. One stakeholder (ALT Balaji) has stated that OTTs must not make any investment for the TSPs and TSPs should not be allowed "double dip", that is earn revenue for the same traffic from both content providers as well as end users. Another stakeholder (Sharechat) has suggested that TSP revenues with respect to value added



services have been declining due to technology contended that this alone should not give rise to the need for regulation of its competitors due to a market change.

- (d) From the perspective of the TSPs, there is considerable expense which has been incurred in building towers and other infrastructure for setting up a telecommunication network for which there is high capital investment along with payment of license fees, taxes, offering services at regulated tariffs and other limitations. TSPs are facing challenges, including decreasing revenues and greater competition from companies that provide services that run 'over the top' of the internet and that compete directly or indirectly with their service offerings. TSPs argue that less stringent regulations imposed on these OTT providers create difficulties in competing with these new services leading to a regulatory or licensing imbalance.
 - (e) Ensuring fair competition is particularly important as telecommunications companies must invest in new infrastructure to meet increasing demand for high-speed, high-quality internet and achieve all of the goals provided in the NDCP, 2018.
 - (f) Undoubtedly, the voice traffic has migrated to OTT platforms, but the pipe carrying the voice traffic is that of TSP, who charges the customer for usage of the data. Is it possible to look into rebalancing if voice, data tariff or some share of OTT remains to be ploughed in to TSPs for capacity augmentation and upgradation to maintain the consistent growth of service.
 - (g) It is therefore urged that the inter-dependencies between the TSPs and the OTT providers should be understood and the co-operation between the TSPs and OTTs should be encouraged by develop enabling policies with a view to promoting competition, encouraging innovation and investment in the TSP's network.
 - (h) Indian system follows Net Neutrality, the principle that TSPs should enable access to all content and applications regardless of the source, and without favoring or blocking particular products or websites. Users, accordingly have a right to access all the data available on the internet. However, like a website is required to pay regular domain and hosting charges, OTT providers may be asked to pay a nominal charge depending of the traffic flowing towards their websites/ apps. This payment may be made quarterly or periodically to the TRAI/DoT, and in turn distributed by the TRAI/DoT to the TSPs in the forms of rebates.
 - (i) TSPs may also make its shift towards other business models through diversification of their service. Some of these are, for instance through tie ups with OTTs, as is prevalent in the case of various voice and video streaming apps, and opening of their own e-wallets and mobile banking systems. Further, TSPs may diversity into other modes of technology that require communication, as in the case of the development of Internet of Things (IOT) and Artificial Intelligence.
- 2.4 *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.*



- (a) Many stakeholders have given their view in the affirmative suggesting inter-operability non-discriminatory models which would promote healthy competition and benefit to users. Some stakeholders (Airtel, COAI, Vodafone Idea and Centre for Policy Research) suggest that inter-operability should not be mandated or regulated but may be left to market forces and mutual agreements.
- (b) One stakeholder (OLX) has indicated that while TSPs have stated their own OTT services, promoting inter-operability may give rise to anti-competitive practices and could be antithetical to net neutrality.
- (c) It is well understood and accepted in the market, that the traditional telecommunication services (such as voice and messaging services) have now been integrated to internet-based services. The services provided by OTT service providers offer extensive capabilities that go well beyond traditional telephony and broadcasting. Hence it is necessary to formulate guidelines/policies to promote inter-operability among OTT services and TSP services. By encouraging co-operation between OTT service providers and TSP's, there will be a direct bearing on stimulating innovation and investment in the development of the telecommunications sector. While we agree, that such contacts may be free flowing, they must be bound by certain regulations to such contracts do not disregard fair competition, are not violating the principles of net neutrality and duly meet the due Security Guidelines
- (d) The quality of OTT services depends on the quality of telecom infrastructure. So does the quality of various other data-based services such as video streaming that are increasingly being bundled as packages by TSPs. There is already precedence in the market where a TSP has partnered with an OTT service provider providing video streaming services, whereby the OTT service provider gets the opportunity to acquire more customers in India and the TSP gets assured data usage by the customer.
- (e) Inter-operability with regulation and revenue share could be a way forward. Regulation shall encourage interoperability amongst OTT service providers as well as those offered by TSPs with proper checks and balances and result in revenue stream.

2.5 *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.*

- (a) Some of the TSPs (Reliance Communications) have described a well-defined LIM process and procedure for the OTT services to be regulated. They state that the encryption of data happens at the end point of the server/device in various OTT communication service and the interception and decryption should be done considering that it is an important aspect of security. This view has also been supported by other stakeholders such as (Tata Communications and BSNL) who agree that the responsibilities of TSPs and OTT service providers must be separated, and a system with respect to security for OTT service providers must fall into place. Another stakeholder (Airtel) has suggested that a regulatory mechanism which ensures national security and consumer privacy must be prepared.

- (b) We agree with this perspective that in comparison to TSPs who have an absolute obligation for monitoring services through lawful interception and monitoring, the OTT service provider has no such obligation to comply with. There could be security issues relating to the usage of the OTT applications as some free applications share the personal information of the users with third party developers. There may also be loss of content and privacy and compromise of cyber security leading to cyber-crimes. The usage of some OTT applications could lead to cultural sensitivity and diversity since some off-shore OTT service providers which are highly capitalised and control million of customers across continents.
- (c) Keeping the above in mind, it is suggested that the security norms applicable to OTT service providers should be in line with those applicable to the TSPs. National security is extremely important and may not be compromised at any stage.
- (d) No doubt internet traffic has to be monitored by LIM of a TSP, but it is unlikely to be decrypted if embedded by special encryption in the applications, Blackberry messenger has a matter of concern in part the 21st century
- (e) It may hence be considered to include a mechanism for IT audit of the OTT service providers, similar to the lines provided under the IT Act, which is stated below:

1. *Information Technology Act, 2008, Section 7A- Audit of Documents etc in Electronic form. Where in any law for the time being in force, there is a provision for audit of documents, records or information, that provision shall also be applicable for audit of documents, records or information processed and maintained in electronic form (ITAA 2008, Standing Committee Recommendation).*

2. *Information Technology (Reasonable Security Practices and procedures and sensitive personal data or information) Rules, 2011- Rule 8, Sub rule(4) Reasonable Security Practices and Procedure, The body corporate or a person on its behalf who have implemented either IS/ISO/IEC 27001 standard or the codes of best practices for data protection as approved and notified under sub-rule (3) shall be deemed to have complied with reasonable security practices and procedures provided that such standard or the codes of best practices have been certified or audited on a regular basis by entities through independent auditor, duly approved by the Central Government. The audit of reasonable security practices and procedures shall be carried out by an auditor at least once a year or as and when the body corporate or a person on its behalf undertake significant upgradation of its process and computer resource.*

3. *Information Technology (Information Security Practices and Procedures for Protected System) Rules, 2018 – Chief Information Security Officer (CISO) shall establish a process of sharing documented records of Cyber Security Operation Center (related to unauthorised access, unusual and malicious activity) of Protected System with NCIIPC to facilitate issue of guidelines, advisories and vulnerability, audit notes etc. relating to Protected System.*

- 2.6 *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*



- (a) Stakeholders who are TSPs- (BSNL and Idea Vodafone) promote the need of an Emergency service on an OTT platform. Another stakeholder (Jio) has questioned the possibility of emergency services to an OTT service provider since they do not have PSTN but encourages if a system may be made. One stakeholder (Tata) also states that OTTs by their nature of multi-channel communication can provide an enhanced emergency service.
- (b) The opposite view has been taken by other stakeholders (Centre for Policy Research) who are critical about emergency services and state that such services on OTTs would not be accessible to a majority of India's mobile phone subscribers as all these services require Internet access and a smart phone. Other stakeholders have supported the aforesaid view (Bharti Airtel and AMCHAM) and have indicated a framework which would refrain from emergency services through OTT service providers since they are not connected to PSTN as TSPs.

- (c) Under the Unified License, the term emergency services have been defined as follows:

"23. EMERGENCY SERVICES means the relevant public, police, fire, ambulance, coast guard or any other services so declared by the Licensor."

As per Clause 7.1 (Chapter VIII-Access Services) of the UL, the TSP is under an obligation to provide emergency and public utility services as follows:

"7. Emergency and Public Utility Service:

7.1 The LICENSEE shall provide independently or through mutually agreed commercial arrangements with other Telecom Service Providers all public utility services as well as emergency services including toll free services like police, fire, ambulance. Licensor may declare any public utility or emergency number as toll free service from time to time. While providing access to public utility services/ emergency services/ emergency response services/ services for relief and rescue on occurrence of disaster including police, fire, etc. as defined from time to time, the Licensee shall take all measures to ensure that such calls are delivered to the designated control room of the concerned authority, as prescribed from time to time."

- (d) Traditionally, emergency and public utility services have been provided by the TSPs. As per the 2022 Goals under the NDCP, 2018, it is proposed to:

"2022 Goals:

- a. Provide Universal broadband connectivity at 50Mbps to every citizen
- b. Provide 1 Gbps connectivity to all Gram Panchayats of India by 2020 and 10 Gbps by 2022
- c. Enable 100 Mbps broadband on demand to all key development institutions; including
all educational institutions
- d. Enable fixed line broadband access to 50% of households
- e. Achieve 'unique mobile subscriber density' of 55 by 2020 and 65 by 2022



- f. *Enable deployment of public Wi-Fi Hotspots; to reach 5 million by 2020 and 10 million by 2022*
- g. *Ensure connectivity to all uncovered areas”.*

If the Government takes adequate steps to meet the 2022 goals as aforesaid, it may be considered to allow emergency services to be provided through OTT platforms.

2.7 *Is there an issue of the 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*

- (a) Many stakeholders (mostly TSPs) agree that there is an issue of nonlevel playing field between the OTTs and TSPs providing similar services and that there should be same service same rule policy to ensure a level playing field (Bharti Airtel). While some stakeholders have suggested the introduction of a licensing regime (BSNL) for OTT service providers so that security, regulatory and quality of service is maintained, it has also been suggested that OTT service providers may be required to procure an ISP UL license and comply with the Information Technology act and its allied laws (TCS) and. Other stakeholder (COAI and ISPAI) have suggested that the existing regulatory and licensing conditions imposed on TSPs should be reviewed and minimized for OTTs keeping in view light touch licensing approach. A major telco (Reliance Jio) has a different opinion on this subject and mentions that level playing field in terms of financial levies is not clear in the era free calling and SMS. National security and data privacy must be of concerns for the OTT and the same must be provided for.
- (b) While many players objected to the substitutability of the OTT providers, it was mainly due to the loss in revenue and due to the operational similarity in the services. However, not many comments strongly advocated for a licensing system for OTT service providers, and we are of a similar stance with respect to licensing.
- © In our view there is a non-level playing field between OTT providers and TSPs. Some light touch regulations may be made applicable to OTT providers. It may be considered to introduce registration norms applicable to OTT provider’s terms of the service offered by the OTT application.
- (d) Please refer to our response under Point 3.3.
- (e) Under the existing norms, TSPs are required to pay license fee of 8% of their adjusted gross revenue and about 5% as spectrum usage charges. Similarly, the OTT providers may be required to pay charges if their user traffic is beyond a specific prescribed threshold. This charge levied on the OTT may further be passed on to the end users of such information in the form of paid services by the apps
- (f) We also agree that a comprehensive research needs to be done, both from the side of the usage by the end of customers, and that of the relevant market bodies in respect to change in preferences and a comparison of financial positions before any change is brought into force.



- 2.8 *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.*

In our opinion, no licensing requirements should be made applicable to OTT providers, however a light touch regulation, possibly in the form of a registration may be considered. There may be a provision of compulsory registration for operability of an OTT service (similar to the OSP Registration requirements).

It may be considered to make changes to the existing legislation, broadly on the basis given below:

1. Data Specific recommendations

- Conduct content filtering in accordance with the laws and regulations: This shall include filtration as directed by the MIETY from time to time;
- Conduct data protection in accordance with the laws and regulations;
- Strong laws for end to end data encryption;
- Comply with the laws and regulations regarding prohibition against monopoly and unfair business practices;
- Local storage of data to be mandated in India;
- Payment gateways must be through an Indian entity;
- Guarantees access for lawful interception and collection of evidence for the purpose of criminal inquiries or investigation by the competent authority in accordance with the laws and regulations;
- All other laws on data protection applicable to other Internet based platforms

2. Other recommendations

- Consumer Protection Laws in case of theft of information through OTT services/ forums, or with respect to Quality of Services in case of Paid apps towards the Consumer;
- A percentage of their revenue must be considered for the purpose of Taxation irrespective of the country of origin of the OTT;
- Strong Advertisement laws on use of information for customer specific marketing.
- All other laws as are applicable to other Internet based platforms.

- 2.9 *Are there any other issues that you would like to bring to the attention of the Authority?*

It is understood that at present, regulatory provision do not exist to monitor or regulate the OTT providers. Therefore it must be ensured, that in the interest of growth, investment and attracting of foreign investment, regulations must not exist in order to hinder the growth of OTTs providers, rather a means to encourage the use of value added services in a safe environment which may create a market which is of benefit to both the traditional and new means of operation. Toll Gate mechanisms must be created by which

either the inventor of the OTT pays or the user of the application pays upon its downloads. Management of internet traffic including security, Registration of OTT services, Regulations for Quality of Standards for OTT providers, and mechanisms for cross tie ups between OTT and TSPs for revenue generation must be formalized in order to benefit all stakeholders.

OTT application is a non-starter without internet. There remains a need to continuously invest in the internet infrastructure, to ensure a growth in the industry, the fruits of which shall be borne by all the service providers, allowing a continuous growth in the nation's technological development.

There has been a hue and cry that about voice traffic going to OTT, however, when it comes to statistics, we lack an empirical study of the migration of traffic from conventional switch services to any/ all of the OTT services. We believe that the prudence demand before any euphoria of immigration of traffic of any sort is created from conventional to OTT services; it would be illogical to even consider subjecting OTT services to conventional services provided by TSPs. Any obstruction due to evolution of technology in some apprehensions must not be encouraged.

Having said all this, the more important issue is that of legal interception. We believe & strongly recommend that the present paying capability for NLD, ILD and ISP or any other services are in are inadequate to intercept any other OTT services.

The soft touch regulation in order to prevent the proliferation of OTT services in a disorganized manner. So far these services have proliferated because of the no touch approach either by the regulator or licensor. Had there been any oversight, for example to say that the consumer can't download the application without a toll intimation or any payment to the service provider. As we may recall form a few years ago, any Value Added Services equivalent to today's OTT services were not possible without the acquiescence of the regulator. Why has all this been given a go by? Some such regulatory, policy & interception mechanism must be introduced at the earliest by requesting complete characteristic of the encryption etc.

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