
To,
Telecom Regulatory Authority of India
advqos@trai.gov.in

January 07, 2019

Dear sir,

*Re: Comments by the Internet Freedom Foundation on TRAI's Consultation Paper on OTT [Over-The-Top] Consultation released on November 12, 2018*

The Internet Freedom Foundation (IFF) is a non-profit organisation created by members of the SaveTheInternet.in movement for net neutrality. Over one million of our fellow citizens wrote to the TRAI in April 2015 as part of the consultation paper on OTT services using the SaveTheInternet.in platform, and continued to engage the TRAI and the Dept of Telecommunications on subsequent consultative exercises in this area. Our submissions in these consultation exercises has been consistently to protect net neutrality and prevent onerous licensing of internet platforms and services.

The later question on licensing is emerging again, albeit in different forms and regulatory reasoning. In our submissions we underline some concern but base all our views with the perspective of helping achieve and assisting in the goal of securing public interest.

IFF aims to promote the rights of Indian Internet users — freedom of speech, privacy, net neutrality and freedom to innovate - before policymakers, regulators, the courts, and the wider public sphere. We are grateful to submit our views in the consultation on consultation on TRAI's Consultation Paper on OTT [Over-The-Top] Consultation released on November 12, 2018.

To broaden stakeholder comment and inform a larger number of people, we also prepared a page summary of the present consultation paper to help citizens in understanding the issues at play in this subject and empower them to be better placed if they wish to provide their views to TRAI [link]. We have also put out our presumptive views [link] and conducted an economic analysis of the major telecom companies [link] to deepen public understanding of the thrust of the present consultation. Our responses on specific questions is contained below.

Sincerely,

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# IFF's Submission on TRAI's Consultation Paper on OTT [Over-The-Top] Consultation released on November 12, 2018

**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.**

The ambit of this consultation is sought to be limited at the outset with the definition of OTT [Over-The-Top] being narrowly defined by the the Consultation Paper. While an OTT service may be any internet application or service which sits on "*top*" of a telecom network, the present consultation limits the scope to only those which, "*only on regulatory issues and economic concerns pertaining to such OTT services as can be regarded the same or similar to the services provided by TSPs*" .

There is some historical baggage to this particular choice. The previous Net Neutrality and OTT Regulation paper published on March 27, 2015, made the unfortunate decision of lacking precision and ended up making paternal statements for regulation, citing arguments such as online gaming and social media addiction. To many in the SaveTheInternet.in movement this also seemed to be driven by an instinct to regulate the internet *per se* from the lens of telcos rather than satisfy any regulatory need.

At this juncture we would like to recount past submissions on this issue where the SaveTheInternet.in campaign consistently avoided the use of "OTT" in preference to "internet applications and services". To many, "OTT" was a reductionist term which limited the vibrant, innovative pace of applications and services and viewed the internet from the lens of a telco. This has real implications on regulation as we soon discover.

The second problem is the ambiguity of the term as the Consultation Paper itself accepts that the phrase OTT does not yet have any firm, universal definition. To reach a firmer understanding, it conducts a comparative assessment of the regulatory documents and proposals in foreign jurisdictions and international bodies.

There is a problem in this approach as India has adopted an indigenous, progressive approach towards net neutrality which is in many ways due to the leadership of TRAI setting the norms of net neutrality. Hence, while India may learn from comparative models under development in other jurisdictions, we may have an opportunity to help globally set standards once again.

On principle itself, we hold a view against the functional definitional treatment of internet applications and services as OTTs which further builds into a case for licensing and registration to protect telcos.

**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.**

To us, substitutability is a bad criteria as the substitutability of any service cannot be clearly made out and is closely linked to a large list of criteria. Let us for instance consider internet based calls, in which user behaviour is distinct due to voice quality, reliability and ease. For instance, many of use voice calls in preference to data calls and would usually do it for emergency services.

We may on the contrary use data calls when network is spotty or we are talking to a friend abroad. Both services co-exist, for very different purposes. Or, even internet based messaging, which is richer and more interactive than SMS based texting. The substitutability if any, by itself, operates on a very reductive criteria.

Substitutability as a criteria also leads to the problem of disaggregation, which the Consultation Paper acknowledges as well. In short, internet applications and services quite often offer multiple functionalities—which may include voice calling and instant messaging—even through their primary functionality, for instance, may be social networking. With WebRTC, nearly all browser based content and mobile applications can have a communications layer that supports messages, voice, and video. Will such services also be brought within the regulatory ambit?

To us, this is again illustrative of the reductiveness of a debate that commences from dulling the feature richness and diversity of internet applications and services into the straightjacket of OTT. The dangers of avoiding bright lines of regulation and the uncertainty in treatment may prevent free expression which the very basis for innovative thought and action. There are also concerns that overbearing and costly legal compliances and product decisions which may harm India's vibrant start-up ecosystem. Even a case-by-case assessment may bring in uncertainty and build ad-hocism.

Hence, we urge that the criteria that is distinct from substitutability, but a priori first examine the very need under which such a test is being devised. We would urge the TRAI to first examine the very premise and need for devising such criteria.

**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.**

One of the cardinal sins of any public policy dialogue can be the problem of self-evidence. It is when the premise which forms the basis for the prescription itself is not validated because it is never examined and hence lacks evidence. This becomes important in this consultation as its first principles arise from an economic overview, contained in Chapter 3 of the Consultation Paper with two distinct premises which need to be interrogated.

The first premise: there exists a market failure, in which there is a lack of adequate financial incentive for large telecom players to invest in infrastructure. The second premise: several internet services may be direct substitutes which have taken away revenue from voice and text revenues. This is to an extent where data revenues at present do not compensate for the losses, or may not be able to do so in the future, hence marking a disincentive for future investment in telecom networks. By itself, large swathes of the Consultation Paper, make this to be the causal link requiring regulatory intervention.

There are also subsidiary arguments made to further these two premises. These includes the rising user consumption of data, the dropping price of data per GB due to competition amongst telcos, growing convergence (where even voice calls originate over data networks), which requires investments for upgradation and increasing the capacity of existing networks. All these trends are stated on the basis of reference to reports by consultancies and industry associations. While we may like to dispute the sources, there is a much more concerning aspect which requires a concentrated analysis. This is on the profitability and the continued investment of major telcos.

Ideally any prescriptions on this should commence from a data driven analysis in which the profitability of large and medium telcos was set out in the consultation paper. To fill this gap we conducted an economic analysis of the financials of large telecom players which is available in full, broken into quarters to the fullest extent of their public filings over a 3 year period from 2015 to the present quarter of financials [Link].

Our economic, data driven analysis reveals the following:

- **Massive growth post 16Q2:** Use in both voice calling and data use is growing across the sector. This explodes after 16Q2 which is when Reliance Jio starts services. The rate of growth is increasingly and more people are coming online.

- **Fall in average rate per user:** This massive growth has coincided with a drop in per user revenue for the major telecom players. Such fall appears to be due to a hyper-competitive environment after the entry of Reliance Jio, however with a wave

of consolidation this period may soon end. Such trends are as per statements in the press by leading executives of telecom companies and analyst reports such as Moody's and Fitch.

- **Ambiguity in the amount of investment:** While there is a need for continued investment, we do not know to what extent, to what number and in what period of time. The data here is spotty and while the number may be large to devise any public policy measure there needs to be evidence.

We urge the authority to refer to the spreadsheet with the bare figures [click here] which also contains a links to the data points which lead to this view. This has also been further explained by us in a public analysis of the data [click here].

This leads us to submit that, we cannot any longer keep blaming increased data use for a fall in profitability for telecom companies. Statements by major telecom companies usually attribute multiple correlations, but the overwhelming consensus is hyper-competition. As per analyst reports this is slated to end sometime next year (latest by QY20) when the sector enters a period of consolidation given that only three major telecom companies will exist (Airtel, Idea-Voda, Reliance Jio).

We hold a view that devising regulations to place regulatory burdens or financial levies on internet platforms and services by itself is not a sound public policy measure from the perspective of data. The objective of regulation should not be to protect the profits of companies, it should be to serve public welfare.

**Q.4 Would inter-operability among OTT services and also inter-operatbilty 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.**

This is a relevant concern for the Consultation Paper to indicate as the market power of large online platforms concentrates and quite often there is a lack of compatibility or ease of migration from one online service or app to another. Hence, this quite often results in a lock-in for a user to a particular online service provider. While this is a credible public policy concern and may require regulatory intervention, we are unsure whether the TRAI, as a telecom regulator is well tasked to take this up.

Our two basic reasons for hesitance are: firstly, the lack of a clear statutory basis to do so (TRAI may go outside its legal mandate); and secondly, even beyond the niceties of law, it may turn the TRAI into some sort of internet regulator. We believe the absence of legality and authority would also blur the objectives of regulation and the boundaries within which TRAI would have to restrict itself.

We hope that the issue of interoperability is picked up within a competition law and consumer protection frameworks, which may be better suited to undertake this task. IFF is holds the committed belief that that web and mobile services that lock-in users should be regarded as anti-competitive.

**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.**

Lawful interception is an incredibly concerning issue, as we first need to step back and consider that India does not have any comprehensive privacy and data protection law. We at IFF have been supporting the #SaveOurPrivacy campaign which asks for a strong, user centric privacy law that includes surveillance oversight and reform.

The Government of India's own expert committee on data protection chaired by Justice Srikrishna acknowledged that current legal provisions and practices on surveillance - including the absence of any judicial oversight - fail to adequately protect our fundamental right to privacy. Some may argue (we do not agree fully) that any safeguards present today have been achieved through technical measures by users -- this principally includes end to end encryption. Even if we do consider a hypothetical scenario where the data protection law under debate becomes law, there is no active government proposal to either bring surveillance reform within its ambit or to regulate intelligence and policing agencies, which are the principal recipients of such information. Hence, any conversation which progresses to argue against end-to-end encryption or for weakening it is completely against user interest and will be another step in building a surveillance state.

We strongly hold onto the position of asking for reform of India's surveillance law (including introducing judicial oversight such as directed in the Puttaswamy-Aadhaar Judgement) and defending the use and deployment of encryption technologies. We believe both these measure protect the privacy of individuals and also safeguard them from second order impacts such as identity and data theft, which in many cases today lead to social and economic harms. It is also not out of place to mention that platforms are under pre-existing legal obligations under a swathe of legal provisions including Section 69 of the Information Technology Act, 2000 and the rules made thereunder to provide personal data to law enforcement. Even this requires urgent reform.

At this juncture we are also concerned by the steps being taken by the TRAI to challenge the the ruling of the Delhi High Court by which it has permitted persons who are put under surveillance to utilise the Right to Information Act to file applications with telecom operators with a copy to the authority requesting for disclosure if their communications have lawfully intercepted. We urge TRAI to rather than challenging this decision, to

support it as this is one of the only existing methods of ensuring scrutiny and accountability in the process of interception which is a power which is highly concentrated in the executive branch of government.

**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.**

On this issue, we hold a view that the conversation can be deferred to a later date. We believe we have not yet reached the moment for regulatory intervention, but we do hope that better citizen advocacy and user demand spur market mechanisms may require application providers of internet applications and services to clearly mark that they do not have the functionality for emergency calling. Some other services may by themselves opt-in and offer this feature to users as a product feature.

But, the primary point which needs to be stressed is that given that voice calling and SMS messaging by itself still persists and is a feature which is always available on feature- and smartphones. Hence, emergency services are at present available to users in India to an extent where a regulatory intervention may not be justified. We also hold the preliminary view that our broad suggestion to avoid regulation for emergency calling does not include VOIP services which hold E.164 Numbers and terminate on PSTN networks (on which the authority has cited references to OFCOM, European Commission and the french regulator ARCEP). This is as such services substantially mimic conventional voice calling and build user expectations.

**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.**

It bears repetition that the core thesis of a market failure and the need to correct regulatory imbalances is yet to be established on the contrary our economic analysis 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.

We do agree that the extant regulatory framework on telcos needs to be further liberalised with a focus on user benefits. Viewed as service providers, the telcos should provide a quality of service; however, as per most anecdotal accounts, their service remains incredibly inconsistent, despite the efforts of the TRAI. We would urge that renewed regulatory efforts are made to ensure that the regulatory burden on *telcos* does not

compromise their obligations towards users. Ultimately, telcos rely on and utilise spectrum, a public resource held in trust by the Government for our benefit.

We do indicate that internet platforms and services need to be regulated when a clear social need arises in a rights respecting framework and pursuant to legality. This is most immediately necessary in the domain of privacy, where a comprehensive, horizontally applicable national privacy and data protection law is necessary. One such proposal supported by us is the Indian Privacy Code available at www.saveourprivacy.in.

This model law - and several other proposals - seeks to establish Central and state level privacy and data protection regulators, which may be best suited to perform the duties of privacy and data protection through active enforcement. Also as indicated before we are not adverse to examination of large social media platforms or data driven businesses within consumer protection and competition law frameworks.

**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 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.**

Inapplicable as per the response to Q.7