



**Counter Comments:**

**Consultation Paper on 'Regulatory Framework for Promoting Data Economy Through Establishment of Data Centres, Content Delivery Networks, and Interconnect Exchanges in India' | The Dialogue**

## Table of Contents

<b>Introduction</b>	<b>3</b>
Issue 1: Competition law and CDN	3
i) No abuse of dominant position	4
ii) No anti-competitive agreements	4
Issue 2: Licensing frameworks, net-neutrality and regulatory framework	5
Issue 3: Jurisdictional overlaps	6
Issue 4: Data Privacy	7
<b>Recommendations</b>	<b>8</b>

### List of Abbreviations

CDN	Content Delivery Networks
DEPA	Data Empowerment and Protection Architecture
DoT	Department of Telecommunications
DPA	Data Protection Authority
ISP	Internet Service Provider
OTT	Over The Top
PDP Bill	Personal Data Protection Bill
TRAI	Telecom Regulatory Authority of India
TSP	Telecom Service Provider

## Introduction

Digital platforms, online content, and broadband connectivity have played a significant role in boosting digital consumption and engagement to new levels in the face of increasing internet and mobile penetration. One of the implications of such a booming data economy is data itself, whose control, storage, processing, and sharing is crucial to the growth of businesses on one hand, and for better customer experience on the other. An enabling framework for the data economy in India, is thus vital for ensuring equitable growth of all players in the sector. It is in this context that there has been an exploration into “key contemporary infrastructure” of the digital ecosystem - data centres, information exchange points, and content delivery networks.

A CDN refers to a geographically distributed group of servers which help in the seamless and fast transmission of Internet content. They do not host content on their own servers, rather, “help cache content at the network edge”<sup>1</sup>, improving website performance, user engagement, and content consumption. Thus, a CDN delivers content from the website to users in different geographies in a quick, reliable, secure and efficient way, without forcing the website to physically set up servers closer to the users.

On 16.12.21, TRAI released a ‘Consultation Paper on the Regulatory Framework for Promoting Data Economy Through Establishment of Data Centres, Content Delivery Networks, and Interconnect Exchanges in India’ (CP). Thereafter, comments on the CP were submitted by various stakeholders to TRAI. In this response of counter comments, The Dialogue will analyse the CP and the comments received in response to the same. Our inputs primarily concern regulation of CDNs and the data privacy framework. Therefore, The Dialogue will be dealing with four issues, i.e., ‘Competition law and CDN’, ‘Licensing frameworks, net-neutrality and regulatory framework’, ‘Jurisdictional overlaps’ and ‘Data Privacy’ before making recommendations to deal with these issues.

### Issue 1: Competition law and CDN

The CP underscores the existence of anti-competitive conduct pertaining to CDNs<sup>2</sup>. ISPAI, in its comments reiterates this by stating that global CDNs are dominant in India, have market power and are able to adversely impact the growth of home grown players. Lightstorm also stresses on the need to ensure that the market is not used to create dominance. These concerns relate to two aspects pertaining to competition law: *firstly* it provides that abuse of dominance issues may arise from big OTT players starting their own CDN platforms *Secondly*, it worries that the relationship between CDNs and ISPs can be “ misused to create dominance and hurt

---

<sup>1</sup>What is Edge Computing?, CLOUDFLARE, <https://www.cloudflare.com/en-gb/learning/serverless/glossary/what-is-edge-computing/> (last visited Feb. 23, 2022)

<sup>2</sup>Telecom Regulatory Authority of India, Consultation Paper on Regulatory Framework for Promoting Data Economy Through Establishment of Data Centres, Content Delivery Networks, and Interconnect Exchanges in India (Dec 16, 2021)

the business of small players by way arbitrary demands”<sup>3</sup>, as provided in the CP. In a burgeoning CDN market, it is crucial that antitrust concerns are not raised prematurely, and are only given due consideration in the presence of staunch evidence. These concerns of anti-competitive behaviour are currently misinformed due to multiple reasons. We will deal with them in this section.

### **i) No abuse of dominant position**

The issue of abuse of dominant position by larger OTT platforms must be studied in the context of what the Competition Act, 2002 (the Act) considers to be ‘dominance’ as per Section 19(4). Owing to a highly competitive space, lower switching costs for customers (due to availability of diverse content) and absence of direct agreements between OTT platforms and ISPs to prioritise a particular section of consumers, there is limited evidence of dominance in the space. TRAI is concerned that OTT platforms may leverage their market power in the OTT sector to establish themselves in the CDN market.

However, allegations pertaining to this have not been investigated by the CCI. There is no evidence to suggest that the OTT market is concentrated in the hands of a few dominant players. The market consists of various players with none enjoying dominance in terms of market share<sup>4</sup>. Further, any analysis in this direction needs to keep factors prescribed by Section 19(4) of the Act in mind, including size and importance of competitors and countervailing buying power. In the absence of dominance, there can be no question of abuse of dominant position. In the absence of evidence and legal backing, aspects of competition law should not be sought to be regulated.

### **ii) No anti-competitive agreements**

Further, the CP states that relationships between CDN players and ISPs may be ‘misused to create dominance and hurt business of smaller players’<sup>5</sup>. The statement is misinformed as collective dominance is not acknowledged under the Act, which only recognizes unilateral dominance. Further, DIPA, in its comments also states that due to a rise in internet traffic and a limited number of players controlling this traffic, there are chances of anti-competitive agreements between CDNs, ISPs/TSPs and internet companies. This comment fails to establish the premise that a limited number of internet players control traffic and more importantly, that there is a relationship between internet traffic and anti-competitive agreements.

---

<sup>3</sup>Telecom Regulatory Authority of India, Consultation Paper on Regulatory Framework for Promoting Data Economy Through Establishment of Data Centres, Content Delivery Networks, and Interconnect Exchanges in India 96 (Dec 16, 2021)

<sup>4</sup>Tanushree Basuroy, Video OTT Market Share in India FY 2020, By Provider, STATISTA, (Oct. 8, 2021) <https://www.statista.com/statistics/1265303/india-video-ott-market-share-by-provider/>

<sup>5</sup>Telecom Regulatory Authority of India, Consultation Paper on Regulatory Framework for Promoting Data Economy Through Establishment of Data Centres, Content Delivery Networks, and Interconnect Exchanges in India 96 (Dec 16, 2021)

It is also submitted that to establish concerns of anti-competitive vertical arrangements between the CDNs and ISPs, we need a coherent analysis of *firstly* market power of relevant players, *secondly*, existence of anti-competitive agreements and *thirdly* appreciable adverse effect on competition (AAEC). As discussed earlier, there is no evidence of OTT platforms enjoying significant market power. Further, the existence of anti-competitive vertical agreements between ISPs and OTT platforms has not been noted. Lastly, a ‘rule of reason’ analysis to determine AAEC, on the basis of Section 19(3) of the Act before raising concerns of anti-competitive conduct has not been done. Therefore, concerns of anti-competitive agreements in the current scenario do not have a legal basis.

Further, as stated by the comments of IAMAI, there is evidence of high competition in the CDN market considering that the price of these services are constantly dropping. In the absence of evidence of market failure, we believe there is no reason to analyse concerns of competition law.

## **Issue 2: Licensing frameworks, net-neutrality and regulatory framework**

The paper notes that concerns of net-neutrality may require licensing and a regulatory framework. It is submitted that a straightjacket standard for the CDN market’s licensing and regulations is not feasible. Arrangements in the market vary widely and involve the involvement of multiple stakeholders. While certain OTT platforms have their own CDNs, wherein they bear the cost of its integration, others companies utilise caches in local data centres of all major service providers. Further, there exist traditional CDN service providers who enter into agreements with TSPs to improve connectivity. In the absence of a more nuanced understanding of the market and various agreements therein, it would be premature to introduce regulatory and licensing frameworks.

Stringent policy mandates may affect the growth of CDNs in the country, specifically in the context of net neutrality. CDNs decongest networks, improve efficiency and, therefore, rather than slowing down other content, they help overall delivery efficiency. Therefore, they often improve the quality of service, as a growing demand for video content can affect internet traffic in the absence of specialised services that optimise video content.

Further, CDNs are not a customer based offering, therefore its impact on net neutrality is negligible. CDNs provide benefit of faster content to *everyone*, without discriminating among the end users. As a response to TRAI’s paper on Net Neutrality in 2017, ISPAI had also recommended<sup>6</sup> that CDNs should be treated as network optimization solutions, and do not require regulatory oversight. This sentiment has also been echoed by CDNs, TSPs, and OTT platforms alike, in response to the same paper. It is crucial to keep in mind that regulatory burden in a burgeoning market has the potential to affect ease of doing business, and the overall efficiency of the industry. As stated by Netpico in its comments to the CP, the success

---

<sup>6</sup>Internet Service Providers Association of India, ISPAI Response to Consultation Paper on Net Neutrality, available at [https://www.trai.gov.in/sites/default/files/ISPAI\\_13\\_04\\_2017.pdf](https://www.trai.gov.in/sites/default/files/ISPAI_13_04_2017.pdf) (last visited Feb. 23, 2022)

of the CDN industry depends on the upstream and downstream players, i.e., ISPs and content providers. In the interests of efficiency, consumer welfare and in the absence of verifiable evidence of violation of net neutrality, it is recommended that CDNs are not regulated.

We concur with the comments of stakeholders like BIF that regulation of CDNs should not be done, considering the market is still at a nascent stage. A deeper, evidence based policy should be made only at the right time. In its absence, a policy not well-suited to the sector should not be formulated, to avoid raising of regulatory entry barriers. It must also be noted that most other countries do not regulate CDNs and India should not set this precedent, as highlighted by USBIC. Even the EU classifies CDN as an interconnection service, keeping it outside the purview of net neutrality regulations, as noted by Sugar Box in its comments.

### **Issue 3: Jurisdictional overlaps**

Even though TRAI is completely within its jurisdiction to explore licensing norms for CDNs, it indicates at examining this from a competition lens, making references to ‘anti-competitive behaviour’ and ‘abuse of dominance’ in the telecom space. The Telecom Regulatory Authority of India Act, 1997, gives TRAI the power to make regulations<sup>7</sup> and the Competition Act, 2002 gives the same to the CCI<sup>8</sup>. The jurisdictional overlap needs to be settled before going ahead with the authority making regulations pertaining to the same. While the Hon’ble Supreme Court’s judgement in *CCI v. Airtel* gave primary to TRAI in investigating cases in the sector, the question of primacy in making regulations has not yet been settled.

Issues of competition law involve complex social and economic analysis and require assessment on the basis of principles in the Competition Act, 2002. A sectoral regulator creating regulations pertaining to this may, therefore, not be conducive to effectively maintaining competition in the market. In recent times, analysis of competition law issues by ministries and authorities other than the ones concerned have received criticism. Recent amendments to E-Commerce Rules by the Ministry of Consumer Affairs proposed to regulate certain competition law issues in e-commerce<sup>9</sup>. Various ministries, the NITI Aayog and industry stakeholders criticised these aspects of the rules<sup>10</sup>. Therefore, it is crucial to arrive at a consensus on the powers of TRAI and CCI with respect to CDNs before prescribing a regulatory framework. It is also to be noted that DoT’s expert Committee on Net Neutrality had also recommended that since CDN interconnection arrangements are business decisions,

---

<sup>7</sup>Telecom Regulatory Authority of India (TRAI) Act, 1997, § 36.

<sup>8</sup>Competition Act, 2002, § 64.

<sup>9</sup>Ministry of Consumer Affairs, Food and Public Distribution, G.S.R. 328 (E) (Notified on May 17, 2021) available at <https://consumeraffairs.nic.in/sites/default/files/Consumer%20Protection%20%28E-Commerce%29%20%28Amendment%29%20Rules%2C%202021.pdf>

<sup>10</sup>Ministry of Consumer Affairs, Food and Public Distribution, G.S.R. 328 (E) (Notified on May 17, 2021) available at <https://consumeraffairs.nic.in/sites/default/files/Consumer%20Protection%20%28E-Commerce%29%20%28Amendment%29%20Rules%2C%202021.pdf>

discrimination in access or adoption of anti-competitive practices is best left to be covered under competition laws. Similar sentiments have also been reiterated by IMAI in their comments to the CP.

#### **Issue 4: Data Privacy**

The paper highlights challenges pertaining to sharing telecom subscriber data, including logistical and privacy challenges. The paper suggests a mechanism that is based on individual consent that also ensures ease of data flows between data custodians<sup>11</sup>. It proposes a consent management framework for data in the telecom sector, that is based on DEPA, stresses on the use of consent managers, and is based on the principles of<sup>12</sup>: i) users being given decision making power on use of data; ii) use of digital signatures for data integrity; iii) leverage universal identity for interoperability and usability; and iv) allowing user granular control on their permissions and rights and open standards.

While the intention of the authority to balance privacy and interoperability is commendable, the suggested approach presents certain challenges. *Firstly*, the approach has been formulated without assessing the standards proposed in the PDP Bill. While the CP refers to the PDP Bill, 2019, an analysis of the standards proposed pertaining to consent frameworks and data processing has not been done. Further, the Bill has recently seen changes in its scope and nature; a development that needs to be taken into consideration. Therefore, it is crucial that any consent management framework for the telecom sector is proposed only after carefully analysing the PDP Bill, considering its relevance for the data protection framework in the country. A due consideration of the Bill can reveal relevant factors that may need to be considered. The possibility of jurisdictional overlaps, as highlighted by UISPF in its comments, as well as the very need of a separate framework, in the presence of a data protection law, could also come to the fore once the PDP Bill is carefully analysed.

Further, the DEPA framework, that is proposed as a reference point by the paper, has certain infirmities that have not been addressed by the Authority. A criticism received by the framework was an absence of analysis of its legal basis in the light of the law laid down in *Justice Puttaswamy v. Union of India*. This has not yet been resolved. Further, the framework does not provide adequate safeguards for ensuring that the dependency of data principals on consent managers does not hurt the former's ability to provide informed consent. Therefore, implementing a framework that heavily relies on DEPA; without sufficient scrutiny; might not be in the best interests of users in the telecom sector. Further, as highlighted by COAI in its comments on the CP, there exist different models under DEPA. We submit that a due

---

<sup>11</sup>Telecom Regulatory Authority of India, Consultation Paper on Regulatory Framework for Promoting Data Economy Through Establishment of Data Centres, Content Delivery Networks, and Interconnect Exchanges in India 150 (Dec 16, 2021)

<sup>12</sup>Telecom Regulatory Authority of India, Consultation Paper on Regulatory Framework for Promoting Data Economy Through Establishment of Data Centres, Content Delivery Networks, and Interconnect Exchanges in India 154 (Dec 16, 2021)



consideration of different models in the telecom context be done before relying on the framework.

### **Recommendations**

In light of the issues highlighted above, we submit the following recommendations:

- For any regulatory framework or policy instrument that concerns CDNs, effective public consultations and stakeholder discussions should be done to ensure that concerns of various players in the ecosystem are given due consideration.
- To ensure that net neutrality does not suffer, the authority can focus on ensuring that ISPs do not violate relevant laws and consequently cause harm to consumers.
- A regulatory mechanism for CDNs should not be introduced prematurely, considering that the sector is still in its nascent stages.
- Concerns of competition law should be evaluated with context to substantive law. In the absence of sufficient evidence of market failures, ex ante regulation of these issues should not be done.
- Issues of jurisdictional conflicts with the CCI and the proposed DPA need to be evaluated before taking any decisions pertaining to data privacy or competition law.