



Counter Comments: TRAI Consultation Paper on “Privacy, Security, and Ownership of the Data in the Telecom Sector”

The responses received by the TRAI as part of its consultation process on Privacy, Security, and Ownership of the Data in the Telecom Sector provide constructive perspectives towards regulation of data in the telecom sector. While this deliberative attempt has pointed towards a various regulatory strategies that may be adopted by TRAI, there is a need for clarity on which of these strategies should be chosen from among all available options.

To answer this question, we believe that only those strategies which are in tandem with the Indian government’s broader policy priorities should be adopted by the TRAI. As a corollary, those regulatory tools which do not bear a nexus with the government’s overall socio-economic initiatives and priority segments should be avoided. In other words, India’s overall policy goals should serve as *tie breakers* between different regulatory strategies suggested to the TRAI. This warrants a more nuanced articulation of the regulatory outcomes to be pursued while rethinking privacy and data protection in the telecom sector. Please see below our limited comments in this regard.

1. Make in India and the Ease of Doing Business

One of India’s primary regulatory priorities is set out in the Make in India policy. Through this, the government is actively encouraging national and multinational companies to manufacture locally. For such encouragement to be effective, it must be easy for companies to set up and carry on business in India. Predictable and simple regulatory regimes are sine qua non to the ease of doing business. Onerous or broad compliance burdens which are not in conformity with international standards should be avoided. Therefore, it is submitted that the least burdensome regulatory approach should be selected from a range of available options.

Applied to the present consultation, ***this principle disfavours the introduction of entry restrictions in the form of licensing or data localisation requirements.*** We are of the opinion that in the absence of strong utilitarian justifications for such restrictions, all players in the ecosystem should be exempt from onerous compliance burdens. ***Accordingly, we strongly urge TRAI to explicitly reject stakeholder comments that call for creating additional barriers in the form of licensing or data localisation for any player in the ecosystem.*** Similarly, in the absence of evidenced regulatory justifications, ad-hoc measures such as mandating participation in a government sandbox should be avoided.

An effective way of bringing international standards into India’s telecom sphere is to encourage industry to meet internationally set out standards, instead of formal, localised legal requirements. For this, the government can adopt a policy of self-certification and accreditation, as has been suggested by several stakeholders in their responses to the Consultation Paper. Comments to the Consultation Paper have clarified that the current definitions of personal information and SPDI are structurally and functionally similar to international standards; and therefore it would be ill-advised to disturb this definition. Here, we would also like to flag that caution should be exercised in incorporating foreign privacy standards in the Indian context. For instance, the introduction of the GDPR in the EU is projected to cause significant costs to SMEs and start-ups. India should avoid imposing complicated compliance requirements like the GDPR to safeguard its budding industries against similar costs.

While it is essential to encourage local production as highlighted above, care should be taken that *inefficient* production is not inadvertently promoted. Local products and services must be competitive in terms of quality and price, in order to be sought out by the market. Therefore, the Make in India policy must be supplemented with techniques to drive companies to achieve high standards of technological innovation so that state of the art products and services can be offered at low prices. Innovation is primarily a collaborative activity which is known to flourish in specific social settings. A functional approach to regulation requires that the law understand the language of innovation, allowing it to grow organically and on its own terms. The law must respect the language of the innovation system, and not disturb its specific sensibilities. Demands for licensing and data localisation under the garb of *same service same rules* simplistically ignores internal nuances of this language. For example, placing internet based applications in the same regulatory category as telecom network providers would go against the grain of internal categorisations and sensibilities of the innovation system.

2. Access to Foreign Markets

Interconnected with the Make in India initiative is the objective of enabling Indian players' access to international markets. Some ways in which Indian products can reach international standards and quality at internationally competitive price have been discussed above. In addition to this, regulatory barriers to the free flow of technologies and services across borders must be avoided as far as possible. Any constraints on the flow of data across jurisdictions would form such a barrier. ***If India were to impose restrictions of data moving out of the country, it is likely that the global community would impose reciprocal restrictions.***

India is the world's largest sourcing destination for the IT industry, accounting for approximately 67 per cent of the \$124-130 billion market. It is critical for India to continue facilitating cross border data flows to ensure the growth of its IT/ITES sector. India's flourishing global Information Technology Industry cannot be placed at a competitive disadvantage with others in the Asia Pacific region. A data transfer framework that prohibits data transfers is bound to harm the domestic IT industry, who will not have the same level of choice of certain services due to those restrictions to foreign providers.

On account of this, India would be left out of global trends in innovation. This would compromise Indian consumer's access to the fruits of emerging technology. At the same time, the currently booming outsourcing industry would be dealt a serious blow. Infact, stakeholders have pointed out that localisation will result in a 0.8% loss to India's GDP. ***Therefore, India should avoid imposing data localisation and data retention requirements, so as to not cut itself off from foreign markets.***

3. Digital India and the Protection of Citizen Consumers

The digital empowerment of India's citizens is another primary policy objective in India. For this, the government has been promoting digital infrastructure creation, digital government service delivery and digital literacy. This vast and laudable project will require the government to harness the growing capabilities of the internationally booming technological sector. As discussed above, placing geographical barriers to the movement of data, or regulatory burdens on the ease of doing business, are likely to act as hurdles to this. It is preferable for the government to learn and benefit from an organically evolving technology sector, instead of imposing abrupt artificial restrictions on it.

Any potential side-effects of reliance on the international innovation sector can be checked by adequate data protection laws. Various responses to the Consultation Paper have identified that the current data protection framework is both adequate and reasonable. A few stakeholders have highlighted that regulation should be on a principled basis.

In 2012, the Group of Experts headed by Justice Shah had laid down a set of Privacy Principles. These included the principles of notice, consent (including consent for third-party transfer), use limitation, and implementation of security safeguards. ***We highlight comments of various stakeholders that The IT Act and the SPDI Rules thereunder already incorporate these principles. Comments also reflect that the definitions of personal information and SPDI are largely considered satisfactory, and the IT Act includes remedial measures and recourses in case of data breach.*** The collection of SPDI requires prior written consent of the providers of personal information, who should be informed about the purposes for the collection of such information. Information can only be used for such purposes as were communicated to their providers. The SPDI rules also required entities to implement reasonable security practices and procedures. Therefore, the current data protection regime adequately satisfies accepted principles of data protection. The only way in which the data protection framework can, perhaps, be made more consumer friendly, is by replacing monolithic consent requirements with a more flexible approach, especially in the case of anonymised personal data.

4. Principles of Constitutional Democracy

In addition to the abovementioned regulatory outcomes, it is essential for any policy measure to be consistent with established principles of law in the constitutional democracy of India. These include the rule of law, a rights culture, and personal liberty. Various responses to the consultation paper had highlighted that the creation of a government sandbox would compromise the right to property since it would have implications for the SPDI of persons. Concerns relating to unwarranted state surveillance have also been raised. In addition to this, governmentally mandated sandboxing is also likely to have consumer law implications. ***Therefore, the creation of a government mandated sandbox is not a constitutionally viable option at this stage and should be explicitly rejected by TRAI.***

5. Conclusion

Responses to the TRAI's consultation paper have provided an array of regulatory choices to govern the Indian telecom sector. By way of these comments, we have tried to cull out a principled basis for selecting specific regulatory strategies from this range of choices that have emerged as part of this process. We think that conformity with broader policy goals of the Indian government should guide and inform the regulatory strategies adopted by the TRAI in this regard.

In light of this, we recommend that any sectoral regulation adopted by TRAI be geared towards the harmonious goals of Make in India, ease of doing business, access to foreign markets, Digital India, and the protection of citizen customers. Regulatory strategies that are not justified by these goals should be avoided, as far possible.
