

**From:** legal@aigf.in  
**To:** "Akhilesh Kumar Trivedi" <advmn@traigov.in>  
**Sent:** Thursday, September 14, 2023 5:19:37 PM  
**Subject:** AIGF Counter-Comments: TRAI's Consultation Paper on 'Regulatory Mechanism for Over-The-Top (OTT) Commu

Respected Sir,

I write to you on behalf of the All India Gaming Federation (AIGF), the oldest, largest, and most diverse industry body for online gaming within India. AIGF is dedicated towards ensuring effective self-regulation for online gaming platforms with the aim to foster best industry practices for responsible gaming and player protection. AIGF appreciates the efforts taken by the Telecom Regulatory Authority of India ("TRAI") with respect to the stakeholder consultation for its consultation paper on "Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services" ("Consultation Paper").

We thank TRAI for providing us the opportunity to provide our counter-comments to the Consultation Paper. To assist with the consultation process, we have provided our counter-comments (attached herein) in relation to several of the issues raised by stakeholders after examining their inputs published by the TRAI in response to the Consultation Paper.

If you may require any further input from us, or would need any clarification on any of the matters discussed in our counter-comments, please do not hesitate to reach out to us at [legal@aigf.in](mailto:legal@aigf.in) or [dhruv.garg@aigf.in](mailto:dhruv.garg@aigf.in).

Thanking you,  
Regards,

AIGF Legal Team

*This e-mail and any files transmitted with it are for the sole use of the intended recipient(s) and may contain confidential and privileged information. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message. Any unauthorized review, use, disclosure, dissemination, forwarding, printing or copying of this email or any action taken in reliance on this e-mail is strictly prohibited and may be unlawful.*



## ALL INDIA GAMING FEDERATION'S COUNTER-COMMENTS

### TRAI'S CONSULTATION PAPER ON "REGULATORY MECHANISM FOR OVER-THE-TOP (OTT) COMMUNICATION SERVICES, AND SELECTIVE BANNING OF OTT SERVICES"

#### Introductory Remarks

- ☐ The All India Gaming Federation ("AIGF") is an independent industry association for online skill gaming in India. AIGF is dedicated towards ensuring effective self-regulation for online gaming platforms with the aim to foster best industry practices for responsible gaming and player protection. AIGF appreciates the efforts taken by the Telecom Regulatory Authority of India ("TRAI") with respect to the stakeholder consultation for its consultation paper on "*Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services*" ("**Consultation Paper**"). We thank TRAI for providing us the opportunity to provide our counter-comments to the Consultation Paper. To assist with the consultation process, we have provided our counter-comments to several of the issues raised by stakeholders after examining their inputs published by the TRAI in response to the Consultation Paper.
- ☐ We wish to highlight that the services provided by over-the-top ("OTT") platforms and those by the Telecom Service Providers ("TSPs") are not substitutable in nature. OTT service providers provide a wide range of application and content-based services, whereas the TSPs primarily control the deployment of the network infrastructure. Further, OTT services operate on the application layer and provide their services over the network layer, which is operated by the TSPs. OTT services and TSPs, therefore, cannot be subjected to a similar regulatory framework. In case any additional regulations are required for OTT services, it should be introduced in the existing framework, such as under the Information Technology Act, 2000 ("**IT Act**"). We further wish to highlight that OTT services which provide online gaming features and functionalities are, in any case, regulated under the IT Act, by way of the recent amendments to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ("**Intermediary Guidelines**").

#### Part A

##### Revenue Sharing Arrangements

1. We note that a few stakeholders have advocated for a regulatory framework to ensure collaboration between OTT service providers and TSPs. They have pushed for revenue sharing agreements ("**RSAs**") between TSPs and OTT service providers. They have also asked for OTT service providers to contribute towards the spectrum user charges ("**SUCs**"), which are currently paid by TSPs or pay certain network usage fees ("**NUF**") to TSPs.
2. In this regard, we believe that the requirement to pay NUF / SUCs or enter into RSAs will not only negatively impact the growth of the OTT sector but will also be detrimental to end users of OTT services, as discussed in detail below.



## **I. No requirement to pay Development Costs.**

3. TSPs in their comments to the Consultation Paper have argued that OTT service providers ‘free ride’ over the telecom services provided by TSPs. This presumed free riding is aimed to be curbed by way of RSAs and by requiring OTT service providers to pay development costs (i.e., the costs related to network infrastructure development like 5G deployment etc). At this stage, we wish to highlight the mutually dependent and beneficial relationship that exists between TSPs and OTT services on account of the nature of the services that are provided by them. For example, in terms of revenue, high-quality content and application services that are provided by the OTT platforms lead to increased usage of data services by end users and, therefore, higher revenue for TSPs. In return, increased network connectivity offered by the TSPs increases the customer base / subscription base for OTT services and enables OTT service providers to generate high quality content and digital services. For instance, OTT service providers, which provide online gaming services, have led to a notable boost in home-grown digital services in India. These services, together, have undoubtedly led to increased data consumption since users have to almost always have an internet connection in order to be able to play online games on their mobile phones. This has undoubtedly contributed to TSPs’ revenue stream. Thus, revenue-wise, both these sectors are co-dependent on each other. In addition, as further elaborated below in this document, OTT services are not substitutable with the traditional telecom services provided by TSPs. Thus, OTT platforms have not, in any case, taken over a share of the revenue of TSPs (as has been argued by certain stakeholders).
4. In addition to the contribution made by OTT services to the growth in revenue of TSPs, multiple reports showcase that various OTT services have made complementary investments in terms of developing network infrastructure (to improve connectivity) across the world, including in India. Accordingly, from an economic perspective there is, as such, no requirement to introduce any RSA between TSPs and OTT service providers.

## **II. No requirement to contribute towards statutory charges, such as SUCs.**

5. At the outset, SUCs are borne by TSPs because of the exclusive rights they enjoy vis-a-vis the deployment of network infrastructure, including the exclusive right to purchase spectrum from the Government. OTT service providers have no such rights. Therefore, there is no rationale for OTT platforms to bear the burden of SUCs that are paid by the TSPs.
6. In terms of SUCs, it is further noteworthy that the burden of SUCs paid by TSPs is ultimately borne by their end users in the form of higher data charges for 4G/5G connections. Alternatively, if such charges are further imposed on the OTT platforms, the same will trickle down to end users in the form of paid online or digital services, or increased subscription costs and platform entry fees. This may, for example, specifically impact users who prefer to play free-to-play online games. The quality of services provided by OTT platforms would also be hampered as they may be disincentivized from developing or providing online or digital services given that their investments



would now be diverted towards tackling increased regulatory costs. This will, ultimately, impact the welfare of end users in the long run. Please note that these concerns would also apply in the event NUFs are sought to be imposed on OTT service providers.

7. Separately, we note that few stakeholders have advocated in favour of licensing OTT services under the Unified License – Internet Service Provider Authorization and Access Service Authorization (“**Unified License**”) under the Telegraph Act, 1885 (“**Telegraph Act**”) - further discussed in detail below. They have also proposed that all the extant entry fee and license fee requirements and bank performance guarantee requirements that apply to TSPs be extended to OTT services. We request the TRAI to not consider these suggestions given the fact that the reason behind imposing such fees and guarantees on TSPs relate to the fact that they have access to a scarce natural resource– i.e., spectrum. OTT service providers do not have access to the same and thus cannot be subject to such requirements.

### **III. Incidence of NUF would violate net neutrality requirements.**

8. At the outset, we oppose any incidence of NUFs as it would violate net neutrality requirements (for the reasons noted below). Further, a NUF model may impact competition negatively in the OTT market, especially for smaller OTT players. Smaller players may not be able to afford any form of NUF, making it difficult for them to compete with larger players. This is especially true for the online gaming sector which is still a sunrise sector in terms of innovation and market penetration, all of which will be hampered by imposition of NUFs on OTT service providers.
9. We note that TSPs have advocated for a classification of OTT platforms based on the number of subscribers and have suggested that only the large OTT platforms should be subject to NUF requirements. We urge the TRAI to disregard such a suggestion. Among other things, any classification model based on number of users of an OTT service is unreasonable, arbitrary and violates the principles of net neutrality. In addition, if NUF is imposed on OTT services, then the same would, once again, likely be reflected in the increase of costs which will trickle down to the end users (in the form of subscription costs, or platform entry fees), potentially preventing users, who cannot afford paid services, from accessing any and all OTT platforms.
10. Additionally, we seek to highlight that there is a lack of appropriate metric to determine the quantum of NUF that should be imposed. TSPs have suggested the rate of network traffic as the basis to determine the quantum of NUF payable. However, the revenue generated by TSPs is already linked to the rate of network traffic in the form of data charges that are paid by users to TSPs. On the other hand, OTT services do not receive any revenue directly out of such network traffic. Therefore, if NUFs are imposed on OTT service providers, the same will unfairly benefit TSPs at the cost of such OTT service providers.

## **Part B**

### **Regulatory Framework for OTT Services**



## I. Definition of OTT services

1. We note that some stakeholders, especially TSPs, in their comments to the Consultation Paper, have highlighted that OTT services are a category of ‘digital content delivery systems’ that operate on the internet. Such a term has been used broadly to refer to the *manner* in which the services are being provided.
2. We oppose this approach taken towards defining OTT services. OTT services are not just any service that freely ride over the network layer. Rather, they are specific content and application-based services. In this regard, we are in agreement with the position adopted by other stakeholders like the Internet Society and the Broadband India Forum (“BIF”) in their comments to the Consultation Paper. They have suggested that instead of the term ‘OTT services’, such services should be referred to as ‘Internet-based services’ or ‘Content and Application Providers’. As a result, OTT services may be defined as application or content-based services that are provided on the application layer over the internet or network layer provided by TSPs.
3. In addition, we disagree with the position taken by some stakeholders that OTT services can operate over the internet and TSPs have no control over the dissemination of these services. We wish to highlight that OTT services necessarily require a TSP’s network to provide their services to end users. As per the regulatory licensing framework under the Telegraph Act, only TSPs have control over the operation and deployment of network services in India. OTT services cannot operate a network. They also cannot lease the network capacity from TSPs to, for example, provide network connectivity or internet services to end users in India.<sup>1</sup> Therefore, TSPs have the ability to determine if OTT services reach their end users or not.
4. Lastly, we note that certain stakeholders have suggested a separate definition for ‘OTT communication services’. On account of this, they attempt to categorise those OTT services which may be functionally similar to the services provided by the TSPs under a common definition of ‘OTT communication services’. Such stakeholders have also placed reliance on the ‘same service, same rules’ principle. However, OTT communication services cannot be defined based on presumed functional similarity with traditional telecom services. We wish to highlight that no functional similarity can be assumed between the services offered by OTT service providers and TSPs. This is on account of the following reasons:
  - ❑ As noted above, TSPs operate and control the network layer whereas the OTT services operate on the application layer.
  - ❑ Unlike OTT service providers, TSPs enjoy exclusive rights under the Telegraph Act which gives them added economic benefits like high entry barriers, reduced market competition, and exclusivity in business operations.
  - ❑ Operational differences exist between telecom services and OTT services. In fact, the pricing conditions, the devices used to access these services, etc. are different.

---

<sup>1</sup> This understanding is in tandem with the definition of OTT services suggested in the TRAI Consultation Paper on Regulatory Framework for OTT Services (2015), available at <https://traigov.in/sites/default/files/OTT-CP-27032015.pdf>.



- ☐ OTT services are provided in a bundled manner which extend beyond the traditional communication services provided by TSPs (as further explained below). As a result, an end user does not typically perceive them as inter-changeable services.

## II. Classification of OTT services not feasible.

5. We note that a few stakeholders, especially TSPs, have resorted to classifying OTT services based on the nature of services provided. This includes sub-categorising OTT services into, for instance, OTT gaming services, OTT communication services, OTT broadcasting services, OTT application services, OTT media services and so on.
6. We oppose any such sub-classification of OTT services based on the nature of services as it lacks any intelligible differentia. OTT services are generally provided in a bundled manner where several services are interlinked to each other. Any sub-classification of OTT platforms based on the nature of service should be avoided because of the following reasons:
  - ☐ At the outset, it is not feasible to sub-classify OTT services based on whether a communication service is being provided or not. Many of bundled OTT services being provided have communication, as well as non-communication features. Similarly, sub-classification of OTT services between OTT media services and OTT application services would create the same effect as OTT application services often include digital content as well.
  - ☐ Further, online gaming platforms which allow internal calling and messaging also allows such feature to be opted out of. That said, it may be noted that some team based online games cannot be played without communication-based services. Thus, it would be difficult to sub-classify such OTT platforms.
  - ☐ Any attempt at regulating OTT services, especially OTT communication services, based on such sub-classification would lead to regulatory overlap. We understand that telecom authorities may seek to only regulate OTT communication services. However, and as noted above, in most cases, they are bundled with various OTT services such as online gaming platforms, etc. Such OTT services are already regulated under sectoral and horizontal regulations. If TRAI seeks to regulate them further due to any communication service being provided, the same will lead to regulatory hurdles and impact the ease of doing business. This will hamper both the viability of existing OTT platforms and the entry of new participants in the OTT market.
  - ☐ Few stakeholders, especially TSPs have identified a lack of regulatory oversight for OTT communication and broadcasting services. In contrast, OTT services are already subject to a myriad of regulations under the IT Act and the rules made thereunder, as well as the recently enacted Digital Personal Data Protection Act, 2023 (“**DPDP Act**”). Further, OTT platforms which provide for specific services such as online gaming are also regulated under the Intermediary Guidelines, in addition to the norms that will be laid down by self-regulatory bodies (“**SRBs**”) pursuant to their membership with such SRBs. Therefore, any further regulation (if needed) should be implemented horizontally under the existing frameworks of the IT Act, DPDP Act, etc., or at the level of self-regulation by the SRBs.





7. Lastly, we note that a few stakeholders have attempted to classify OTT communication services (as a sub-category of OTT services) based on the ‘core’ service being provided (such as messaging, voice, social media, etc). Given the fact that OTT services are often bundled in nature, it may not be technically feasible for regulatory authorities to dynamically determine the classification of a service based on its core service. Additionally, this method of sub-classification can also lead to regulatory overlap. For instance, the Intermediary Guidelines’ definition of a social media intermediary covers various communication services like instant messaging, video calling, voice calling, etc. which will all classify as modes of online interaction. Additionally, online gaming platforms can provide internal communication as a feature which is intrinsically linked to the game, in which case it would be difficult to determine the ‘core’ service involved. As a result, any attempt to sub-classify OTT services based on the core service being provided is not required at this stage.

### **III. Similar Regulatory Framework for OTT services and TSPs not required.**

8. TSPs in their comments to the Consultation Paper have advocated for the application of the Unified License framework to OTT platforms. Their argument is two-fold: (i) there is a lack of existing regulatory framework for OTT services, and (ii) there is a need to apply the stringent requirements under the Unified License to OTT services due to the nature of services being provided by them.
9. We wish to highlight that a unified framework for OTT services and TSPs (whether under Unified Licence or otherwise) is not tenable because-
  - ☐ As noted above, the services provided by TSPs, and OTT platforms are not substitutable in nature.
  - ☐ The Unified License framework seeks to regulate the exclusive rights of operating and developing network infrastructure that are available to TSPs under the Telegraph Act. In order to ensure proper exercise of such rights, TSPs are subject to stringent requirements under the Unified License framework. None of these requirements can be applied to OTT service providers, as they do not have access to these exclusive rights.
  - ☐ Additionally, stakeholders, like the Internet Freedom Foundation, have pointed out that licensing requirements should be adopted where a resource that is sought to be regulated is scarce (such as spectrum bands or network connectivity infrastructure). For the reasons discussed above, this is not applicable to OTT services.
10. In addition, the argument that OTT platforms are not sufficiently regulated is also unfounded. In fact, they are subject to existing regulations that cover different aspects under the Unified License framework for TSPs. For instance, OTT platforms (including online gaming intermediaries) are required to: (i) Employ appropriate methods for user verification under the Intermediary Guidelines;<sup>2</sup> (ii) comply with interception and takedown laws as per the rules made under the IT

---

<sup>2</sup> Please refer to Rule 4(7) of the Intermediary Guidelines which requires an online gaming intermediary to enable its users to voluntarily verify their accounts by using any appropriate mechanism, including the active Indian mobile number of such users.



Act;<sup>3</sup> (iii) adhere to various reasonable security obligations under the IT Act and the DPDP Act in addition to the requirements imposed by the Computer Emergency Response Team of India; etc.

11. Lastly, contrary to the arguments made by some stakeholders, subjecting OTT service providers to the Unified License framework would hamper net neutrality requirements, instead of fostering the same. Specifically, and as noted above, the same will hamper the growth of small OTT services due to onerous regulatory requirements and create undue entry barriers to this market.

### Part C Selective Banning of OTT Services

#### **I. Ineffectiveness of selective blocking through TSPs.**

1. Most of the stakeholders, including a few TSPs, have acknowledged that selective blocking of OTT platforms and websites in specific regions, especially if done by TSPs is an ineffective solution. We take this opportunity to highlight three major concerns involved with selective blocking of OTT services:
  - ☐ At the network layer there is no differentiation between different OTT services that pass over a TSP's network, making selective blocking difficult. Since OTT services are generally provided in a bundled and interlinked manner, it will be difficult to selectively block one OTT service without inadvertently blocking another. This will particularly affect online gaming platforms which also inadvertently provide communication services and can get affected by a blanket blocking order for OTT communication services in a specific region.
  - ☐ The second hurdle to selective blocking relates to an inherent feature of OTT platforms, i.e., dynamic IP addresses. Since many OTT service providers rely on cloud services for hosting their respective OTT platforms, these services tend to be hosted on dynamic IP addresses. As a result, it may be difficult for TSPs to identify such IP addresses and effectively block OTT services, while ensuring that they do not accidentally block unintended OTT services that are hosted on the same cloud service and use the same dynamic IP address. This technical barrier may be circumvented using deep packet inspection. However, if pursued, the same will lead to grave net neutrality, free speech, and data privacy concerns.
  - ☐ The availability of technological solutions like virtual private networks, tunnelling etc. are also effective workarounds. In respect of any method that might be involved to selectively block any OTT platform, these options would always be available, rendering selective blocking ineffective.
2. That said, we note that a few stakeholders have, however, advocated for network level selective blocking by TSPs. This will, however, require proper identification of OTT services by the government (i.e., name of the service provider, its web address and IP address, the specific service or content to be blocked etc.) while it passes blocking orders. These details of identification would

---

<sup>3</sup> For example, please refer to Section 69 and Section 69A of the IT Act.





then be shared with the TSPs for selectively blocking specific OTT platforms at specific locations. We wish to highlight that such proper identification cannot be easily provided for OTT services, considering the fact that they are hosted on dynamic IP addresses.

3. As a workaround to the issue of dynamic IP addresses, we note that a few stakeholders have demanded for specific regulations directing OTT services to mandatorily share their IP addresses with TSPs to execute blocking orders and to maintain constant IP addresses. Any such regulation, in our opinion, would not only create market restraints in the OTT sector but also not be technically infeasible, given that most OTT platforms are hosted on cloud services. Further, mandatory disclosures of IP addresses to TSPs would raise concerns for breach of privacy and other cyber security concerns (for example, it may have such OTT services which are prone to cyber-attacks).

## **II. Ineffectiveness of blocking through OTT service providers.**

4. In their comments to the Consultation Paper, some TSPs have stressed that even though selective blocking cannot be easily carried out at the network layer by TSPs, it can be done at the level of OTT platforms. We wish to emphasize that implementing blocking measures at the level of OTT platforms would require them to gather location-based data from users, which can lead to privacy concerns. Not all OTT platforms collect such data from users as a matter of practice. These privacy concerns will likely get exacerbated given that the DPDP Act has recently been enacted. Additionally, specific blocking at the regional level cannot be carried out quickly, keeping in mind the overall technical complexity involved in the process.
5. Separately, we note that a few stakeholders have proposed that content filtering can be carried out at the level of OTT platforms, as an alternative to selective blocking. However, content filtering is not a feasible solution. It would require OTT service providers, who are also likely to be intermediaries as per the IT Act, to determine the legality of content being published or transmitted through their platforms. Such an action by an OTT platform (as an intermediary) would, if pursued, violate the fundamental rights of freedom of speech and expression, and go against the 'actual knowledge' standard laid down by the Supreme Court in *Shreya Singhal v Union of India*.<sup>4</sup> In any case, the option of platform and / or content blocking (as the case may be) through orders from courts or concerned governmental authorities is already available under Section 69A of the IT Act read with the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 and the Intermediary Guidelines.

## **III. Selective blocking of specific classes of OTT services.**

6. We note that some stakeholders in their comments to the Consultation Paper have suggested that only certain class of OTT services should be subject to selective blocking based on factors such as nature and number of users, provision of inter-personal communication at mass level, etc. At the outset, any such regulation would be discriminatory considering the overlapping nature of bundled

---

<sup>4</sup> *Shreya Singhal v Union of India*, AIR 2015 SC 1523.



OTT services (especially in case of popular online gaming services providing communication features, as discussed above). It would be difficult to segregate specific classes of OTT services to be banned.

7. Additionally, any attempt at selectively banning only a specific class of OTT services would require the Government to dynamically determine the classification of a service based on its 'core' features before passing the blocking order. We, once again, reiterate that this is not a feasible exercise for the reasons highlighted by us above.

\*\*\*