

BIF RESPONSE TO TRAI CONSULTATION PAPER ON REGULATORY MECHANISM FOR OVER-THE-TOP (OTT) COMMUNICATION SERVICES, AND SELECTIVE BANNING OF OTT SERVICES

At the outset, Broadband India Forum (**BIF**), as an independent policy forum and think-tank dedicated to working towards the proliferation of high-quality broadband and the realisation of a 'Digital India', wishes to laud the Telecom Regulatory Authority of India (**TRAI**) for coming out with a comprehensive Consultation Paper (**CP**) dated 7th July 2023 on over-the-top (**OTT**) services.

The app economy has significantly contributed to the true digital transformation of our country. Today India has the highest data consumption, highest number of digital transactions and multiple ways of enhancing quality of life. The goal of 1 trillion-dollar digital economy cannot be accomplished in a licensed regime. During the unprecedented lockdown due to pandemic, the apps contributed for ease of education, work from home and in a significant way eased the way of life. Therefore, such innovations need to be rewarded as against regulations.

Before responding to the questions in the CP, we would like to reiterate that OTT services and the services provided by licensed Telecom Service Providers (**TSPs**) are not the same and hence should not be subject to the same regulations. OTT services are already subject to regulations which address the concerns raised in the CP. In case any additional regulations are required to be imposed or the existing regulations are required to be enhanced, it should be done under the existing Information Technology Act, 2000 (**IT Act**).

In accordance with the basic principles as given above, we have given our detailed responses to the questions posed in the CP. We hope that the TRAI finds our submissions useful in determining the need for regulatory mechanisms for OTT services, and while considering the issue of selective banning as well.

A. ISSUES RELATED TO REGULATORY MECHANISMS FOR OTT COMMUNICATION SERVICES

Q1. What should be the definition of over-the-top (OTT) services? Kindly provide a detailed response with justification.

Response:

There is no universally accepted definition of 'OTT service' and by itself, the term is extremely broad and can potentially include any service that is delivered over the internet. However, to answer the specific question, a possible definition of OTT services that could be offered is that they are either content-based or application-based services that are provided on the application layer over the internet to end-customers.

This could, thus, include a wide range of services such as cab aggregation (Uber, Ola, etc.), accommodation services (Airbnb, booking.com), or ticketing services (such as, MakeMyTrip and Cleartrip) and payment apps (such as, PhonePe and

PayTM), which are not technically within the current telecommunication framework. Such businesses should simply be seen as 'digital businesses", rather than OTT services to account for innovation.

Justification:

1. OTTs neither operate a network nor do they lease network capacity from a network operator/TSP for the provision of their services.
2. They are not free riders insofar as they do not merely ride on top of the TSPs networks as the name OTT suggests. In fact, as correctly pointed out by BEREC in its report dated October 2022, they should be named as 'Content & Application Providers' or CAPs. Not only are huge investments made by the OTT service providers to bring the content as close as possible to the end customers but, more importantly, the OTT services are significant revenue generators for the TSPs, without which the network pipes would be virtually empty.
3. This is in sync with the definition of OTTs provided by TRAI which in its consultation paper on Regulatory Framework for OTT Services, 2015, defined "OTT provider", as a service provider which offers information and communication technology (i.e., ICT) services, but neither operates a network nor leases network capacity from a network operator.
4. In fact, OTT services are delivered over the TSPs' network and therefore can only be provided by TSPs to their end-customers. To elaborate, OTTs cannot connect directly to the TSPs' customers and need the TSPs' network to help deliver the content/application/service to the end user (who, in turn, is a TSP customer).

Q2. What could be the reasonable classification of OTT services based on an intelligible differentia? Please provide a list of the categories of OTT services based on such classification. Kindly provide a detailed response with justification.

Response:

At this stage it is not necessary to sub-categorise OTT services because OTT services offering different digital products have overlapping features and functions. For example, OTT services like cab aggregators, food delivery apps, accommodation services, etc. allow users to communicate with drivers, restaurants, hotels, etc. through messages or phone calls. Therefore, there are OTT services that provide communication features, in order to enhance their primary digital service offering. Thus, it may not be easy or practical to categorise any OTT app into a specific category due to multiple and diverse functionalities and features supported by one OTT app. Any attempt to straitjacket and categorise an OTT service that performs multiple functionalities, would be an artificial exercise and could lead to market fragmentation and thereby market failure and

customer harm. Given the overlaps in features between various OTT services, attempting to identify sub-categories of OTT services is not feasible at this stage, and should be avoided (please refer to our justification below for further information). As such, our responses to the questions in this document pertain to OTT services as a whole.

Justification:

1. Any OTT app may use messaging or calling merely to augment unrelated services and improve the overall consumer experience. Conceiving "communication services" as a sub-category of CAPs / OTT applications creates an impractical distinction between communication functionalities and non-communication functionalities among CAPs / OTT applications. For example, gaming, document editing, photo sharing, social media and many other fundamentally dissimilar functionalities allow users to communicate with each other.
2. CAPs / OTT applications can have multiple functionalities that are inextricably interlinked. For example, ride-hailing applications connect drivers and passengers, allow them to communicate, plan routes, enable payments, and more. The application requires all these features to work in tandem to provide a ride-hailing service. Additionally, multiple CAPs / OTT applications today also build on other platforms to provide a full array of services to users, which inevitably improves the user experience. Any classification of CAPs / OTT services that results in selective (and onerous) regulation of some CAPs / OTT applications over others will negatively affect this ability of CAPs / OTT applications to integrate services to overall enhance their services as well as user experience.
3. We also take this opportunity to stress on the fact that regulating OTT services will likely: (i) result in unintended regulation of a wide range of unrelated digital services that have no relation to telecom services; and (ii) negatively impact the availability of such services due to the higher compliance burden and entry barriers created through regulation; (iii) disincentivise innovation without enhancing consumer protection; and (iv) impede the development of India's otherwise burgeoning start-up ecosystem, with follow-on implications for foreign investment. and discourage or reduce foreign investment in India. This can be critical, especially considering the economic benefits provided by such services.

Q3. What should be the definition of OTT communication services? Please provide a list of features which may comprehensively characterize OTT communication services. Kindly provide a detailed response with justification.

Response:

OTT communication services cannot be singled out because of their multi-functional nature and due to the rich interactive applications and services they provide to TSP's customers, including voice and messaging services over the internet. Thus, it is *not* necessary to distinguish between different types of OTT services. We have accordingly not proposed a definition for OTT communication services. Please refer to our justification below for further details.

Justification:

1. As mentioned in our Response to Q2 above, OTT apps cannot be categorised or straitjacketed into traditional features of communication services offered by TSPs viz. voice calling and messaging only. OTTs provide expansive experiences to customers that go beyond conventional messaging and communication services provided by TSPs.
2. OTT applications such as Whatsapp, Hike, Messenger, etc. provide rich messaging features not available through SMS. Further, they have a broader economic impact than traditional voice communication and messaging services provided by TSPs. A study estimated that for the year 2017,¹ the 'consumer surplus'² for India provided by "Rich Interactive Applications" or "RIA" was a substantial Rs 6.3 lakh crore.³ A 2017 report by WIK found that each 10% increase in usage of RIAs led to an average increase of US\$5.6 trillion in global GDP (0.33% of GDP) from 2000 to 2015.⁴ In addition, according to one study, a 5% increase in WhatsApp penetration in 2015 is associated with a US\$22.9 billion increase in global GDP.⁵ Lastly, a recent study in 2023 by three Professors from IIMA, Prof. Rekha Jain, Prof. V. Pingali and Prof. Ankur Sinha, estimated the economic impact of OTT Apps to be as high as 12% of the GDP by 2030 (using conservative estimates).
3. As noted above, any attempt to categorise OTT services will lead to market fragmentation and even market failure for OTT apps, thereby causing customer harm. Communications is an integral part of any OTT service/app and therefore delineating "OTT communications" separately from rest of the features of the OTT app would be difficult and at best artificial.

¹ In its report "The Economic and Societal Value of Rich Interaction Applications (RIAs) in India", WIK has stated that RIA usage saves on average 803.9 minutes per week.P. 13, available at https://www.wik.org/fileadmin/Studien/2017/WIK-BIF_Report_-_The_Economic_and_Societal_Impact_of_RIAs_in_India.pdf.

² Consumer surplus indicates economic welfare that people gain from buying and consuming goods or services.

³ Available at <https://www.financialexpress.com/industry/telecom-ott-apps-create-rs-6-3-lakh-cr-consumer-surplus-study/935890/>.

⁴ WIK, *The Economic and Societal Value of Rich Interaction Applications (RIAs)*, at I (2017).

⁵ *Id.* at 32.

We also take this opportunity to highlight below the key differences between OTT services and telecom services, which warrants differential regulation for these two services.

OTT services and telecom services are not the 'same service' so should not be subject to the same rules.

- a. *Telecommunication services* provided by TSPs include fixed and mobile telephone services (including internet connectivity), and data transmission services. TSPs provide these services through a license granted by the Government which confers to them an exclusive right to acquire and exploit scarce natural resources like telecommunication spectrum, the right to obtain telecom numbering resources, the right to interconnect with PSTN, and the right of way to set up infrastructure, among others. However, OTT players neither have these privileges listed above, nor own the network or control the access to telecom infrastructure. Therefore, the question of maintaining a 'level playing' field simply does not arise.

These exclusive rights give TSPs economic advantages like high entry barriers, reduced competition, and exclusivity in its business operations. Exclusive privileges are the premise for regulating the telecommunications sector, including conditions such as net neutrality, revenue sharing, contributions to universal service obligations, etc.

OTTs and digital services do not have these exclusive rights and have no control over how telecom infrastructure is developed or deployed. OTTs, as the name suggests, are services that are provided over the internet and include online buying and selling, OTT video streaming services, digital news, search services, navigation services, ride hailing services, dating services, delivery and logistics services, etc. all of which are delivered over the internet. Such "digital markets" are built on top of telecommunication services and characterised by hyper competition and low entry barriers, which results in enhanced experience, abundant choice, and competitive pricing for the end consumers.

- b. TSPs operate on the "network layer" whereas OTTs operate on the "application layer"⁶: the network layer or the physical infrastructure network (as per the OSI communication layers) operates and connects different networks, including the internet. Services on the application layer ride on the network layer and use networks to transfer data. Thus, OTTs facilitate the exchange of information over the internet.

⁶ The TRAI has recognized the separation of layers; TRAI in its 2020 recommendations with respect to OTT communications services acknowledges that the network and application layers are distinct.

- c. TSPs provide internet access and hence they are the gatekeepers for OTT services. For instance, all OTT services, including video streaming, are *dependent* on network services provided by TSPs and cannot be accessed by users without them – *they cannot be substituted*. A network operator can offer services on top of their network, but application/content service providers cannot offer network connectivity.⁷ Additionally, TSPs earn revenue from OTT services, since users pay TSPs for access to the internet and are charged for the data they use on OTT services; the reverse is not true.
- d. "Same service same rules" is a competition principle, but OTT services and TSP services are not part of the same relevant market: Consumers use telecommunication for basic voice and SMS services and OTT applications for rich interactive content and multiple features. Further, consumers have limited choice in switching between the telecommunication networks because of associated switching costs. On the other hand, services on the application layer, such as OTTs, are highly competitive, often cost-free, and there are no limitations on using multiple services at the same time. It is also easy to switch between different OTT apps. The CCI in *Vinod Kumar Gupta Vs. Whatsapp Inc* noted that instant communication applications like WhatsApp are not in the same relevant market as traditional electronic communications,⁸ citing key differences in functionalities enabled by OTT communication services and traditional telecom services, pricing conditions (OTT services are generally free), and device used to access either (any smartphone for traditional telecom services vs. smart devices for OTT services).
- e. International best practice favors a differential approach: organizations like the International Telecommunication Union (ITU)⁹ and other jurisdictions including the European Union¹⁰ and Australia¹¹ acknowledge that OTT communication applications and traditional telecommunication services are not perfect substitutes and adopt a differential approach to regulating them.

⁷CCI Market Study on Telecom Sector, para 59, available at: <https://www.cci.gov.in/images/marketstudie/en/market-study-on-the-telecom-sector-in-india1652267616.pdf#page=28>

⁸ *Vinod Kumar Gupta Vs. Whatsapp Inc* [Competition Commission of India, 01-06-2017] para 11.

⁹ ITU-T Technical Paper 'Economic impact of OTTs' (2017), pg 9, available at: https://www.itu.int/dms_pub/itu-t/opb/tut/T-TUT-ECOPO-2017-PDF-E.pdf

¹⁰ European Electronic Communications Code, 2018, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L.2018.321.01.0036.01.ENG>

¹¹ Telecommunication and Other Legislation Amendment (Assistance and Access) Act 2018, available at: <https://www.legislation.gov.au/Details/C2018A00148>

- f. For instance, the ITU recommends that its Member States encourage "mutual cooperation as far as practical between OTTs and network operators" while keeping in mind "the fundamental differences between traditional international telecommunication services and OTTs",¹² and suggests creating an enabling environment for voluntary commercial arrangements between telecommunication network operators and OTT providers¹³, and separate customer redress and consumer protection mechanisms for OTTs.¹⁴
- g. We acknowledge that substitutability stands as an essential criterion in considering comparable regulations. However, this factor must be treated at par with the level of competition, the level of innovation, consumer welfare, the ubiquity and adoption of such technology, amongst several other factors. Given the popularity of OTT services, there has been an increasing demand for data, which has in turn led to TSPs increasing their investments in their network infrastructure. Moreover, in determining substitutability, several considerations including whether the technologies are operating in the same layer should be accounted for; Telecom networks and OTT applications operate in different layers (network layer and application layer respectively), Further, unlike telecom services, OTT services provide a variety of features and functionalities to users. In the absence of any cogent functional similarity, it is misleading to compare versatile OTT apps and services to traditional telecom services provided by TSPs.
- h. It should be appreciated that Art.14 of our Constitution guarantees equal treatment only to persons who are equally situated. **As per abundant case laws associated with Art. 14, unequals are not only permitted to be treated unequally but they also have to be so treated so mandatorily. Importantly, equal treatment to unequals is nothing but inequality. To put both categories at par is wholly unjustified, arbitrary, unconstitutional, and being violative of Art.14.** This is a well-established point and enough case law is available on this point.

Therefore, question of level playing field simply does not arise.

¹² ITU-T Study Group 3, Recommendation ITU-T D.262 (2019/05): Collaborative framework for OTTs, available at: <https://www.itu.int/ITU-T/recommendations/rec.aspx?rec=13595>

¹³ ITU-T Study Group 3, Recommendation ITU-T D.1101 (2020/08): Enabling environment for voluntary commercial arrangements between telecommunication network operators and OTT providers, available at: <https://www.itu.int/ITU-T/recommendations/rec.aspx?rec=14269>

¹⁴ ITU-T Study Group 3, Recommendation ITU-T D.1102 (2021/12): Customer redress and consumer protection mechanisms for OTTs, available at: <https://www.itu.int/ITU-T/recommendations/rec.aspx?rec=14730>

Q4. What could be the reasonable classification of OTT communication services based on an intelligible differentia? Please provide a list of the categories of OTT communication services based on such classification. Kindly provide a detailed response with justification.

Response:

As responded to Q 2 and 3 above, we are of the firm opinion that any attempt to further classify OTT services (or even OTT communication services for that matter) at this stage is not necessary and would be artificial and could lead to market fragmentation and even market failure for the OTT apps, thereby causing consumer harm. As such, our responses to the questions are limited to OTT services as a whole.

Q5. Please provide your views on the following aspects of OTT communication services vis-à-vis licensed telecommunication services in India:

- 1. Regulatory aspects;**
- 2. Economic aspects;**
- 3. Security aspects;**
- 4. Privacy aspects**
- 5. Safety aspects;**
- 6. Quality of service aspects;**
- 7. Consumer grievance redressal aspects; and**
- 8. Any other aspects (please specify).**

Kindly provide a detailed response with justification.

Response:

In our response to this question, we are assessing the applicability of existing laws and regulations in India with respect to the relevant aspects laid out as part of this Question. Additionally, we will be highlighting the initiatives taken by OTT services under few of these aspects, as well as the positive effect of the increase in use of OTT services in India, specifically in terms of the growth of TSPs.

a) **Regulatory aspects:**

- i. TSPs have long since demanded that in order to create a level playing field OTT services must be regulated under telecom law. They place reliance on the principle of 'same service, same rules'. However, as explained in Question 3 above, there are significant fundamental differences between the services provided by TSPs and those provided by OTT services. As such,

it would not be proper to regulate them under the same laws. These arguments are unfounded and lack any substantive merit. As such, having the same regulations for OTTs as for TSPs, would not only be unfair but also be unjustifiable.

- ii. As previously stated in Question 3 above, technically speaking, TSPs and OTT service providers operate on different layers of the internet. TSPs, among other things, control and operate the network infrastructure that provides access to the internet. On the other hand, OTT service providers depend on the internet access provided by TSPs to disseminate content and services over the internet to users. Even the markets within which TSPs and OTT service providers operate are different. TSPs enjoy specific rights (like the right to acquire spectrum and obtain numbering resources) that OTT service providers do not. By virtue of this, TSPs are subject to a different regulatory and licensing framework in India.
- iii. Considering the fundamental differences between TSPs and OTT service providers, OTT services have, in turn, been subject to a different set of laws, such as the IT Act and the rules and regulations issued thereunder. These include: (i) the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (**SPDI Rules**); (ii) the Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009 (**Interception Rules**); (iii) the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 (**Blocking Rules**); (iv) the Information Technology (the Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013 (**CERT-In Rules**); (v) the CERT-In Directions of April 2022 for a Safe and Trust Internet (**CERT-In Directions**), and (vi) the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (Intermediary Guidelines).
- iv. Additionally, the recently passed Digital Personal Data Protection Act, 2023 (**DPDP Act**) will regulate OTT services as well, from a privacy rights perspective. There is also the proposed Digital India Act (**DIA**) which, based on statements made by the Government, is likely to regulate OTT services from the perspective of promoting user-welfare on the internet.
- v. Given the fact that OTT services are subject to a plethora of laws, we believe that the focus should be on harmonising the existing rules and regulations governing them, rather than imposing additional onerous obligations under a telecom framework. Such a step is likely to increase costs and adversely affect the ease of doing business for OTT services. Therefore, any further regulation of OTTs, especially akin to the regulation over TSPs, would not

only be baseless, but also severely detrimental to the growth of the industry as well as to the consumers.

b) **Economic aspects:**

- i. We note that one of the main arguments in support of regulating OTT services under telecom laws is that OTT service providers are free riding over the network infrastructure established and operated by TSPs. This argument adds to the position taken by certain stakeholders that OTT service providers should be made to compensate TSPs for the investments made and expenses incurred in establishing and maintaining such network infrastructure.
- ii. As already noted above, TSPs are primarily concerned with the transmission of voice and text communication and providing services at the physical layer (of the open systems interconnection model). OTTs, on the other hand, rely on the underlying infrastructure created by TSPs to provide their services on the application layer, and as such are customers with respect to TSPs' network services. In fact, from the customer's perspective, TSPs and OTT are two independent and distinct services.
- iii. The free riding argument is completely irrational and baseless since (i) TSPs' revenues over the years have only increased owing to, inter alia, greater demand for data services and internet access; (ii) lots of TSPs already provide their own OTT / online services along with network access, thereby operating in both the network and application layers and (ii) services offered by TSPs form the backbone of any economy, thereby, all digital activities including e-commerce, gaming, online payments etc., would not be possible without the backbone connectivity. Mere success or additional revenue earned by such digital businesses in a free market, where even TSPs are free to compete, cannot be restricted in favour of TSPs.
- iv. Since OTT service providers contribute to the growth in revenues generated by TSPs, it is not accurate to say that OTT services free ride over the underlying network infrastructure. To elaborate, the rising demand for OTT services (including communication and messaging services) directly contributes to the increase in demand for internet access, and as such a revenue growth for TSPs. In essence, through the rising demand for internet access, OTT services have created a new source of revenue for TSPs. The availability of OTT services has resulted in an increased demand for data services, which only TSPs provide, and consequently, improved their related earnings.

- v. To demonstrate the benefits that have accrued to TSPs, including by way of growth in revenue, the CP has cited the following statistics:
- a. from 2012 to 2022, the monthly ARPU for wireless services in India grew by about 44% from INR 98 to INR 141.14.
 - b. from 2014 to 2022, the volume of monthly wireless data usage grew by about 156 times from 92.4 million GB to 14.4 trillion GB.
 - c. from 2014 to 2022, the average revenue from data usage per wireless subscriber per month increased about 5.6 times.
- vi. The above-mentioned statistics are a reflection of India's status as one of the largest telecom markets in the world. It has been reported that internet subscriptions in India have grown in volume from 248 million in 2014 to 820 million in September 2022, and could further increase to 1 billion by 2025.
- vii. Additionally, the CP refers to BEREC's paper on 'Preliminary assessment of the underlying assumptions of payments from large CAPs to ISPs' (October 2022)¹⁵. The paper finds no evidence of free riding to support the implementation of a compensation mechanism between OTT service providers and TSPs. Instead, the paper notes that OTT service providers and TSPs are interdependent – the growing demand for content further drives the growing demand for internet access. In addition to this paper, BEREC's response to the European Commission's Exploratory Consultation on The Future of the Electronic Communication Sector and its Infrastructure (May 2023)¹⁶ notes that different actors in the internet ecosystem contribute to such ecosystem in varying ways, such as providing network access, or providing online content and applications. We believe that these differences should be accounted for when examining the contribution made by different sectors to the internet ecosystem.
- viii. In this regard, it is opportune to refer to the findings in report we published on 'The Economic Value of the App Economy in India' (June 2023)¹⁷. In this report, we had found that "*Besides the direct effect of the app economy on*

¹⁵ BEREC, Preliminary assessment of the underlying assumptions of payments from large CAPs to ISPs, October 7, 2022, available at https://www.berec.europa.eu/system/files/2022-10/BEREC%20BoR%20%2822%29%20137%20BEREC_preliminary-assessment-payments-CAPs-to-ISPs_0.pdf.

¹⁶ BEREC input to the EC's exploratory consultation on the future of the electronics communications sector and its infrastructure, May 19, 2023, available at <https://www.berec.europa.eu/en/document-categories/berec/others/berec-input-to-the-ecs-exploratory-consultation-on-the-future-of-the-electronics-communications-sector-and-its-infrastructure>.

¹⁷ Broadband India Forum, Report on Economic Value of the App Economy in India, June 2023, at page 9, available at <https://broadbandindiaforum.in/wp-content/uploads/2023/06/Research-paper-on-THE-ECONOMIC-VALUE-OF-THE-APP-ECONOMY-IN-INDIA.pdf>.

the GDP, there are spill-over effects in the supply industries (computer hardware, telecommunication and ICT services) ...An increase in sales in the App Economy not only gives rise to an increase in GDP but also creates a multiplier effect through indirect and induced effects. This is because the value through digitalization is not limited only to the sector in which this happens but influences both downstream and upstream sectors in the entire supply chain."

Therefore, the findings and statistics referred to above are evidence of the positive effect OTT services have on the Indian economy, which includes the revenue growth of TSPs.

c) **Security aspects:**

- i. Security measures that OTT services must adhere to are already covered by existing legislations like the IT Act. For example, the CERT-In Rules and the CERT-In Directions require OTT service providers (among other types of services and entities) to comply with cyber-security requirements like reporting cyber-security incidents.
- ii. Further, under the IT Act, the following provisions contain certain security and safety requirements that will ensure user safety online:
 1. Section 43A provides that anybody corporate handling sensitive personal data or information (**SPDI**) shall be liable to pay compensation if it fails to implement reasonable security practices and procedures and causes wrongful loss or wrongful gain to any person. The SPDI Rules provide details of reasonable security practices and procedures, as well as other compliances regarding personal information (**PI**) and SPDI. OTT service providers handling PI or SPDI in the course of offering communication services are required to comply with the obligations under the SPDI Rules.
 2. In addition to this, DPDP Act (which will now replace Section 43A and the SPDI Rules) imposes heightened obligations on OTT service providers with respect to the implementation of reasonable security procedures and implementing appropriate technical and organisational measures to comply with the DPDP Act. The DPDP Act also allows for the Government, in the interest of the general public, to direct any intermediary to block public access to any information on a computer resource that enables a data fiduciary to offer goods or services within India.
 3. The Intermediary Guidelines require intermediaries to:

- i. Comply with take-down requests for unlawful information within 36 hours of receipt of an order or notification from a court / authorised government agency.
 - ii. Provide, within 72 hours of receiving a written order, information under its control and/or assistance to the law enforcement agencies authorised to prevent, detect, investigate or prosecute any offence under applicable law or for cyber security incidents.
 - iii. If it has more than 5,000,000 users (a) endeavour to deploy tools (automated or otherwise) to proactively identify information that depicts any act or simulation in any form depicting rape, child sexual abuse or conduct or which is exactly identical to previously removed content, among other things; and (b) enable users registering for its services from India/use its services in India to voluntarily verify their accounts using any appropriate mechanism (e.g., via an active Indian mobile number).
4. Further, the IT Act empowers the Government and its agencies to take measures in the interests of national security, public order, etc. for:
- i. interception, monitoring, and decryption under Section 69;
 - ii. blocking of unlawful content available on a computer resource under Section 69A; and
 - iii. monitoring and collecting traffic data available on a computer resource for cyber-security purposes under Section 69B.

Therefore, there are adequate provisions under the IT Act and its rules and the DPDP Act that are already applicable to OTT service providers with respect to safety and security obligations concerning PI or SPDI, and for promoting cyber-security. Moreover, most OTT service providers operate in multiple jurisdictions across the world and are subject to varying degrees of obligations and are scrutinized by agencies across the world. As such, their security and privacy policies are generally of internationally accepted standards.

d) **Privacy aspects:**

- i. As mentioned above, SPDI Rules apply to OTT service providers with respect to collecting and processing PI and SPDI. Thus, OTT service providers already have specific privacy obligations under the SPDI Rules. For example, OTT service providers are required to have a clear and accessible privacy policy for the processing of PI and SPDI. Another privacy obligation for OTT service providers is the requirement to obtain informed consent for the collection and use of SPDI.

- ii. Additionally, (as mentioned before), the DPDP Act – which replaces Section 43A / SPDI Rules – imposes further and heightened privacy obligations on OTT service providers with respect to maintaining the privacy of users. We have outlined few of these obligations below.
- iii. Under the DPDP Act, data fiduciaries are obligated to process personal data for a lawful purpose, based on consent or legitimate use.
- iv. Such consent must be free, specific, informed, unconditional and unambiguous. The data principal must provide such consent through a clear affirmative action, agreeing to the data fiduciary processing its personal data for the purposes specifically notified to the data principal. Such consent will be limited to such personal data as is necessary for such specified purpose.
- v. Under the DPDP Act, when consent is being requested from a data principal, the data fiduciaries must accompany such request for consent with a notice or precede such request by a notice. The notice must inform the data principal of: (i) the personal data and the purpose for which the same is proposed to be processed; (ii) the manner in which the data principal may (a) exercise their rights of withdrawal; (b) grievance redressal; and (c) make a complaint to the Data Protection Board of India. Separately, the DPDP Act requires data fiduciaries to provide all data principals with (i) the option to access the notice in English or one of the 22 regional languages identified in the Eighth Schedule to the Constitution of India; and (ii) fresh notice as soon as reasonably practicable, where the processing has commenced before the DPDP Act takes effect.
- vi. The DPDP Act imposes additional obligations for processing children's personal data. A child means any individual under the age of eighteen years. The DPDP Act requires verifiable parental consent (*i.e.*, consent of the parent or lawful guardian) to be obtained in the manner subsequently prescribed by the Government. The data fiduciary is also restricted from tracking, monitoring behaviour of, or targeting advertisements directed at children, or undertaking any other processing that is likely to cause harm to children.
- vii. The DPDP Act is a comprehensive legislation that imposes several obligations on the data fiduciary regarding digital personal data and explicitly bestows several rights on the data principal.

e) **Safety aspects:**

- i. In addition to the security and privacy obligations that OTT service providers are subject to under the IT Act, Intermediary Rules, SPDI Rules, DPDP Act and the CERT-In Rules / CERT-In Directions, several OTT services have taken their own internal initiatives to implement features that ensure user safety.
 - ii. For example, OTT services have introduced additional verification features (such as two-step verification), as well as heightened privacy controls (such as reporting and blocking options).
 - iii. In addition to this, OTT services are constantly introducing security features that aim to reduce spam and fake news being circulated on their platforms. Moreover, as per news reports¹⁸, certain OTT services cooperate with regulatory authorities to block user accounts for reasons of fraud.
 - iv. Beyond the existing measures being taken to safeguard users, the upcoming DIA will purportedly deal primarily with online safety and user well-being. We believe that the DIA may mandate additional safety measures to be undertaken by OTT services.
 - v. The OTT service providers often also tie up with experts and digital security firms to deploy technologies to help secure and prevent any breaches. In any case, the domestic laws in place sufficiently empower government agencies as well as private individuals to take appropriate action against OTT service providers for breach of any security or privacy obligations.
- f) **Quality of service aspects:**
- i. While 'Quality of Service' (**QoS**) is a concept relevant to the functioning of TSPs to ensure adequate quality of telecom services. Extending the same to OTTs is arbitrary and unfair. This is because OTTs are not responsible for quality of carriage/delivery of content as that is the responsibility of the TSPs. OTTs are responsible for Quality of Content only. Since the OTT market is extremely competitive and has no entry barriers and unlimited choice for the consumers, the Quality of Content is decided by the consumers of the TSPs who seek the OTT content.
 - ii. In any case, the QoS in OTT space largely depends upon the QoS of underlying telecom services and the OTTs do not control the quality of the internet connection that consumers use — since that service is rendered by the TSPs. Therefore, imposing any regulatory obligations on OTT service providers will be pointless as they would not be able to control, support or

¹⁸ 'WhatsApp to axe numbers flagged fraud on DoT's portal', The Economic Times, available at https://economictimes.indiatimes.com/tech/technology/whatsapp-to-axe-numbers-flagged-fraud-on-dots-portal/articleshow/100285792.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

ensure such QoS in the absence of their ability to manage the underlying network access to the users which is controlled by the TSPs.

- iii. The OTT services market is, in any case, structured in such a way that OTT services are driven to compete through constant innovation. With the increasing prevalence of OTT services and the ease with which users can switch from one to the other, the only way in which OTT services can retain users is by offering them the best quality of service in a highly competitive market. Thus, the market structure itself ensures that the quality of service offered by OTT service providers remains high. Further, OTT service providers take periodic feedback from the customer to improve their services.

g) **Consumer grievance redressal aspects:**

Existing laws like the Consumer Protection Act, 2019 (for paid online services) and the Intermediary Guidelines (for intermediary services) subject OTT services to grievance redressal measures, which requires them to have sufficiently robust consumer grievance redressal mechanisms along with statutory procedures to aid consumers whose grievances are not satisfactorily addressed by the OTT service providers. Further, even the DPD Act requires data fiduciaries to establish an effective mechanism to redress the grievances of the data principals (here, the customer of an OTT service). Thus, there is no need for additional obligations in this regard.

In an extremely competitive space such as the OTT services market, with new entrants daily, consumers have many options to choose from, often with competitive pricing and provision of similar features and benefits. Therefore to ensure consumer retention, OTT service providers need to ensure that their consumer grievance redressal is robust, satisfactory, and immediate. In any case, OTT service providers, generally have features such as 'support chat' which enable users to directly communicate with a member of the grievance redressal team in real time and have his/her grievance addressed (whether by call or text).

Q6. Whether there is a need to bring OTT communication services under any licensing/regulatory framework to promote a competitive landscape for the benefit of consumers and service innovation? Kindly provide a detailed response with justification.

Response:

It is not necessary to bring OTTs under any licensing/regulatory framework as they are already regulated extensively under extant laws and regulations.

Justification:

1. OTT services are governed and regulated by the IT Act and its rules, CERT-In Directions, RBI tokenization mandates, and relevant sectoral legislation. There is no need to bring OTT services under any licensing or additional regulatory framework. The introduction of a telecom regulatory regime would undoubtedly qualify as an act of over-regulation on digital service providers and not only increase compliance but introduce a crippling financial burden. Furthermore, any move to introduce a separate licensing regime for OTT services could conflict with the Ministry of Electronics and Information Technology (**MeitY**)'s legislative space and efforts to update the IT Act with the proposed DIA.
2. The goal of promoting a competitive landscape for the benefit of consumers and service innovation is already met – these are the key characteristics of digital markets. The basic elements of competition, entry barriers, consumer choice and service innovation are being met in the OTT space. Any additional regulatory intervention at the behest of certain stakeholders will undermine the competitive forces in the market and lead to market fragmentation and market failure.
3. As noted in our preliminary arguments, there are key distinctions between OTT services and TSP services which mean they are not substitutable; rather they have a symbiotic relationship. For example, network operators can offer content and application services, but OTTs cannot offer network connectivity. TSPs also earn revenue from the consumption of OTT services (as users are charged for the data they consume). Additionally, TSP services are interoperable with each other in a way that OTT services are not (a subscriber of one network operator can call a subscriber of another network operator, but a user of an OTT app/service cannot interact with a TSP service user). Thus, it would be a false and incorrect assumption that OTT services are complete substitutes for traditional TSP services, and hence are liable to be regulated.
4. Even OTTs that offer communication services are different from traditional telecommunications services. This is based on several key features (which are not present in traditional telecom services): (a) instant-messaging communication; (b) real-time notification if a message was delivered or read by the recipient or even when the recipient is typing a message; (c) the ability to engage in group communications by way of group chats or group calls; (d) the ability to sharing and exchange documents or media files; (e) device synchronicity, i.e., the ability to work across any number of internet-capable devices.
5. Even consumers do not consider telecom services and OTT services as substitutable services. There are several services provided by OTTs (ranging from social media to online shopping, and food delivery to document sharing) which are not provided by traditional telecom services. We submit that consumers tend to view OTT services as an offering they can access in addition to traditional telecom services. That is, consumers may choose to

- use both services together, or only use legacy telecom services. Therefore, OTT services and telecom services are not substitutable services.
6. In any case, OTT services should not be treated or regulated at par with traditional telecom services, i.e., services provided at an application layer must not be regulated in the same way as services provided at an infrastructure/network layer. The probability of OTT services having some aspects similar to services being offered by a TSP should not by itself be regarded as a criterion for the regulation of OTT service providers.
 7. The rationale for regulations applicable to TSP services stems from the exclusive rights granted to TSPs, including the right to acquire and exploit spectrum, and the right to obtain numbering resources. As mentioned in our preliminary arguments, the issues highlighted by TSPs regarding OTT services arise from issues with the present licensing framework for TSPs. These issues must be addressed at the root (the outdated licensing regime) rather than trying to impose this licensing regime on OTT services. Accordingly, there is no valid or fair justification available for licensing OTT services, particularly when broader concerns of privacy, encryption, etc. are already addressed by existing and other anticipated legislation.
 8. A shift away from the current regulatory regime governing OTT services: (a) will adversely impact innovation and ease of doing business in that sector; and (b) has the propensity to stifle innovation in the industry, particularly for start-ups that form a significant bulk of the industry which is constantly innovating and helping start-ups grow. This would impede the availability and access to global OTT services for Indian consumers and prevent Indian businesses from reaching a global consumer base through OTT apps.
 9. The market for OTT services is characterised by low barriers to entry and constant innovation, which helps OTT services stand out amongst their competitors. Imposing onerous regulatory compliances that are meant for the telecom sector, may discourage OTT service providers from investing in innovation and new technologies, and force them to pass on costs to the consumer (for example, by charging consumers for use of OTT services that are currently offered free of cost). This will create a stark divide between those who can afford the price of such services, and those that cannot. In fact, it may be argued that given the free to freemium business model of various OTT service providers, there is sufficient natural competition in the industry that necessitates innovation and creativity, and at the same time also keeps each player in check and prevents deliberate and created monopolisation in any form. The industry is extremely dynamic and sensitive to user demands, and thus extremely consumer sensitive and competitive.
 10. Further, additional licensing and regulatory burdens will negatively affect the ability of OTT services to evolve and adapt to newer technologies.
 11. Therefore, OTT services should not be subject to a new licensing and regulatory framework, especially if the framework was not originally designed for such services. If the Government feels the need for additional regulations,

there are already upcoming laws like the DIA and the DPDP Act (once enforced) that will adequately regulate them.

Q7. In case it is decided to bring OTT communication services under a licensing/ regulatory framework, what licensing/ regulatory framework(s) would be appropriate for the various classes of OTT communication services as envisaged in the question number 4 above? Specifically, what should be the provisions in the licensing/ regulatory framework(s) for OTT Communication services in respect of the following aspects:

- (a) lawful interception;**
- (b) privacy and security;**
- (c) emergency services;**
- (d) unsolicited commercial communication;**
- (e) customer verification;**
- (f) quality of service;**
- (g) consumer grievance redressal;**
- (h) eligibility conditions;**
- (i) financial conditions (such as application processing fee, entry fee, license fee, bank guarantees etc.); and**
- (j) any other aspects (please specify).**

Kindly provide a detailed response in respect of each class of OTT communication services with justification.

Response:

As noted in our response to Q6 above, there is no need to bring any OTT services under a licensing or additional regulatory framework. Legislations including the IT Act and its rules and DPDP Act address lawful interception, privacy and security, and other aspects. Any additional regulatory measures should be introduced through the existing regulations in the event of any gaps, keeping in mind technical differences that impact services. For example, as noted above, OTT QoS depends on the underlying network (which OTT service providers do not control). Similarly, provision of emergency services is also dependent on underlying networks, which OTT services do not have control over.

However, we have still commented on the above-mentioned aspects vis-à-vis OTT services and the fact that they are already sufficiently regulated.

- a) **Lawful interception:**

- i. The Government and its agencies have powers under Section 69, 69A, and 69B, respectively, to: (i) intercept, monitor, and decrypt information in a computer resource for reasons such as national security and public order; (ii) block access to information in any computer resource for these same reasons; and (iii) monitor and collect traffic data or information in a computer resource for cyber security purposes. There are also relevant powers conferred to the Government under the Intermediary Guidelines.
- ii. For further details, please refer to the response to Question 5 on 'security aspects' above.

b) **Privacy and security:**

- i. The SPDI Rules, DPDP Act and even the CERT-In framework impose several obligations on OTT service providers to ensure adequate safeguards against data breaches, cyber-security incidents and to maintain the privacy of individuals.
- ii. For further details, please refer to the response to Question 5 on 'privacy aspects' above.

c) **Emergency services:**

- i. TSPs – under the Unified Licence regime - are required to provide public utility and emergency services like toll free calls to emergency departments such as fire, police and ambulances. This is to ensure that individuals are able to make these critical calls during emergency situations and they are not charged when doing so.
- ii. Attempting to impose the same set of obligations on OTT services (including vis-à-vis OTT services that allow users to communicate with one another) is problematic because OTT services require the internet to function, and there is no guarantee that internet access will be readily available during an emergency. Additionally, OTT services do not have the infrastructure to provide emergency calling services, in light of the fact that most of these services do not have interconnection functionalities. Any such obligation for OTT providers will be meaningless as they would not be able to support the very purpose of emergency services in the absence of their ability to manage the last mile access to the users.
- iii. Further, in order to help individuals during emergencies, it is sometimes crucial to be able to identify their specific location (such as during search and rescue operations), but OTT services may not be able to perform this function for all their users based on the privacy settings on a platform.

d) **Unsolicited commercial communication (UCC):**

- i. OTT services that provide users with a means to communicate on their platforms have introduced features on their platforms that allow users to report or block numbers from which they receive unsolicited messages and calls.
- ii. A few OTT services also offer users the option of unsubscribing from marketing messages as an alternative to blocking the number completely.
- iii. In addition, with the commencement of the DPDP Act, processing of personal data is only permitted under specific grounds as provided under the DPDP Act. This will also curb UCC going forward.

e) **Customer verification:**

- i. Users signing up to use OTT services are required to verify their identity through one-time passwords sent either to their phone number or email.
- ii. Notably, the Intermediary Guidelines require significant social media intermediaries to give users the option to voluntarily verify their accounts through appropriate mechanisms, such as a mobile number. Thus, OTT service providers that fall within the ambit of significant social media intermediaries are already subject to verification requirements. Further, CERT-In Directions only requires data centres, virtual private servers, cloud service providers and virtual private network service providers to collect specific customer information accurately, validate certain information, and maintain customer information for a period of 5 years after the suspension/cancellation/closure of customers' accounts. This indicates that mandatory customer verification has only been imposed on specific entities (meeting certain thresholds or specific kinds of intermediaries) as opposed to all intermediaries or all OTT service providers.
- iii. Lastly, we note that certain OTT services cooperate with regulatory authorities to identify situations where users continue to use OTT services with disconnected numbers, and in this regard, require users to re-verify these numbers.
- iv. Therefore, imposing additional requirements is onerous, unnecessary, and expensive serving no legitimate purpose since the TSPs already undertake a robust verification process.

f) **Quality of service:**

- i. Please refer to the response to Question 5 on 'quality of service aspects' above.

g) **Consumer grievance redressal:**

- i. Please refer to the response to Question 5 on 'consumer grievance redressal aspects' above.

h) **Eligibility conditions:**

- i. We do not believe there is a need for any additional licensing or regulatory framework for OTT services, and therefore this question is not relevant.

- i) **Financial conditions:** We do not believe there is a need for any additional licensing or regulatory framework for OTT services, and therefore this question is not relevant.

Q8. Whether there is a need for a collaborative framework between OTT communication service providers and the licensed telecommunication service providers? If yes, what should be the provisions of such a collaborative framework? Kindly provide a detailed response with justification.

Response:

There is absolutely no need for any collaborative framework to be imposed between OTT service providers and licensed TSPs. They already have a symbiotic relationship as the TSPs are largely dependent on their customers pulling OTT applications & services over their network and thereby driving major share of the data revenues for the TSPs. It is not necessary to impose any additional mandatory collaborative framework.

Justification:

- (a) There is no logic or reason to ask OTTs to pay the fee due to the large traffic caused on the network which necessitates capex investments. **The traffic of the TSPs is due to its own customers wanting the OTT apps to be made available for their use.** The OTTs are not responsible for pushing the apps or services down the TSPs network.
- (b) Please refer to Q9 below for our arguments against a NUF model.
- (c) A majority of the EU nations (18 out of 29) have rejected the TSPs' proposition of sharing the network cost with the OTT service providers and they have upheld the findings of the **BEREC report on 'Preliminary assessment of the underlying assumptions of payments from large CAPs to ISPs'**¹⁹. In

¹⁹ BEREC, Preliminary assessment of the underlying assumptions of payments from large CAPs to ISPs, October 7, 2022, available at https://www.berec.europa.eu/system/files/2022-10/BEREC%20BoR%20%2822%29%20137%20BEREC_preliminary-assessment-payments-CAPs-to-ISPs_0.pdf.

fact, the Dutch Government has officially rejected the TSPs' position in the matter.

- (d) As advised by TRAI, as well as ITU, both TSPs and OTTs "engender *benefits for each other in a symbiotic, complementary and mutually reinforcing manner...and...both sectors have invested heavily in the infrastructure to support it.*". For example, OTT providers already contribute to aspects such as infrastructure expansion through the development of Content Delivery Networks (CDNs) and projects to lay deep-sea cables, among others (as noted below).
- (e) TSPs provide the transmission capacity and OTT apps offer content that boosts user demand for this capacity. Both are mutually interdependent. Building transmission pipes without anything to transmit is not a viable business, and developing content without transmission capability is not viable either. Further, the content provided by OTTs is driving the demand for the transmission capacity provided by TSPs, since it can increase the end-user demand for more bandwidth.
- (f) As consumers use more bandwidth-intensive OTT services, such as video streaming services, they pay for higher-tiered services that offer faster speeds and greater bandwidth, which TSPs price at a premium. In other words, TSPs are using the content provided by OTTs to increase their revenues, which in turn would lead to higher investments in the TSPs' networks. As noted in the CP, TSPs' average revenue from data usage has increased tenfold, from 8.10% in June 2013 to 85.1% in December 2022, driven by content consumption on OTT services.
- (g) We agree with the **ITU's findings in its report on 'Collaborative framework for OTTs'**²⁰, that a collaborative framework to promote competition, consumer protection and benefits, innovation, investment, etc. are important factors that the current regulatory framework already advances. We further note that the **ITU's paper on 'Economic impact of OTTs on national telecommunication/ICT markets'**²¹ observes that the relationship between TSPs and OTT service providers is already complementary since there have been several collaborative efforts between TSPs and OTT service providers regarding investment in network infrastructure.
- (h) For example, OTT service providers already make investments in complementary internet infrastructure around the world. In the Indian context,

²⁰ International Telecommunication Union, 'Collaborative framework for OTTs', May 2019, available at https://www.itu.int/rec/dologin_pub.asp?lang=e&id=T-REC-D.262-201905-I!!PDF-E&type=items.

²¹ International Telecommunication Union, 'Economic impact of OTTs on national telecommunication/ICT markets', 2019-2020, available at https://www.itu.int/dms_pub/itu-d/oth/07/23/D07230000030001PDFE.pdf.

it has been²² reported²³ that²⁴ several OTT service providers have already invested in infrastructure in order to provide better internet access.

- (i) Another report on 'The Impact of Tech Companies' Network Investment on The Economics of Broadband ISPs' (Analysys Mason, October 2022)²⁵ looks closely at the demand of ISPs that OTT service providers should provide compensation for using the underlying network to provide their services to users. Analysys Mason observes that the collaboration between OTT service providers and ISPs has contributed to the growth of the internet, which is in turn driven by the rise in demand for online services and internet access. More investment by OTT service providers in internet infrastructure means better delivery to end users and reduction of costs for ISPs. In any case, we believe that the efficient delivery of content to end users is very important for OTT service providers, and as such they are committed to investing in hosting, transport, and delivery networks.
- (j) Given that the nature of the market encourages collaboration between OTT service providers and TSPs, imposing additional obligations for further collaboration is not necessary and should be avoided.

Q9. What could be the potential challenges arising out of the collaborative framework between OTT communication service providers and the licensed telecommunication service providers? How will it impact the aspects of net neutrality, consumer access and consumer choice etc.? What measures can be taken to address such challenges? Kindly provide a detailed response with justification.

Response:

- (i) At the outset, the internet is a network of networks connecting private as well as state-owned entities for the free flow of communications. Agreements that govern the exchange of traffic between networks rely upon voluntary, commercial negotiations and are the foundation of the internet's networking model. Introducing a Network Usage Fee (NUF) may disrupt this model significantly and irreversibly change the fabric of the internet and its core elements of success.

²² Jay Parikh, 'Facebook: Partnering to build the Telecom Infra Project', February 22, 2016, available at <https://telecominfraproject.com/facebook-partnering-to-build-the-telecom-infra-project/>.

²³ The Indian Express, 'Airtel partners with Meta to develop undersea cable infra for high speed internet', December 6, 2022, available at <https://indianexpress.com/article/business/airtel-partners-with-meta-to-develop-undersea-cable-infra-for-high-speed-internet-8307705/>.

²⁴ Bikash Koley, Announcing the Blue and Raman subsea cable systems, July 30, 2021, available at <https://cloud.google.com/blog/products/infrastructure/announcing-the-blue-and-raman-subsea-cable-systems>.

²⁵ Analysys Mason, The Impact of Tech Companies' Network Investment on the Economics of Broadband ISPs, October 2022, available at <https://www.analysysmason.com/contentassets/b891ca583e084468baa0b829ced38799/main-report---infra-investment-2022.pdf>.

- (ii) Contrary to the argument being made, there is no evidence to hold OTT services accountable for free riding. Recent reports of Analysys Mason and WIK Consult have echoed the BEREC's findings that it is the TSPs' customers who are wanting and using the apps, thereby driving network utilisation, consequently helping TSPs generate more revenues. Moreover, the customer is paying data usage charges (which increased by a healthy 40% in the last 3 years) to the TSPs and they have full freedom to charge enough to cover their costs under tariff forbearance which is permitted by the TRAI.
- (iii) Analysys Mason has also found that network-related costs for TSPs have remained stable over time even while traffic volumes have grown significantly. Data traffic only drives a small share of the provider's costs which are further mitigated by the investments that CAPs make in internet infrastructure. There's no additional cost for TSPs if a user streams more content as the user will likely pay the operator in the form of a higher data plan. This just shows that TSPs are perfectly able to handle steady traffic growth at an almost negligible incremental cost. Further, WIK Consult confirmed the findings of the Analysys Mason study by asserting that *"growth is stable, which is explained by a relative market saturation for streaming services. BEREC also stated that "internet traffic has grown steadily over the years. There has been no fundamental change in the general growth tendency."*
- (iv) BEREC also concluded that imposition of such a fee may lead to price hikes for consumers, disincentivise Big Tech from making investments and breach EU net neutrality rules.
- (v) It can, therefore, safely be surmised that the demand of network fee from OTTs / CAPs is merely a strategy to extract monopolistic rents, negatively impact the trajectory of innovation being pursued by the OTTs / CAPs and impose higher data costs indirectly on the end-customers.
- (vi) TSPs claim that network fees would unlock socio-economic opportunities for citizens and businesses, is quite hollow. However, the opposite is true as evidenced by South Korea's experiment with the concept which gave results like consumer prices going up dramatically, content offering becoming less diverse and the internet itself becoming slower while investments in network infrastructure actually declined. Upholding the BEREC findings (as noted immediately above), majority of the EU nations have officially rejected the TSPs demands in this regard.²⁶ It has also seen almost total rejection in all other (non-EU) regimes, wherever it has been taken up.

²⁶ Foo Yun Chee, 'Majority of EU countries against network fee levy on Big Tech, sources say', Thomson Reuters, June 3, 2021, available at <https://www.reuters.com/business/media-telecom/majority-eu-countries-against-network-fee-levy-big-tech-sources-say-2023-06-02/>.

- (vii) The imposition of NUF may impact competition negatively, especially for smaller players in the market. Smaller players may not be able to afford the NUF, making it difficult for them to compete with larger players who can afford to pay. This may result in smaller players being forced out of the market, foreclosing competition, and freedom of choice for end-users.
- (viii) A NUF model between TSPs and OTTs is likely to violate the principle of net neutrality and go against the open and free nature of the internet. 'Net-Neutrality' refers to the concept of non-discrimination of internet traffic by intermediate networks on any criteria. The network should be neutral to all the information being transmitted through it. All communication passing through a network should be treated equally i.e., independent of its content, application, service, device, sender or recipient address. A collaborative framework will encourage TSPs to charge different rates to different OTT services based on several factors, including but not limited to, existing relationship with the OTT service provider, popularity, size and volume, target audience etc. For instance, if different OTT services are charged different rates by TSPs (depending on their nature, size, etc.), net neutrality may be violated. Another concern (including from a competition law perspective) is –anti competitive practices such as margin squeeze, wherein TSPs that have their own OTT services will be exempt from any such revenue sharing requirement.
- (ix) Further, if a or NUF is implemented, OTT services may be forced to reduce their investment in improving the quality of their online services and improving the underlying infrastructure they rely on to provide their services. We believe that any decrease in the QoS provided to users will go against their welfare in the long run.
- (x) Recently, there have been strong objections to the NUF model suggested by TSPs. Industry stakeholders and think tanks have raised the following concerns, which are, in principle, similar to our aforementioned comments:
 - a) The Internet and Mobile Association of India has observed²⁷ that revenue sharing between OTT service providers and TSPs will allow TSPs to become exploitative, which would adversely impact the Indian economy. Further, higher costs for internet usage are likely to disincentivise the growth of OTT services in India and reduce revenues.

²⁷ The Economic Times, 'IAMAI opposes revenue sharing between OTTs and telcos', February 23, 2023, available at <https://economictimes.indiatimes.com/industry/telecom/telecom-news/revenue-share-underhanded-attempt-to-violate-net-neutrality-iamai-on-coais-demand-of-compensation-by-otts/articleshow/98169929.cms?from=mdr>.

- b) CUTS International is of the view that²⁸ subjecting OTT service providers to unreasonable regulations (over and above existing regulations) will negatively affect consumers, particularly smaller OTT service providers may not have the capacity to enter into a “*mutually beneficial cost-sharing pact*” with TSPs. This will have ripple effects and consumers will have to bear higher costs because they will be paying the TSPs for internet access and OTT service providers for services offered (assuming that OTT service providers start charging for their services to meet the demands of the NUF model). A NUF model will also force OTT service providers to choose between investing in the improvement of their services and paying TSPs for use of the underlying network.
- c) Moreover, the reduction in number of OTT service providers in the industry, due to the service providers being forced out of the Indian economy / industry considering increased operating costs (as mentioned in point (a) above), would further reduce consumer choice. Pertinently, only big entities will be able to survive in such a highly regulated market, forcing smaller entities out of business; consequently, reducing consumer choice. In fact, in a previous consultation paper, TRAI highlighted that permitting TSPs to charge content providers to reach their users could result in TSPs assuming the role of gatekeepers. TSPs would, accordingly, be incentivised to charge higher rates for access to such services, resulting in fewer OTT services being available to end consumers.²⁹ Such a construct would be antithetical to the growth of digital businesses in India and ultimately hurt consumer interests. As a result, many would be forced to cease usage of such services and, in turn, such service providers would be forced out of the Indian economy / industry.

B. ISSUES RELATED TO SELECTIVE BANNING OF OTT SERVICES

Q10. What are the technical challenges in selective banning of specific OTT services and websites in specific regions of the country for a specific period? Please elaborate your response and suggest technical solutions to mitigate the challenges.

Response:

Selective banning of OTT services or platforms / websites raises legal, policy, and technical challenges, as discussed below.

(i) Consumers will find ways around selective banning

²⁸ Centre for Competition, Investment & Economic Regulation, ‘OTT regulation should keep consumer interest in consideration: CUTS International’, March 3, 2023, available at <https://cuts-ccier.org/ott-regulation-should-keep-consumer-interest-in-consideration-cuts-international/>.

²⁹ TRAI Consultation Paper on Net Neutrality dated 4 January 2017, page 23.

- a. Consumers rely on OTT services as more than just a means of communication. Thus, consumers are likely to be more motivated to finding workarounds to the imposition of selective bans on OTT services or websites. For example,³⁰ when the U.S. Government announced a ban on China's most popular messaging app, 'WeChat', Chinese users switched to an alternative messaging service with ease and immediacy. Therefore, selective banning of apps will not stop people from communicating with each other. Instead, it will encourage alternate means of communication.
- b. Another popular workaround to selective bans is the use of VPNs. News reports³¹ suggest that Russia's ban on certain social media websites increased the demand for VPNs by a significant amount. Even in the Indian context, a similar trend was observed in Jammu and Kashmir when there were successive and prolonged internet shutdowns and only certain websites were made available for a while. Therefore, the reliance placed on VPNs to circumvent selective banning cannot be avoided, or even curtailed (despite attempts to regulate VPN services under the CERT-In Directions).
- c. Indeed, selective banning may have a negative impact on users (i.e., it will undermine user choice or inhibit the ability of local communities to access OTT services of their choice for legitimate purposes), and it may not be the best strategy to counter terrorism or stop the spread of misinformation or fake news in politically sensitive regions in the country or in areas of public unrest.

(ii) Selective banning may not pass muster under the scrutiny of fundamental rights

- a. The Supreme Court of India has held that the fundamental right to speech and expression, and the fundamental right to carry on trade, business, or occupation, are protected even over the internet (*Anuradha Bhasin v. Union of India & Ors.*, W.P. (C) No. 1031 of 2019).
- b. Therefore, the Government has a duty to act proportionally with respect to all orders that selectively ban OTT services, and which may hamper individuals from exercising these fundamental rights. This means that the Government must ensure that all restrictions placed are minimal, seek to achieve a legitimate goal, and there are no better alternatives. With regard to selective banning, we understand that there is no conclusive evidence to indicate that it

³⁰ 'China appears to block Signal, one of last popular encrypted messaging apps', The Wall Street Journal, March 16, 2021, available at <https://www.livemint.com/technology/apps/china-appears-to-block-signal-one-of-last-popular-encrypted-messaging-apps-11615915217474.html>.

³¹ 'Russians' demand for VPN skyrocket after Meta block', Thomson Reuters, March 14, 2022, available at <https://www.reuters.com/technology/russians-demand-vpns-skyrockets-after-meta-block-2022-03-14/>.

is the most feasible alternative to a total internet shutdown in times of public unrest.

- c. It would be appropriate to selectively ban an OTT service, if and only if, such service has wilfully not complied with laws or legal requirements in India. Section 69A of the IT Act in any case permits selective blocking to take place on certain critical grounds – and the Government has, in the past³², used its powers under this provision to block applications from China or with a connection to China.

(iii) Privacy concerns and technical challenges

- a. In the Parliamentary Standing Committee's Report on 'Suspension of Telecom Services/Internet and its Impact', the DoT has stated that services hosted on the cloud are difficult to ban selectively because they operate from multiple locations across multiple jurisdictions and keep switching from one service to the next.
- b. Recently, a blog post (July 2023)³³ brought to light the technical difficulties and privacy concerns that arise because of selective banning of OTT services. We have elaborated on the same below.
 - i. In the event blocking of websites is to be pursued, the same can be carried out at the URL-level. This is because websites following the domain name system have fixed / easy to identify URLs and IP addresses. However, even if websites are blocked using this method, individuals are likely to try and circumvent selective bans on websites. They may do so by relying on a different domain name for the same online service, or they may use VPN services to circumvent the ban.
 - ii. In the event blocking of OTT services is to be pursued, the same can be carried out at the application level. At this level there are two ways to selectively ban platforms, i.e., either through the OTT service provider itself or through the TSP. The problem with the former approach, i.e., getting OTT service providers to ban their services in certain geographical areas is the fact that OTT service providers will require the location information (a form of PI) of their users. Allowing OTT services to access such information raises privacy concerns. They will also have to seek permission from users (which they are unlikely to give) before accessing such PI. This is where the latter approach gains relevance – albeit it comes with its own set of challenges.

³² Divya Bhati, 'Full list of Chinese apps banned in India so far: PUBG Mobile, Garena Free Fire, TikTok and hundreds more', India Today, August 21, 2022, available at <https://www.indiatoday.in/technology/news/story/bgmi-garena-free-fire-tiktok-and-more-banned-in-india-check-the-full-list-1990048-2022-08-19>.

³³ 'Selective banning of OTT Application', available at <https://paragkar.substack.com/p/selective-banning-of-ott-application>.

- iii. TSPs can block an OTT service in specific geographic areas by identifying the destination IP addresses of all the servers used by the OTT service provider. However, given the technical complexity and difficulty in carrying out such hyper-regional geo-blocking, it may not be possible for TSPs to implement such measures in a short period of time during times of unrest or of any imminent security concerns.
- iv. Moreover, an OTT service provider may be reluctant to share its IP address with a TSP for various reasons – such as to prevent exposure to cybersecurity incidents. Moreover, the IP addresses may be dynamic – especially if these services are hosted on cloud platforms - and therefore difficult to track. Any given dynamic IP address will also have other OTT service providers hosted on the same cloud platform and using the same dynamic IP address, which means all OTT services using the same dynamic IP address could be erroneously blocked by a TSP. This could lead to a situation of over-blocking. We understand that TSPs may avoid this situation by accessing these IP addresses in real time and also conducting a deep-packet inspection to correctly identify which OTT service it seeks to block. However, this is a tedious and onerous task that has privacy and free speech ramifications and raises net neutrality concerns as well. Therefore, selective banning of OTT services does not seem like a feasible option whether done at the URL-level or the application level.

Given this, there is some technical infeasibility in carrying out selective banning and this requires a collective study between the DoT and the industry stakeholders.

Q11. Whether there is a need to put in place a regulatory framework for selective banning of OTT services under the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 or any other law, in force? Please provide a detailed response with justification.

Response:

- a) At the outset, we would like to highlight, and as noted in the CP, that internet shutdowns or suspensions can have disproportionate negative effects. Similarly, banning specific services can have severe implications for civil liberties including free speech. In addition to this, there are significant economic costs. Estimates from the Internet Society suggest losses caused by internet shutdowns crossed INR 187 billion in 2022.³⁴
- b) The provisions under the IT Act (noted below) are sufficient for blocking of online content and entire OTT platforms, and as such there is no need

³⁴ See BQ Prime, The Economic Cost of Small Internet Shutdowns, available at: <https://www.bqprime.com/opinion/the-economic-cost-of-small-internet-shutdowns>

for an additional regulatory framework for selective banning of OTT services. If there are shortcomings in the provisions of the IT Act, the same can be addressed by updating the IT Act itself.

- c) As laid out in the response to Question 5 on 'security aspects' above, there are already existing provisions that allow the Government to issue blocking orders on specified grounds. For example, under Section 69A of the IT Act read with the Blocking Rules, "any information generated, transmitted, received, stored or hosted in any computer resource" can be blocked. This can include online content (such as a post) or an entire website / platform, which may be blocked on grounds relating to the sovereignty and integrity of India, national security, public order, etc. Further, under Section 79 of the IT Act read with the Intermediary Guidelines, any access to online content can be blocked under certain grounds, and upon directions from the appropriate regulators or courts of law in India.
- d) Further, insofar as the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 (**Temporary Suspension Rules**) are concerned, they are formulated under the Indian Telegraph Act, 1885 (**Telegraph Act**) and are applicable to 'telegraph' as defined under the Telegraph Act, which does not seek to regulate the application layer services. Notwithstanding the fact that OTT services would not fall within the definition of "telegraph" or under the scope of the Act, the Temporary Suspension Rules are also restricted to suspension of the telecommunication services alone. Moreover, given that OTT services are dependent on TSPs and their infrastructure for operating, the suspension of telecommunication services would necessarily also result in the non-accessibility to OTT services as well. There is no requirement for a separate law to carry out temporary suspension of OTT services since it is the natural consequence of temporary suspension of telecommunication services.
- e) Therefore, there is, currently, no requirement for formulating a framework for selective banning of OTT services.

Q12. In case it is decided to put in place a regulatory framework for selective banning of OTT services in the country, -

- (a) Which class(es) of OTT services should be covered under selective banning of OTT services? Please provide a detailed response with justification and illustrations.**
- (b) What should be the provisions and mechanism for such a regulatory framework? Kindly provide a detailed response with justification.**

Response:

Having explained why there is no need to implement a regulatory framework for selective banning of OTT services in India in Question 11 above, we have not provided our inputs herein.

Q13. Whether there is a need to selectively ban specific websites apart from OTT services to meet the purposes? If yes, which class(es) of websites should be included for this purpose? Kindly provide a detailed response with justification.

Response:

Having explained why there is no need to implement a regulatory framework for selective banning of OTT services in India in Question 11 above, we have not provided our inputs herein.

Q14. Are there any other relevant issues or suggestions related to regulatory mechanism for OTT communication services, and selective banning of OTT services? Please provide a detailed explanation and justification for any such concerns or suggestions.

Response:

Having elaborated on all our concerns regarding the regulation of OTT services in our responses to Questions 5, 6, 7, 8, and 9 above, and addressing our concerns with respect to selective banning of OTT services in our responses to Questions 10 and 11 above, we request you to refer to those responses.

That said, we take this opportunity to state the following:

- (a) In conclusion, we believe the issue that the Government should address is not vis-à-vis the regulation of OTTs, but the manner in which telecommunication services are currently regulated. For instance, the current system of a Unified License with multiple authorizations and onerous compliances is based on laws which are more than a century old. It is also the result of the post-Independence 'License Raj' approach, which persists in telecommunications despite liberalizations in many other sectors.
- (b) In recognition of these issues, the Department of Telecommunications introduced a Draft Indian Telecommunication Bill in September 2022. The Bill seeks to replace the Indian Telegraph Act of 1885, recognizing "the need for a new legal framework that is future-ready".³⁵ Rather than regulating OTTs, we humbly submit that the Government must overhaul and simplify the regulatory framework for the telecommunications. A potential license or regulatory framework for services like OTT communication applications will

³⁵ DoT, Explanatory note to the draft Indian Telecommunication Bill, 2022, available at: <https://dot.gov.in/sites/default/files/Explanatory%20Note%20to%20the%20draft%20Indian%20Telecommunication%20Bill%2C%202022.pdf>

act as an entry barrier, increase compliance burdens, and adversely impact India's startup ecosystem. It would go against the government's vision of Ease of Doing Business, Digital India, and Maximum Governance, Minimum Government. It also goes against the position in the National Digital Communications Policy 2018 when the DoT committed to "*remove regulatory barriers and reduce regulatory burden that hampers investments, innovation and consumer interest...*".³⁶

- (c) Entry barriers and compliance burdens could decelerate India's internet growth, dis-incentivizing the entry of new entrants (especially smaller local entrants), new offerings, and innovation.³⁷ MeitY has set a target of unlocking 1 trillion-dollar value from India's digital economy by 2025.³⁸ Any disruption in the governance framework for internet services is likely to have an adverse effect on the digital economy. Moreover, it would hurt telecommunications service providers in the long run because – as noted above – the demand for OTT services drives the increase in data consumption and subscriptions by TSPs' customers.

³⁶ 8, Preamble to the National Digital Communications Policy 2018, available at: https://dot.gov.in/sites/default/files/2018_10_29%20NDCP%202018_0.pdf.

³⁷ OECD, Broadband Networks of the Future (July 2022), available at: <https://www.oecd-ilibrary.org/docserver/755e2d0c-en.pdf?expires=1689860012&id=id&accname=guest&checksum=464420A2D01B72335EA57EC1680E8FEE>.

³⁸ MeitY, India's Trillion Dollar Opportunity, (February 2019), available at: https://www.meity.gov.in/writereaddata/files/india_trillion-dollar_digital_opportunity.pdf.