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Cc: amk@cuts.org, vs1@cuts.org, sva@cuts.org

Sent: Wednesday, August 23, 2023 1:03:00 PM

Subject: CUTS Comments on TRAI CP on Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services

Dear Mr. Trivedi,

Greetings of the day!

[CUTS](#) expresses its gratitude to the Telecom Regulatory Authority of India (TRAI) for inviting comments on the [Consultation Paper](#) on *Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services*.

Now, we are pleased to submit our comments on it, which have been attached herewith for your kind perusal. We would be grateful if you could kindly acknowledge receipt of the same.

We have engaged with different consumer groups on key issues arising out of the Consultation Paper. We hope our submission would be useful to understand the consumer's perspective.

We are keen to engage with TRAI on this proposed facility, and would be happy to make an in-person submission and presentation to you. Look forward to your kind positive response in this regard.

Please feel free to reach out to us, in case of any queries/clarifications.

Thanking you,

Warm regards,

Amol

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**TRAI Consultation Paper on
Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective
Banning of OTT Services**

CUTS Comments

1. Background

Consumer Unity & Trust Society (CUTS) expresses its gratitude to the Telecom Regulatory Authority of India (TRAI) for inviting comments on the Consultation Paper (CP) on Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services.¹

2. About CUTS

CUTS in its 39 years of existence, has come a long way from being a grassroots consumer centric organisation headquartered in Jaipur², having centres in Delhi³, and Kolkata⁴, to now opening overseas Resource Centres in Vietnam⁵, Kenya⁶, Zambia⁷, Ghana⁸, Switzerland,⁹ and in the United States of America¹⁰. It continues to remain an independent, non-partisan, and non-profit economic policy think tank while opening various programme centres, namely: Centre for International Trade, Economics & Environment (CITEE);¹¹ Centre for Consumer Action, Research & Training (CART);¹² Centre for Human Development (CHD)¹³; and Centre for Competition, Investment & Economic Regulation (CCIER)¹⁴.

CUTS has been working towards improving the regulatory environment through evidence-based policy and governance-related interventions across sectors and national boundaries. It has conducted various studies and events in the telecommunications (telecom) sector, such as Demystifying Reality from Myth for 5G in India¹⁵; Coding and Enforcing Mobile Internet Quality

¹ https://www.trai.gov.in/sites/default/files/CP_07072023_0.pdf

² [CUTS International – Consumer Unity & Trust Society \(cuts-international.org\)](https://cuts-international.org)

³ <https://cuts-international.org/DRC/>

⁴ <https://cuts-crc.org/>

⁵ <http://www.cuts-hrc.org>

⁶ <https://cuts-nairobi.org/>

⁷ <https://cuts-lusaka.org/>

⁸ <https://cuts-accra.org/>

⁹ <http://www.cuts-geneva.org/>

¹⁰ <http://cuts-wdc.org/>

¹¹ www.cuts-citee.org

¹² <https://cuts-cart.org/>

¹³ <https://cuts-chd.org/>

¹⁴ <http://www.cuts-ccier.org/>

¹⁵ [5G in India \(cuts-ccier.org\)](https://cuts-ccier.org/)

of Standards in India¹⁶; Consumer Broadband Labels for Greater Transparency & Informed Consumers;¹⁷ Towards Effective Choice: A Nation-Wide Survey of Indian TV Consumers;¹⁸ among many others. Currently, CUTS is undertaking studies on ‘Elements of Ethical Framework for 6G and Creating Opportunities for India and Australia,’¹⁹ ‘Understanding and Highlighting Stakeholders’ Perspectives on Caller Name Presentation (CNAP) in Telecommunication Services,’²⁰ ‘Understanding and Highlighting Consumers’ Perspectives in the debate of regulation of Over the Top (OTT) Communication Services,’²¹ and ‘Bringing Forth a Consumer Perspective on Wi-Fi 6E’²². Based on such evidence-based studies, CUTS is pleased to submit its comments on the Consultation Paper, which have been discussed in subsequent sections.

3. Response to the issues of consultation

CUTS has approached the proposal of introducing a regulatory mechanism from a consumer interest perspective. Any regulatory change, if proposed or implemented, must be beneficial to the public at large: it must foster competition, innovation, economic growth and increase consumer choice, accessibility, and quality of services. There are several implications of regulating OTT services over consumers which need to be explored and understood.²³ We have explored these implications by looking at multiple jurisdictions which adopted different models of OTT regulations, in terms of the effects on the consumer interests. In the CP, under Chapter IV, TRAI has also looked at different jurisdictions and their regulatory framework for OTTs. **We have also engaged with different consumer groups on key issues arising out of the consultation paper.**²⁴ Therefore, our answers to the consultation questions are provided below:

¹⁶ [Coding and Enforcing Mobile Internet : Quality of Standards in India - ccier \(cuts-ccier.org\)](#)

¹⁷ [Project Launch Meeting “Consumer Broadband Labels: For Greater Transparency & Informed Consumers” - ccier \(cuts-ccier.org\)](#)

¹⁸ <http://cuts-ccier.org/pdf/research-report-towards-effective-choice-a-nation-wide-survey-ofindian-tv-consumers.pdf>

¹⁹ [Ethical 6G – Identifying Elements of Ethical Framework for 6G and Creating Opportunities for India and Australia - ccier \(cuts-ccier.org\)](#)

²⁰ [Understanding and Highlighting Stakeholders’ Perspectives on Caller Name Presentation \(CNAP\) in Telecommunication Services - ccier](#)

²¹ [Understanding and Highlighting Consumers’ Perspectives in the debate of regulation of Over the Top \(OTT\) Communication Services - ccier](#)

²² [Understanding Consumer Perspectives on 6GHz Band - ccier](#)

²³ [View: Consumers cannot be the collateral in OTT tussle - The Economic Times](#)

²⁴ Some of the Consumer organisations and groups with whom we have engaged include *Bhartiya Manav Kalyan Samiti, Noida; Consumer Guidance Society; Consumers & Telephone Subscribers Forum, Patiala; Himachal Upbhogkta Sanrakshan Parishad, Shimla; Consumer Research, Education, Action, Training & Empowerment); Avadh Upbhokta Hit Sanrakshan Samiti, Lucknow; Consumer Guild; Consumer Care Society; Consumer Education & Research Centre; Islampur Ramkrishnapally Rural Welfare Society; New Indian Consumer Initiative, and Bharat Jyoti.*

Chapter II: Issues Related to Regulatory Mechanism for OTT Communication Services

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

- (a) regulatory aspects;*
- (b) economic aspects;*
- (c) security aspects;*
- (d) privacy aspects;*
- (e) safety aspects;*
- (f) quality of service aspects;*
- (g) consumer grievance redressal aspects; and*
- (h) any other aspects (please specify).*

Kindly provide a detailed response with justification.

Response:

This Chapter deals with the perceptions of regulatory imbalance between OTT services and traditional telecom services. The focus of the Chapter is on OTT communication services, which TRAI notes is in a regulatory vacuum, whereas most telecom regulations covering existing players are concrete and extensive. It highlights a need for developing a policy and regulatory framework for OTT communication services. The central point of TRAI's argument is the current disparity between the different regulations governing telecom service providers (TSPs) and OTT services like WhatsApp. Since these entities provide similar services but are not subject to the same regulations, TRAI believes it's necessary to establish regulatory parity to ensure a fair and balanced digital ecosystem and is consulting stakeholders on whether changes are needed in rules governing the two types of services.²⁵ In this context, the chapter also discussed the similarities and differences between telecom service providers and communications-based OTTs.

This debate has been on-going for a significant period of time now. Therefore, the debate centres around two aspects. First, it is the presumptions regarding 'same service, same rules'.²⁶ TSPs have demanded that OTT messaging services be regulated, and the government levy a licence fee on OTT communication apps on par with telcos and that carriers should be compensated for all OTT data consumed on their networks.²⁷ TSPs argue that OTT communication services provide the same services as they do, without being subject to the same regulatory provisions including licensing, interconnection, rollout obligations, security, consumer protection, quality of service and other compliances.²⁸ They have also demanded that carriers be compensated for all OTT data

²⁵ Ibid.

²⁶ G. Aulakh, [Telcos seek level-playing field with web messaging services | Mint \(livemint.com\)](#) (November 2022)

²⁷ Ibid.

²⁸ [OTTs should compensate telcos for using infra: COAI - The Economic Times](#)

consumed on their networks.²⁹ TSPs claim that the over regulated telecom industry is subject to significant additional regulatory and other costs including licence fees, spectrum charges, telecom equipment and security apparatus. Arguing that they are not at an equal footing with OTT players, TSPs demand a “level playing field”.

The second is the issue draws from the above issue of levelling the playing field. TSPs demand that OTT services should contribute to developing digital telecom infrastructure in exchange for the use of these services.³⁰ This is proposed to be done through a revenue-sharing model, which has been met with significant opposition from the OTT providers.³¹ The market share and revenue of OTTs have also grown steadily, adding fuel to the concerns that OTT is a “substitute services” and thus a threat to traditional services.³² They propose a revenue-sharing model between themselves and OTT players.

The CP deals with these issues and examines them from a regulatory structure point of view. It is thus important to explore the effects that the proposal of regulating OTT players would have on the industry and the consumers.³³ These effects are discussed below.

(1) Regulatory burdens and overregulation:

There is significant penetration and wide usage of OTT communication services in India. India has the highest number of WhatsApp users, with 487.5 million users.³⁴ Another report puts India’s broadcasting OTT user base at 423.8 million.³⁵ The report suggests that there has been a 20% growth of this user base in 2022, of which a large share has come from rural areas and smaller towns.³⁶ With growing internet penetration, these services will continue to influence the consumers socially as well as economically. It is noteworthy that rural India, despite its internet connectivity hovering around 40%, is a significant contributor to OTT consumption, accounting for over 70% of video consumption.³⁷ Consequently, any regulation must cater to nurturing this vibrant sector, acknowledging its vast potential to benefit the public. Therefore, any adverse implication of proposed regulation needs thorough examination.

As the TRAI has noted in its CP, OTT services are already regulated under existing and evolving regulatory frameworks. There are important provisions related to intermediary liability, consumer

²⁹ “OTTs Eating Into Our Revenue”: Telcos in India

³⁰ ET Bureau, ‘OTTs should compensate telcos for using infra: COAI’, *Economic Times* (November 2022)

³¹ <https://economictimes.indiatimes.com/opinion/et-commentary/otts-vs-telcos-why-should-otts-pay/articleshow/102917049.cms?from=mdr>

³² LEVELLING THE PLAYING FIELD BETWEEN TRADITIONAL AND DIGITAL BUSINESSES

³³ OTT regulation should keep consumer interest in consideration: CUTS International; OTT vs TSPs: Who will foot the bill? Consumer welfare at stake in ongoing debate! says CUTS International

³⁴ WhatsApp Statistics 2023 — How Many People Use WhatsApp. (February, 2023)

³⁵ India Records Nearly 423 Mn OTT Users, 65% Male Paid Subscribers: Report

³⁶ Indian OTT users grew by 20% in 2022: Ormax report | Campaign India

³⁷ Don’t kill the golden goose | The Financial Express

protection, privacy and data protection³⁸ Some experts believe that additional regulation of OTTs through proposed means like licensing, would potentially stifle innovation and hinder economic growth,³⁹ and could also have implications for privacy and data protection of consumers.⁴⁰

It is noteworthy to examine that while there are demands of 'same services, same rules', based on the idea of substitutability of telecom and OTT services, they are not substitutes. They differ significantly at an operational and functional level. OTT services cannot be accessed without using telecom services, but this is not the same for telecom services. Also, they operate at different layers as TSPs can acquire the spectrum, build network infrastructure, and thus have control over the layer. Therefore, according to OTT service providers the licensing requirement and similarly regulating carriage and content, might result in over-regulation.⁴¹ It has been argued that this could have a chilling effect on investment and entrepreneurship on an emerging sector.⁴²

Moreover, OTT providers are already regulated under various legal instruments which ensure consumer safety, security, data protection. These include the Information Technology Act, 2000 (IT Act) and the rules and regulations issued thereunder. Moreover, the OTT services are regulated under the recently passed Digital Personal Data Protection Act, 2023. Further they are likely to be regulated under the upcoming Digital India Act. Further regulation will lead to increasing the cost of compliance and business uncertainty, which will have an indirect impact on consumers.

(2) Effectiveness of market price over regulated price

At the heart of the debate is the TSP demand for a 'network usage fee' (NUF) from OTT service providers. TSPs see it as a compensation for the bandwidth OTT services use on the operator's network. TSPs argue that this model is crucial for the development, maintenance, and upgrade of network infrastructure. They perceive a structural imbalance, asserting that OTT platforms extensively leverage TSP-funded networks without investing in their creation, operation, maintenance, or expansion.⁴³

The demand for a revenue sharing model seeks to get the edge companies i.e., those who produce and send content to end users over the Internet- to shoulder a larger share of the cost to build and maintain ISPs' broadband network infrastructure. Such a policy may lead to harm to the industry and the internet users.

³⁸ [Regulation of OTT Communications Services: Justified Concern or Exaggerated Fear? — Esya Centre \(January 31, 2023\)](#)

³⁹ [Letting go of a chance to democratise telecom services - The Hindu](#)

⁴⁰ [CUTS Submission to the Department of Telecommunications, Ministry of Communications, on the Draft Indian Telecommunication Bill, 2022](#)

⁴¹ A. Kulkarni, [In pursuit of modern governance and regulatory framework, Communications Today](#) (February 2023)

⁴² [IAMA slams COAI over revenue sharing demand that may dilute net neutrality | Business Standard News](#)

⁴³ [Consumers Are the Ones Who End Up Paying for Sending-Party-Pays Mandates | ITIF](#)

Globally, ‘sending-party-network-pays’ (SPNP) policies are under consideration in several regulatory jurisdictions. These policy shifts appear to be appealing, especially when domestic telecommunications companies stand to benefit financially from the dominant tech giants. However, such policies may have unintentional consequences on both the industry and consumers. However, most international regulators have not found merit in, proposed, or implemented SPNP policies. South Korea, which we discuss below in our response to TRAI’s questions, is an exception. However, there is little evidence of benefits of such policies for industry or consumers.

Data, contrary to popular perception, does not necessarily flow through a single network. Instead, it traverses multiple networks to reach its destination, a process known as ‘Mandated NUF would distort the widely preferred settlement-free peering model. Studies estimate that more than 99% of Internet peering agreements which are fixed, benefiting from economies of scale and are informal, and usually settlement-free.⁴⁴ Policies regulating the market price, such as SPNP, disrupt this process by dictating the price one party (the edge provider) must pay the other (the ISP).⁴⁵ Consequently, this mandated price fails to reflect the real network load and capacity, distorting market signals. The complexity is magnified when considering the roles of broadband providers and their business relationships with edge companies and end users. Notably, in neither model does an SPNP policy efficiently transfer money from edge companies to ISPs in a way that benefits consumers. The mandate charges essentially increase the edge company’s operational costs, leading to higher prices for end consumers and potentially causing some to forgo the service. As such, while the money is transferred from the edge company to the broadband provider in accounting terms, the real cost, whether that be increased monetary expenditures or reductions in content quality, is borne by both the edge company and its customers.⁴⁶

Therefore, it can be The SPNP models, which necessitates companies to pay set prices for delivering their services to customers, tends to skew prices within the intricate market for peering and transit services. This can distort efficient broadband markets and lead to inefficient management of internet traffic. Moreover, the infrastructure of broadband is not a zero-sum game because OTT companies not only use these resources but also contribute to their enhancement through investments in undersea capacity, data centres etc. They build delivery networks and cache content to enhance performance, making them more than mere consumers of bandwidth. Furthermore, users play a dual role: they are both creators and consumers of content, which adds to the inherent value of internet services. In light of the above, and the fact that market mechanisms to collaborate between OTT service providers and TSPs already exist and function effectively, additional regulations and mandatory frameworks will be a case of over-regulations, which should be avoided.

⁴⁴ <https://www.internetsociety.org/blog/2022/05/old-rules-in-new-regulations-why-sender-pays-is-a-direct-threat-to-the-internet/>

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.

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.

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:

The various implications from a consumer interest point of view which may arise through the regulatory framework for OTT communication services are as follows:

(1) Differential pricing for different set of consumers

One of the risks with the proposed cost-sharing framework between OTT players and telcos, is differential pricing for different sets of consumers. TSPs may discriminate between OTT services that pay them and those that do not and block or slow the content of OTT players which do not enter into cost-sharing arrangements with them.⁴⁷ This can impair consumer choice available to consumers for accessing services they desire.⁴⁸

(2) Increased cost to consumer

There is a substantial risk of increased cost to consumers if OTTs are required to share infrastructure cost, and should they wish to pass on the same, by imposing a usage fee on OTT services.⁴⁹ The consumers will face double whammy of paying the TSPs for access to broadband and to the OTT providers for access to content.

In a country like India, the impact of potential regulatory changes could be considerable due to the existing digital divide and the less-than-optimal quality of services. A study conducted post-

⁴⁷ M. Kalawatia, 'Why OTTs, telcos mustn't lock horns over infra cost-sharing (theprint.in)', *The Print* (August 2022)

⁴⁸ L. Kabelka, 'Infrastructure costs: fair contribution versus net neutrality – EURACTIV.com', *Euractiv* (May 2022)

⁴⁹ Mozilla, EU net neutrality letter – DRAFT (mofoprod.net), Mozilla (June 2022)

pandemic indicated that inadequate connectivity was a significant obstacle, with 80% of school-going children lacking access to education during school closures.⁵⁰ Considering that only 3.74% of the country's total internet subscribers are wired internet users, any additional increase in tariffs could substantially undermine India's digital potential.

(3) Possibility of lower quality of services and increased latency

South Korea began the introduction of the sending-party-network-pays (SPNP) regime in 2016. It then expanded it to large content providers in 2020.⁵¹ The consensus is that the arrangement has been a failure. Assessments by experts have concluded the SPNP rules have harmed users in South Korea and its telecom network.⁵² In the internet impact assessment done by the Internet Society⁵³, it was found that the existing “sender pays” rules created unnecessary costs and bottlenecks in South Korea’s digital ecosystem. The result was inefficient traffic flows, higher costs of data transmission, and a more hierarchical, less resilient network topology. All of this has impacted the internet users in South Korea with lower quality of services.⁵⁴

The policy has resulted in reduction in streaming quality of audiovisual content by OTT providers in order to preserve costs, as well as increase in subscription prices. Netflix has increased its price for its premium package by 17.2% and its standard plan by 12.5%.⁵⁵ The results also include exit of players from the market and increased data costs and latency. As per an OECD study the latency has gone from approximately 120 milliseconds in 2018 to 160 milliseconds in 2020.⁵⁶ More than a dozen civil society groups had appealed to the government of Korea to revoke the SPNP rule.⁵⁷

Since the fees effectively penalise high traffic volume, ISPs are disincentivized from positioning themselves downstream of popular content platforms, or they pass those added costs to the content providers.⁵⁸ At the same time, edge companies have reduced the quality of certain high-bandwidth traffic, such as 4K video, to minimise costs even as applications in other countries improve in quality.⁵⁹

⁵⁰ [Repeated school closures due to COVID-19 leading to learning loss and widening inequities in South Asia, UNICEF research shows](#)

⁵¹ [South Korea’s Internet Traffic Tax: An Example for Europe To Follow? \(Spoiler Alert: It Isn’t, Here’s Why\)](#)

⁵² [Sender Pays: What Lessons European Policy Makers Should Take From The Case of South Korea - Internet Society](#)

⁵³ [South Korea’s Interconnection Rules](#)

⁵⁴ <https://thediplomat.com/2022/08/south-koreas-sender-pays-policy-is-a-threat-to-the-internet/>

⁵⁵ [Afterword: Korea’s Challenge to the Standard Internet Interconnection Model - The Korean Way With Data: How the World’s Most Wired Country Is Forging a Third Way](#)

⁵⁶ [Broadband networks of the future | OECD Digital Economy Papers](#)

⁵⁷ [Civil society to South Korea: protect online freedom of speech - Access Now](#)

⁵⁸ [Consumers Are the Ones Who End Up Paying for Sending-Party-Pays Mandates | ITIF](#)

⁵⁹ [Afterword: Korea’s Challenge to the Standard Internet Interconnection Model - The Korean Way With Data: How the World’s Most Wired Country Is Forging a Third Way](#)

Another report summed up the effects of this regime of South Korea as “*Market observers report a decline in diversity of online content and expect rising prices for end users for content, as well as lower network infrastructure investments. Quality for end users is declining.*”⁶⁰ The price of internet data has also risen steeply. The price in Seoul is over eight times higher than they are in Paris and almost five times higher than in New York.⁶¹ While India has one of the lowest cost of data, Korea is amongst the highest in the world.⁶²

(4) Detrimental to smaller enterprises

There is a multitude of local and regional OTT content, which are provided by small and medium sized service providers. These have a significant presence, in terms of users, in certain regions of the country.⁶³ This will be counterproductive as the small OTT providers will be disadvantaged if the TSPs will receive a network fee proportional to the internet traffic generated by OTT players.⁶⁴ This is because TSPs will not have an incentive to make the network available to the small OTT service providers. It might also lead to TSPs restricting consumer access to such smaller OTT apps, and indirectly controlling the OTT app market, and increase in price of their services thus adversely impacting the consumers.⁶⁵ It can be argued that regulation may require and thus ensure that TSPs provide minimum guaranteed network to smaller OTT providers, but this will be difficult to monitor and the extra regulation will pose its own challenges.

Thus, such a mandatory revenue-sharing mechanism will force the OTT service providers to compete for better deals with TSPs, which would hinder smaller OTT providers and have an indirect impact on the consumers.⁶⁶ This could lead to denial or services for consumers, deterioration in quality of services, unavailability of customised/ local content, and challenges with grievance redress.

(5) Risks of internet fragmentation and net-neutrality

There are risks of internet fragmentation and threat to net-neutrality with a revenue sharing model. As discussed above if larger OTT providers will pay a higher NUF, in proportion to their revenue, and smaller OTT players will not be able to do the same, which might lead to a discrimination by the TSPs, it would be violative of principles of net neutrality. Moreover, some TSPs might even

⁶⁰ [Competitive conditions on transit and peering markets - Implications for European digital sovereignty](#)

⁶¹ [2021 Global Pricing Trends in 20 Minutes](#)

⁶² [What Does 1GB of Mobile Data Cost in Every Country?](#)

⁶³ [Finshots on Twitter: "Blume points out that regional OTT platform Stage \(catering to Haryana & Regional OTT startup Stage raises Rs 40 crore in funding round led by Blume Ventures - The Economic Times](#)

⁶⁴ <https://economictimes.indiatimes.com/opinion/et-commentary/otts-vs-telcos-why-should-otts-pay/articleshow/102917049.cms?from=mdr>

⁶⁵ Ibid.

⁶⁶ [TRAI's OTT regulation agenda is confusing. It forgets consumers, serves telco interests](#)

have their own OTT services, which would get exempted from NUF requirements, which would be against the principles of net neutrality, and might also lead to Competition law issues.

Thus, these demands for a mandatory cost-sharing framework may lead to distortion of competition putting smaller and medium-sized OTTs at a disadvantage, thus endangering the principles of net neutrality⁶⁷, and consequently adversely impact low- and medium-income consumers who might not be in a position to pay charges imposed by large OTTs. The possibility of adverse impact on employment of persons directly or indirectly engaged with the OTT industry also exists.

Moreover, the principles of open internet which ensure a global playing field might get lost due to fragmentation, where certain content will be available on certain TSPs, resulting in parallel unconnected internets or 'splinternet'.⁶⁸ In such a scenario cross border service providers may need to negotiate the term of accessibility by navigating complex regulations, in each network.⁶⁹

(6) Might lead to less innovation, as well as decrease in quality and diversity of content and applications

In the scenario that OTT service providers will be required to pay NUF to compensate the TSPs, they might reduce their investment in research & development, quality of content and improving existing infrastructure. This will adversely impact the consumers as they had access to a wide variety of content and services, and innovations specifically targeted towards a better experience for the consumers.

(7) Regulatory uncertainty and effect on the market (example of policy failure in South Korea)

The SPNP model implemented in South Korea has also resulted in legal disputes. After a surge in traffic due to popular Netflix television shows such as *Squid Game* in 2021, South Korean ISP SK Broadband sued Netflix to pay a network usage fee for the increased traffic volume, and Netflix appealed.⁷⁰ Significant time and resources have been spent in such disputes, and this regulatory uncertainty has made South Korea less appealing to international investments.

Similarly, Korean ISP Korea Telecom initially hosted Facebook's domestic cache server to provide cheaper and faster access to the content inside. With the introduction of the SPNP regime,

⁶⁷ Regulation of OTT Communications Services: Justified Concern or Exaggerated Fear? — Esya Centre (January 31, 2023)

⁶⁸ A. Hetler, 'The splinternet explained: Everything you need to know (techtarget.com)', Tech Target (June 2022)

⁶⁹ Regulation of OTT Communications Services: Justified Concern or Exaggerated Fear? — Esya Centre (January 31, 2023)

⁷⁰ [S.Korea broadband firm sues Netflix after traffic surge from 'Squid Game' | Reuters](#)

Korea Telecom had been inundated with fees from the traffic sent from its server to other ISPs' customers. In response, Korea Telecom tried to push that added cost to Facebook, which instead disabled the cache server altogether, forcing customers' data to be transmitted through the original, longer route.⁷¹

There are some examples of disputes due to the SPNP-type arrangement in Europe as well. In 2013 there was a dispute over fees between French telecom providers and Google backbone partner Cogent that broadly decreased quality for consumers attempting to use YouTube.⁷² Similar proposals if enacted, will likely impact users in India in much the same way as in South Korea. This explains why such proposals have been rejected by European regulators in the past. Therefore, the unsuccessful experience and policy failure of South Korea is a befitting real-world example of an SPNP policy that has resulted in wasting resources without benefits to consumers.⁷³

(8) Broad Recommendation:

The concerns of TSPs regarding the telecom industry are not entirely misplaced. But the way to address concerns of TSPs could be to reduce the compliance burden and unnecessary regulation on them, which could further enable innovation and sustainability. In large parts due to the progressive regulation, the country's impressive OTT market growth, has been a primary catalyst for investment and sector development, significantly bolstering the Indian economy. Hence, the introduction of heavy-handed regulations could potentially dampen innovation and creativity in the OTT industry, and consumer interests should guard against such impositions. An over-regulated OTT landscape could limit the accessibility of global OTT apps for Indian consumers and impede the growth of Indian businesses that rely on the worldwide reach of these apps. Instead, the focus should be on reducing existing regulations such as licence fees, spectrum usage charges, and other levies and taxes borne by the telecom industry.

The ultimate goal should be to maintain an open, fair, and accessible internet that nurtures innovation and creativity. This perspective will prove beneficial for Indian consumers, the industry, and the country's economy in the long term. A thoughtful regulatory approach is all the more crucial considering the current digital climate, where even a slight increase in tariffs could significantly undermine India's digital potential.

Chapter III: Examination of the Issues Related to Selective Banning of OTT Services

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

⁷¹ <http://www.opennetkorea.org/en/wp/3122?ckattempt=1>

⁷² [France Telecom Accused Of Holding YouTube Videos Hostage Unless It Gets More Money | Techdirt](#)

⁷³ [South Korea "Sender Pays" Is a Warning, Not a Model, or Why \(Almost\) Everyone Keeps Telling the EU This Is a VERY Bad Idea](#)

Public Safety) Rules, 2017 or any other law, in force? Please provide a detailed response with justification.

Response:

The proposed framework for selective banning of OTT applications and services will be a case of overregulation, and will have unintended consequences of quelling innovation. The OTT service providers are already regulated under the provision of IT Act 2000 and the rules and regulations issued thereunder, which is likely to be soon replaced by the Digital India Act (DIA). Such a consultation on selective banning should form a part of the consultations over the DIA. Moreover, the technicality of how the same can be undertaken remains unclear as well.

Herein, if such selective banning is implemented, it will be important to ensure that there are procedural safeguards, so that principles of natural justice are not violated and due process is followed. Moreover, the proportionality principles laid down by the Supreme Court⁷⁴, should not be violated when banning certain OTT services. Some OTT services are crucial to the daily lives of consumers and small businesses. If the ban is not proportionate, they will be adversely impacted. Moreover, if the process, including the appropriate authority to monitor such selective banning is not clearly laid down, it will result in regulatory uncertainty and further overregulation.

In addition to the requirement of a due process and clearly laid out mechanism for such bans the rationale behind the decision will also be crucial. How the OTT apps are selected, the reason behind such selection and under what scenario will the ban be implemented, are all information which should be made available to the public. This should be done by way of a written public order, which should clearly lay down the rationale of the decision.

Consumer Unity & Trust Society (CUTS) expresses gratitude to Telecom Regulatory Authority of India (TRAI) for inviting comments and suggestions on the Consultation Paper on '*Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services*'. CUTS looks forward to TRAI accepting the above suggestions and assisting in its efforts to empower consumers and lead to effective and optimum regulation. We would be glad to make an in-person presentation of our submission before TRAI.

For any clarifications/further details, please feel free to contact: Amol Kulkarni (amk@cuts.org), Shiksha Srivastava (sva@cuts.org).

⁷⁴ https://main.sci.gov.in/supremecourt/2019/28817/28817_2019_2_1501_19350_Judgement_10-Jan-2020.pdf