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**To:** "Akhilesh Kumar Trivedi" <[advmn@traigov.in](mailto:advmn@traigov.in)>

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**Subject:** IAMAI Counter Comments on TRAI Consultation Paper "Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services"

To,

**Shri Akhilesh Kumar Trivedi**

**Advisor (Network, Spectrum & Licensing)**

**Telecom Regulatory Authority of India**

**Subject: IAMAI Counter Comments on TRAI Consultation Paper "Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services"**

**Dear Shri Akhilesh Kumar Trivedi,**

The Internet and Mobile Association of India (IAMAI) is a not-for-profit industry body and we play a key role in ensuring the growth and sustainability of the digital industry.

We would like to thank you for giving us the opportunity to submit comments on TRAI's consultation paper "Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services". We have now taken feedback from several segments of our membership and formulated counter comments in response to some of the points raised in representations made by certain other organisations to TRAI on the Consultation Paper. Please find attached IAMAI's counter comments.

As always, we extend all cooperation from our end to support informed policymaking.

Warm regards,

Chitrita

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## **IAMAI Counter Comments | TRAI CP on “Regulatory Mechanism for OTT Communication Services, and Selective Banning of OTT Services”**

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Established in 2004, the Internet and Mobile Association of India (IAMAI) is a not-for-profit industry body representing the digital services industry with over 550 Indian and multinational corporations as its members, which include established companies in diverse sectors of the digital ecosystem as well as start-ups. We firmly believe that India’s digital industry is going to be a major driving force in the economic and social development of the country which includes job creation, innovation, contribution to the GDP, inclusion and empowerment of our citizens, etc.

IAMAI, on behalf of its members, would like to put forth counter comments in response to some of the points raised in representations made by certain other organisations to the Telecom Regulatory Authority of India (TRAI) on its consultation paper “Regulatory Mechanism for OTT Communication Services, and Selective Banning of OTT Services”. However, before we begin, we note that our members Airtel and Reliance Jio Infocomm Ltd do not agree with the views being submitted and have divergent views from the ones presented below.

### **IAMAI Counter Comments**

In their respective submissions to TRAI, certain organisations have fallaciously claimed that OTT service providers in India are not regulated, and have advocated for a licensing/regulatory regime for OTT services akin to that for licensed telecom service providers (TSPs). However, the primary ask of such organisations appears to be the introduction of a revenue sharing arrangements between OTT service providers and TSPs, effectively forcing OTT service providers to pay TSPs for using their network.

For instance, in its submission to TRAI, the Cellular Operators Association of India (COAI) has called for OTT service providers to pay a “fair share charge” to TSPs, claiming that “...to ensure fairness and compensate for the increased data demands, it is justifiable for OTTs to pay a fair and reasonable fair share charge to TSPs.”<sup>1</sup>

The COAI further goes on to classify certain companies as “largest traffic originators” (LTOs), calling for regulatory intervention to “...ensure that these LTOs contribute towards the costs of network creation and upgradation in proportion to the internet traffic generated by them – in the form of a ‘fair share charge’.”

In a similar vein, the Indian Council for Research on International Economic Relations (ICRIER) has worryingly called for “...a Broadband Infrastructure Levy to be applied at 3% of India operations to VNOs, significant OTT communication service providers and significant OTT video service providers to contribute to the Broadband Infrastructure Fund. The applicable revenue should be net of revenue earned on the basis of specialized contracts between service providers and the network operator.”<sup>2</sup>

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<sup>1</sup> [https://www.trai.gov.in/sites/default/files/COAI\\_04092023.pdf](https://www.trai.gov.in/sites/default/files/COAI_04092023.pdf)

<sup>2</sup> [https://www.trai.gov.in/sites/default/files/Indian\\_Council\\_Research\\_International\\_Economic\\_04092023.pdf](https://www.trai.gov.in/sites/default/files/Indian_Council_Research_International_Economic_04092023.pdf)

## 1. OTT Services are inherently different from TSPs

Certain organisations have advocated for regulatory equality among OTT service providers and licensed TSPs by way of implementation of a framework based on a claim of ‘same service same rules’. As we have highlighted in our comments to TRAI, there cannot be drawn a parity between digital service providers and TSPs.

TSPs operate on the underlying network infrastructure that essentially enables the functioning of the internet, while OTT service providers operate on the application layer which functions on top of the network layer. Therefore, there is a clear distinction in the operational and technical and nature of OTT service providers and TSPs. Notably, TRAI has previously recognised this distinction in its ‘Recommendations on Regulatory Framework for Internet Telephony’ (2017) with respect to internet telephony services.<sup>3</sup>

Keeping in mind that OTT service providers and TSPs are fundamentally different, ‘same service, same rules’ cannot apply here.

## 2. OTT Services are comprehensively regulated in India

The COAI has argued that “...in the Telecom, the OTTs have no regulatory oversight, whatsoever. The OTT Communication Service providers have neither fulfilled any of the Monetary Obligations that TSPs have paid nor complied with any of the regulatory/license conditions...”

Such statements conveniently disregard that TSPs are spectrum controlling entities, with spectrum being a valuable natural resource. The licensing regime for TSPs is therefore crucial to ensure that this valuable public resource is distributed and used efficiently and in an appropriate manner. On the other hand, digital service providers, such as OTT service providers, do not have any control over critical national resources such as spectrum as they merely provide their services on the application layer.

Moreover, robust regulatory frameworks for digital service providers already exist in India. Notably, such services are already regulated under the Information Technology Act, 2000 (IT Act) and the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 (IT Rules) and the Digital Personal Data Protection Act, 2023 (DPDP Act). They are also variously required to comply with the Consumer Protection Act and Rules for consumer welfare, and the Competition Act for economic regulation. Under the IT Rules, digital service providers / OTT service providers are subject to dedicated compliance and reporting requirements. Therefore, the introduction of a telecom regulatory regime for OTT services would undoubtedly qualify as an act of over-regulation.

## 3. Arbitrary fragmentation of OTT Services

The COAI proposes classifying OTT services into “Direct- OTT Communication Services” and “Incidental- OTT Communication Services”, based on their “core” / “main” / “principal” offering / business and “incidental or ancillary” functions.

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<sup>3</sup> TRAI Recommendations on Regulatory Framework for Internet Telephony dated October 24, 2017, stated: “The separation of network and service layers of telecom service offerings is the natural progression of the technological changes in this domain. It is now possible to separate provision of service contents, configuration and modification of service attributes regardless of the network catering to such service.”

However, OTT services can hardly be compartmentalised into such clear-cut categories. Moreover, creating such artificial distinctions between the ambit of services within applications would fragment the internet and create regulatory arbitrage. Given the fact that the same platform/application can provide multiple services, disaggregating relevant services for the purpose of regulation and otherwise, is not desirable. Such attempts at fragmenting OTT services into sub-categories will also invariably bring rigidity and curtail innovation which will ultimately harm consumer welfare.

It is pertinent to note that such arbitrary classifications do not appreciate the nuances, interplay and overlap between various functionalities of digital services. An example of such arbitrary classifications (for the ostensible purpose of rent-seeking by TSPs) can be found in COAI's submission itself, which effectively calls for certain OTT applications providing financial services to be regulated akin to licensed telecom services. Such ill-conceived demands threaten to throttle India's flourishing digital economy by overregulating and effectively exacting tribute from OTT services. Consequently, we believe that delving into sub-categories of OTT services is not required

#### **4. Data traffic (“strain” on telecom companies) is dependent on data sold to consumers by them**

COAI has contended that “...the impact of OTT on telecom companies is a double-edged sword, causing erosion of traditional revenue sources while necessitating higher capital investments to accommodate surging data traffic.”. Similarly, ICRIER claims that “...internet traffic going up exponentially especially in the pandemic years, has led to unprecedented strain on the telcos who have expended huge resources to maintain their networks driven mainly by traffic from a few leading OTT players.”

It is important to note that “surging data traffic” is merely data consumed by consumers that they have purchased from TSPs. Therefore, in any scenario the amount of data traffic on a TSP network is directly dependent on the amount of data sold by telecom companies to consumers. Thus, the “strain” on infrastructure of TSPs occurs when they sell data to consumers beyond their infrastructural capacity – a fact that has been conveniently ignored.

It is also relevant in this context to note that the telecom sector has been under strain due to high taxes and levies, high spectrum charges, market structure and overregulation. However, recent tariff revisions and resultant rising average revenue per user (ARPU) of TSPs have hidden some of these issues and challenges from view. Revenue from data, which is primarily driven by OTT services, has been the biggest contributor to revenue – as highlighted by TRAI itself in the Consultation Paper, the contribution of data usage in the revenue for telecom companies from mobile subscribers has grown to more than 10 times from 8.10% in the quarter ending (QE) June 2013 to 85.1% in the QE December 2022. Instead of flagging the aforementioned issues that exist within the telecommunications sector, certain organisations are demanding a share of the revenue of India's many OTT services. Such ill-conceived and misguided demands threaten to dismantle India's flourishing digital economy.

#### **5. Revenue sharing arrangements will lead to double payment**

Repeated demands for revenue sharing arrangements between TSPs and OTT applications largely stem from the fallacious notion that OTTs supposedly ‘free-ride’ and make use of the services offered by the TSPs, while TSPs have to pay infrastructure and license costs. Both COAI and ICRIER in their respective submission to the TRAI have claimed that OTT service providers ‘free-ride’ atop the network layer. Such propositions seem to ignore that the demand for telecom services is almost entirely dependent on the ability of OTT services to attract users, as users of OTT platforms separately pay TSPs

to use their network. Moreover, OTTs have their own associated costs such as costs associated with content delivery networks and other forms of infrastructure. It is important to note that such revenue-sharing demands are often articulated through an arrangement where the sending party network pays (SPNP) the network operator. The SPNP system for internet interconnection towards the cost of infrastructure development, would essentially mean charging twice for the same service as consumers already pay TSPs for the data they consume. Moreover, levying additional cost on OTTs, without providing any additional services, would be akin to exacting tribute.

Over-the-top service providers have provided high quality content for little to no cost to users. This in turn has spurred the rapid growth of data consumption and economic activity in India. An SPNP mechanism would effectively reverse this phenomenon by disincentivising growth for OTT based businesses, for whom a volume-based revenue sharing mechanism would be a glass ceiling for continuing growth and may even act as a barrier to entry for startups.

Given that India's internet success has been hugely dependent on affordable access to digital services, instilling a SPNP mechanism would effectively raise costs for users. A higher cost associated with internet usage would lower overall revenues of internet businesses and may even reduce the amount of data consumers would use. This would result in a scenario where there may be no meaningful growth in the revenue of TSP, despite the massive price paid by the digital economy.

## 6. Violation of Net Neutrality

COAI has called for OTT service providers to pay a “fair share charge” to TSPs, claiming that “...to ensure fairness and compensate for the increased data demands, it is justifiable for OTTs to pay a fair and reasonable fair share charge to TSPs.” COAI further goes on to classify certain companies as “largest traffic originators” (LTOs), calling for regulatory intervention to “...ensure that these LTOs contribute towards the costs of network creation and upgradation in proportion to the internet traffic generated by them – in the form of a ‘fair share charge’.” In a similar vein, ICRIER has proposed that “...a Broadband Infrastructure Levy to be applied at 3% of India operations to VNOs, significant OTT communication service providers and significant OTT video service providers to contribute to the Broadband Infrastructure Fund. The applicable revenue should be net of revenue earned on the basis of specialized contracts between service providers and the network operator.”

By requiring “largest” or “significant” OTT service providers to pay TSPs for data used by consumers of such OTT services, TSPs would effectively be treating traffic passing on its network differently depending on its sender. Not only would this mean that TSPs would charge twice for the same service – as they already charge consumers for data – it would also be in gross violation of the net neutrality framework notified by the Ministry of Communications in 2018, which states “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.” Violation of the net neutrality principles will have far reaching consequences on stifling innovation and competition, thereby affecting consumer choice.