From: rkrishnamurthy@usinfoundation.org
To: "Akhilesh Kumar Trivedi" <advmn@trai.gov.in>
Sent: Friday, September 29, 2023 8:13:05 PM
Subject: Counter Comments: Regulatory Mechanism for Over-The-Top (OTT) Communication
Services, and Selective Banning of OTT Services.

Dear Sir,

Greetings on behalf of the U.S.-India Strategic Partnership Forum (USISPF).

Thank you for the opportunity to provide feedback on the TRAI Consultation paper on
Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of
OTT Services.

We are grateful for the extension granted to submit counter comments. Please see attached
our counter comments for your consideration.

Thank You.

Regards

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

USISPF welcomes the opportunity to submit counter comments on the '***Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services'.*** We would like to reiterate the following to address certain issues raised by stakeholders in their comments to this Consultation Paper:

Definition and Classification of Over-The-Top (OTT) Services

Certain stakeholders have defined OTT communication services using substitutability with traditional TSP services as the primary criterion. They argue that the OTTs and TSPs have the same "core functionality". In this regard, please see the following clarifications below.

- The term "OTT" refers to a wide range of services that are provided over the internet, including online buying and selling, instant messaging, streaming, social networking, digital news, search services, navigation services, ride hailing services, delivery and logistics services. As clarified by the Body of European Regulators for Electronic Communications (BEREC) in a January 2016 report, "OTT" does not refer to a particular type of service, but to a method of provision. We believe that one definition of "OTT" will not be able to encompass diverse functions and evolving technology.

- OTT services may have multiple functions that are inextricably interlinked. One application may require several features to work in tandem to provide a particular service. For example, a ride-hailing OTT application connects drivers to passengers, enables communication between drivers and passengers, plans routes, enable payments etc. Any attempt to delineate any of these features for the purpose of creating sub-categories of OTT services would be artificial and could lead to market fragmentation. Therefore, we believe it would be impractical and unnecessary to create classifications of OTT services. A static definition and artificial classification will fail to account for the evolution of technology and create barriers to entry into the OTT ecosystem.

- OTT services are not direct technical or functional substitutes for traditional telecom services provided by TSPs. the OTT ecosystem operates at the application layer above the telecommunications infrastructure and network layers of the interconnected telecommunications systems. The key points of difference are as follows:

  - At an operational level, OTT services cannot be used without relying on services provided by TSPs. Historically, internet applications, including OTT services, have driven data consumption and subsequently contributed to telecom network revenues. The International Telecommunication Union **(ITU)** released a study in 2020 entitled "Economic Impact of OTTs on national telecommunications/ICT markets."[2] This study highlights the symbiotic relationship between OTT and telecommunications operators, stating "the exponential increase in data traffic and use of OTTs results both in new subscribers for broadband services and existing subscribers upgrading their subscriptions for greater speed and bandwidth." As highlighted in this Consultation Paper, data released by TRAI also indicates that OTT services are driving data consumption, which accounted for 85.1% of TSP revenues as of December 2022. Accordingly, OTTs are complementary rather than substitutive of TSPs and depend on network services provided by TSPs. Operation on different layers involves the use of different technologies and resources to deliver services that cannot be regulated at par.

  - Given that OTTs complement TSPs, the argument that OTTs "free ride" over TSPs is unfounded. As highlighted above, OTTs drive data consumption, which is beneficial for TSPs. While TSPs provide internet connectivity, the bandwidth-intensive and high-quality content and application services provided by OTT platforms leads to increased usage of data services

by end-users, thereby contributing to higher revenue for TSPs. Moreover, OTTs have made complementary investments in terms of developing network infrastructure (to improve connectivity) across the world, including in India. For instance, OTTs have made significant investments in the form of CDNs (content delivery networks), cloud infrastructure, data centers, servers, and underground submarine cables.[1] These investments have reduced the cost of data delivery and improved the quality of service by reducing the distance between the data and the user.[2] Therefore, given the complementary nature of services provided by OTTs, they should not be required to pay any contribution to TSPs directly. Imposing such fees would create undue entry barriers to this market and go against the principles of net neutrality. Moreover, introduction of any such fees will adversely impact consumers by driving up consumers costs and reducing the choices and quality of services offered to consumers in India.

o TSPs and OTTs do not operate in the same market. OTTs are dependent on internet access to provide its services and therefore cannot be said to operate in the same market. TSPs provide the enabling infrastructure for OTT services. Additionally, there is no substitutability from a consumer perspective as well as the services provided by OTTs are used in addition to and not in place of traditional TSP services. Consumers may choose to use both services or only use TSP services. However, they cannot use OTT services, without purchasing the services of TSPs. This has led to a symbiotic rather than competitive relationship between the two, with consumer demand for OTTs corresponding to an increased demand for TSP services, particularly internet connectivity.

o The difference in infrastructure and delivery methods is another point of difference between OTT services and TSP services. The proposed definition of "OTT communication service" fails to recognize that certain services, including cloud-based communication services or services such as SaaS (software-as-a-service), B2B and enterprise communication services have specialized features that distinguish them from traditional telecom services. Such services are not operational or functional substitutes of traditional telecommunication services and do not always rely on the underlying telecom infrastructure to deliver their services. For instance, they may invest in their own infrastructure, including data centres, to effectuate delivery of their services.

o At a technical level, a key point of difference is that TSPs control and enjoy the rights to use and monetize critical resources on which the application layer is dependent. Telecommunications network operators have the right to acquire spectrum, obtain numbering resources, interconnect with the Public Switched Telephone Network **(PSTN)** and use the public right of way to set up telecom infrastructure. In contrast, OTT service providers depend on the manner in which TSPs choose to deploy their infrastructure and provide internet access. TSPs are subjected to a licensing regime to ensure efficient allocation of a scare public resource.

o In terms of offerings, OTT service providers offer a broader range of services to users, which are not provided as part of traditional telecommunication services. For instance, features such as group chat, in-app content sharing (photos, stickers and GIFs), document sharing, geo-tagging of images, online payments interface, etc. are not part of traditional telecommunication services. Therefore, certain OTT services should not be considered "OTT communication

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[1] Regulation of OTT Communications Services: Justified Concern or Exaggerated Fear?, Esya Center (Jan 2023) available on: https://static1.squarespace.com/static/5bcef7b429f2cc38df3862f5/t/63d8b49179bdf80b02924cc6/1675146395190/Esya_Centre_Report_Communications_OTT_Services.pdf, Page 26-27.

[2] Regulation of OTT Communications Services: Justified Concern or Exaggerated Fear?, Esya Center (Jan 2023) available on: https://static1.squarespace.com/static/5bcef7b429f2cc38df3862f5/t/63d8b49179bdf80b02924cc6/1675146395190/Esya_Centre_Report_Communications_OTT_Services.pdf, Page 26-27.

services" or substitutable with services provided by TSPs simply because their features include voice and video calling and messaging.

Regulatory framework for OTTs

Stakeholders have argued for the imposition of 'Same Service Same Rules' on OTTs and TSPs. However, we believe that imposing onerous regulatory compliances (typically intended for traditional telecom services) on OTTs will not only adversely impact the ease of doing business in India, but also compel OTT service providers to reconsider their investments in technology innovation and pass on financial burdens to users.

We believe there is no need for an additional licensing/regulatory framework for OTTs. OTTs and TSPs should not be regulated similarly for the following reasons:

- OTT services that run on the application layer do not distribute natural resources or exercise control over the underlying spectrum. The services are offered over the internet and heavily depend on the data provided by TSPs. Accordingly, OTT services should not be regulated under the same regime as licensed telecommunication services. The imposition of similar regulatory frameworks, agnostic to these differences, is likely to cause regulatory imbalances and onerous compliances that will have a serious impact on innovation and growth of the OTT sector.

- OTTs are not exempt from regulations. OTT services are already regulated under existing regulatory frameworks, including the: Information Technology Act, 2000 (IT Act) and the rules thereunder. These include the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (SPDI Rules), Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009 (Interception Rules), the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 (Blocking Rules), the Information Technology (the Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013 (CERT-In Rules), the CERT-In Directions of April 20223 (CERT-In Directions), and the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (IT Rules, 2021). The Consumer Protection Act, 2019, Competition Act, 2002, Companies Act, 2013 etc. also provide sufficient regulation and checks and balances to ensure that the OTT services industry is adequately regulated. Further, OTT service providers will also be regulated under the new Digital Personal Data Protection Act, 2023 (DPDP Act) and are likely to be regulated under the upcoming Digital India Act (DIA), which is set to replace the existing IT Act.

- There is no need for economic regulation of OTT services as the sector is highly competitive. Creating additional regulations for OTT platforms would be contrary to user interests. Any additional compliance costs arising from increased regulation will end up being passed down to the consumers in terms of higher prices. This will severely affect users' ability to access content and communicate over the internet using low cost/free services.

- The open nature of the internet has been key to the growth of OTTs. Overregulation would stifle innovation and increase market entry barriers, hampering the growth of the sector. The app based economy has significantly contributed to India's digital transformation and will play a critical role in meeting the Government's goal of transforming India into a USD 1 trillion digital economy. Therefore, overregulation should be avoided to ensure continued innovation and to support the growth of India's digital economy and start-up ecosystem.

- The objective of regulation must be to address a market failure, address consumer harm, or at the least to benefit consumers. However, there has been no evidence of the same provided by stakeholders in their call for regulatory parity. Accordingly, if OTT services are regulated, it will likely: (i) result in unintended regulation of a wide range of unrelated digital services that have no relation to telecom services; (ii) negatively impact the availability of such services due to the higher compliance burden and entry barriers created through regulation; (iii) impede innovation without enhancing consumer

protection; and (iv) hamper the development of India's burgeoning start-up ecosystem; and (v) disincentivise foreign investment in India.

USOF Levy

The USOF fund was created to reduce the digital divide and increase access to telecommunication services across India. To ensure the development of networks in places where TSPs do not operate, the USOF levy was imposed on TSPs. Based on the comments submitted to this Consultation Paper, we understand that certain stakeholders have argued that OTTs should also be made to mandatorily contribute to the USOF fund.

While OTTs support the overarching objective of enhancing digital connectivity, OTTs play no role in deciding where telecom networks are deployed. To impose the same burden on entities that do not determine where networks are to be deployed or how resources are to be utilized, purely because they use the internet to provide services, is misplaced. Moreover, OTT providers already invest in improving India's digital infrastructure and increasing internet connectivity in rural and remote areas. For instance, Google's Project Taara has devised a way to relay internet signals to remote terrains.[3]

Selective Banning

The Consultation Paper contemplates selective banning of OTT services or platforms to ensure national security and public order. While these are key priorities, it is important to recognise the adverse impact of selective banning on consumers who have grown to increasingly rely on OTT services. OTT platforms are used for a range of purposes including communication, education, job creation, business, social interaction etc. The growth of the OTT sector has provided opportunities for entrepreneurship, levelled the playing field for businesses, and democratized access to information. The Supreme Court of India has also recognized that the right to freedom of speech and the right to carry on trade and business using the medium of the internet as constitutionally protected rights under Article 19 of the Indian Constitution. Therefore, selective banning should only be undertaken in exceptional circumstances in accordance with existing laws. Any selective banning undertaken by the government should be transparent, proportionate and accountable, and adequate procedural and judicial safeguards should be in place.

Certain stakeholders have argued that selective banning is best done at the application level rather than the network level. However, app-level banning presents certain technical challenges, including:

- Implementing blocking measures at the OTT level would require OTTs to gather location-based data from users, which can lead to privacy concerns. Further, the selective banning of apps by OTTs is a technically complex matter that cannot be done instantaneously and would require large-scale changes to their architecture. Further, as this selective banning may be required from virtually any OTT that allows communication and information to be publicized, the scale and impact of such requirements would be enormous, leading to compliance costs that are likely to be unviable for OTTs, particularly start-ups.

- OTTs use dynamic IP addresses for a variety of reasons including security and cost efficiency. As OTT services increasingly move to cloud platforms, they will be unable to provide static IP addresses to implement selective banning. The disclosure of the IP addresses would raise concerns for breach of privacy and other cyber security concerns that can make the entire ecosystem more vulnerable. Additionally, as multiple OTT services are hosted on the same cloud services and use the same IP address, a selective banning based on the IP address may impact other OTT services that are not intended to be blocked.

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[3] Google want India's remotest areas get multi-gigabit internet with project Taara, August 202, available on: https://tech.hindustantimes.com/tech/news/google-wants-india-s-remotest-areas-to-get-multi-gigabit-internet-with-project-taara-71608036759315.html

- Stakeholders have suggested selective blocking of certain classes of OTT services based on factors such as the nature and number of subscribers, provision of inter-personal communication at scale, etc. However, any such regulation would be discriminatory considering the overlapping nature of services provided by OTTs. Additionally, any attempt at selectively banning only a specific class of OTT services would require the Government to dynamically determine the classification of a service based on its 'core' features before passing the blocking order. As noted above, this is not a feasible exercise.

- OTT platforms already take down content that violates their community guidelines. Moreover, the IT Act and corresponding rules already include provisions for take down of harmful content. In the absence of any clear and objective grounds for selective banning, there is a high likelihood of arbitrariness where two similar apps may be treated differently.