



January 07, 2019

To

1. **Mr RS Sharma**
Chairperson
2. **Mr Asit Kadayan**
Advisor (QoS)

Telecom Regulatory Authority of India (TRAI)
New Delhi – 110002

Subject: Response to Request for Comments on TRAI's Consultation Paper (CP) on Regulatory Framework for Over-the-Top (OTT) Communication Services dated November 12, 2018

Dear Sir,

Koan Advisory Group is a New Delhi based policy advisory firm. Our team combines thorough domain knowledge across multiple technology-oriented sectors with continuous engagement of decision makers in industry and government. We specialise in policy and regulatory analysis in both traditional and emergent technology markets, with the aim of identifying optimal frameworks that maximise societal welfare.

In this context, we are delighted to be afforded the opportunity to respond to the telecom regulator's consultation paper evaluating frameworks for India's nascent web application ecosystem. Our response keeps in mind overarching policy targets of a USD 1 trillion digital economy by FY21 as articulated by central ministries like the Ministry of Electronics and Information Technology (MeitY). It is also important to consider certain key statistics mapping India's adoption of information and communication technologies (ICT) namely, an internet user base of more than 500 million; around 390 million smartphone users; and more than 750 million unique wireless users. These adoption metrics present a very clear economic opportunity which require deft policy formulation enabling growth and investment without stifling innovation.

Indeed, the incumbent government has inculcated policy reforms aimed at increasing regulatory stability to improve India's performance in global rankings such as the World Bank's Doing Business Index. A key element which helps with perception and performance in such indices is the institution of robust regulatory regimes. According to our research analysing leading countries in the Doing Business Index, jurisdictions with efficient and qualitatively robust regulatory processes also tend to perform well in other leading indicators such as the Global Competitiveness Index.

Here it is expedient for TRAI to keep in mind that good market regulations/regulatory interventions aim to **prevent market failure, foster competition in the market, and promote consumer interest**. In 2006, India's Planning Commission released a wide-ranging consultation paper exploring issues and the way forward for India's overall approach to regulation. It proposed a broad policy approach to guide future regulatory reform wherein regulations are seen as a state mechanism which address social risk, market failure or equity concerns by providing rules that direct social and individual action. **The Planning Commission's findings highlighted that an uneven approach to regulations has often led to unnecessary, inadequate, and expensive reform**. Conversely, good regulatory practices tend to be principle based, with the understanding that any intervention must further the overall policy objective of the concerned sector/market place. As a key regulatory institution, overseeing critical industries of telecommunication and broadcasting in India, it is important for TRAI to harmonise its regulatory objectives/strategies with the country's overarching policy/economic



aspirations, as well as related sectoral policies and directions. Upon evaluation of the present Consultation Paper, the lens adopted by the TRAI and its linkage with wider policy objectives/programmes (like Digital India) appears tenuous.

The exploratory nature and limited context accompanying some of the questions in the Consultation Paper especially those pertaining to interoperability, result in a degree of regulatory instability which is undesirable from a predictability perspective. In this context, we propose TRAI embrace the adoption of **Regulatory Impact Assessments (RIA)** frameworks to evaluate the potential implications of regulatory interventions in light of their social and economic impact. Periodic RIAs to check regulatory inefficiencies are instrumental in reducing losses to the industry. Exemplarily, many international authorities recognise the cost accompanying any regulatory intervention and establish adequate safeguards against measures being excessively burdensome on both businesses and consumers. A key component of this cost-based analysis is the focus on RIAs which go beyond financial audits and involve a holistic evaluation of the impact of the regulatory intervention on their individual spheres and on the economy overall.

Apart from our broad inputs which we hope will inform future TRAI endeavours concerning India's ICT and web application ecosystem, the following sections seek to provide specific responses to inform TRAI and stakeholders of key concepts for future discussions concerning OTT services and applications.

Specific Feedback – Interventions to Solve for “Same Service Same Rules” Misconception

First, with regard to **substitutability**, it is important to consider the first two questions posed by TRAI which read as follows:

- *Which service(s) when provided by the OTT service provider(s) should be regarded as the same or similar to service(s) being provided by the TSPs. Please list all such OTT services with descriptions comparing it with services being provided by TSPs.*
- *Should substitutability be treated as the primary criterion for comparison of regulatory or licensing norms applicable to TSPs and OTT service providers? Please suggest factors or aspects, with justification, which should be considered to identify and discover the extent of substitutability.*

Here, we would like to highlight certain conceptual fallacies in this line of questioning as it betrays a predisposition toward legacy regulatory concepts. For instance, TRAI's 2015 consultation paper on OTT services compared OTT services specifically to **SMS and Value Added Services (VAS)**. However, such comparisons with legacy VAS and other core TSP services like SMS to OTT service providers require closer scrutiny.

First, from the perspective of legislative intent, Section 4 of the Indian Telegraph Act, 1885 clarifies that the Central Government enjoys an exclusive privilege to maintain and work telegraphs. Section 4 (1) also grants the Central Government the authority to grant licenses (based on specified conditions and payments) to persons to establish, maintain or work a telegraph. In this context, the Act defines **telegraph** as “any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electro-magnetic emissions, radio waves or Hertzian waves, galvanic, electric or magnetic means.” In the context of this consultation it is important to understand the rationale behind such laws which entail tight controls, restricting non-governmental use, maintenance and operation of telegraphs. Pertinently, strict licensing conditions have so far been a norm in India's telecom ecosystem.



Here, Indian Supreme Court jurisprudence across cases like the *Airwaves judgement*¹, *Bharti Airtel v Union of India*² and the *2G Case*³, informs us that the regulatory rationale stems from the fact that spectrum is a scarce natural/public resource of immense national importance which is susceptible to degradation due to inadequate/insufficient utilisation. This has meant government has traditionally maintained tight control of access to spectrum frequencies. Based on these considerations the activities of TSPs/other licensed entities which operate over spectrum differ greatly from service providers who are offering their solutions over the open internet and outside the scope of other managed network service providers. As such, it is also evident that those entities which are providing services over managed IP/telecom networks have the added benefit of greater reliability and quality of service. Further, licensed entities are afforded certain exclusive privileges which OTT service providers (of any type) cannot avail. These exclusive privileges granted to licensed entities include, *inter alia*: (i) the ability to acquire interference free spectrum, and (ii) Right of Way for Infrastructure.

Second, even the Consultation Paper's proclivity for substitutability as an appropriate ground for **regulatory parity** is questionable. Instructively, the Indian Competition Act, 2002 defines "**relevant product markets**" as "... all those products or services which are regarded as **interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use**". Moreover, the CCI has clarified that substitutability is to be narrowly construed as the **smallest set of products (either goods and/or services) which are substitutable given a small but significant non-transitory increase in price (SSNIP)**.⁴

Indeed, the application of the SSNIP test in the context of online/digital economies requires a nuanced understanding of the distinction between online and offline markets. Experts such as Parsheera, Shah and Bose; have opined that it is important for regulators to start considering qualitative factors when evaluating whether two products are part of the same relevant market. In this vein they observe that unique 'characteristics' of a service and/or niche 'intended use', creates a higher possibility of products being regarded as forming separate relevant markets.⁵ Therefore, ex-ante regulatory actions contemplating the interplay between offline and online products/services can seek effective guidance from the Competition Commission of India's (CCI's) evolving approach in determining relevant markets.

In contrast to the Consultation Paper which underpins its discussion on the concept of substitutability, the CCI considers aspects such as presence of network effects, price, convenience, and regulatory conditions, besides substitutability between the players, to determine relevant markets. Indeed, the Competition Commission's own understanding has undergone considerable transition. For instance, one of the first cases decided by the anti-trust regulator was a complaint against Snapdeal in 2014⁶, alleging that the e-commerce platform abused its dominant position by entering into exclusive agreement with the sellers. The CCI in this case, held that online and offline markets are merely two different channels of distribution of the same products, and do not constitute distinct relevant markets.

¹ *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal and Ors.*, 1995 AIR 1236, Available at <https://indiankanoon.org/doc/539407/>

² *Bharti Airtel Ltd. v Union of India*, (2015) 12 SCC 1

³ *Public Interest Litigation & Others v. Union of India & Others*, (2012) 3 SCC 1

⁴ Competition Commission of India, Advocacy series, Provisions relating to Abuse of Dominance,; Available at https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/AOD.pdf

⁵ Competition Issues in India's Online Economy, NIPFP Working Paper Series; Available at https://www.nipfp.org.in/media/medialibrary/2017/04/WP_2017_194.pdf

⁶ *Ashish Ahuja v. Snapdeal and Ors*, Case No. 17 of 2014. Available at <http://www.cci.gov.in/sites/default/files/172014.pdf>



More recently, such a broad construction of relevant market has undergone revision. This is evident from the 2016 CCI Order in a complaint against WhatsApp⁷. In this case, the complainant contended that WhatsApp held a dominant position in the relevant market for ‘free messaging apps available for various smartphones globally’. **Critically, the CCI observed that instant communication apps (such as WhatsApp) cannot be compared with “the traditional electronic communication services such as text messaging, voice calls etc.” provided by TSPs. The key factors considered to justify that instant communication apps constitute a separate relevant market, as compared to “traditional modes of communication”, include accessibility (wherein the former can only be used via a smartphone), pricing model, and additional functions available to users.** Subsequently in cases against online entities such as Ola⁸ (2016), and Google⁹ (2018), the CCI held that online markets differ from their offline counterparts, due to presence of specific characteristics such as convenience, prices, and network effects.

It is worth noting that, albeit adopting a narrow approach for ascertaining relevant product market, the Commission has thus far refrained from premature intervention in the digital markets, recognising its adverse impact on innovation in general.

Alternative Approach – Undertake Study to Understand Distinction Between OTT and Telecom

Similar to the CCI Order in the *WhatsApp* case, international authorities in advanced jurisdictions like BEREC (EU) have observed that National Regulatory Authorities across Europe do not consider OTT voice services as substitutes for voice and non-voice (SMS) services.¹⁰ The report observed that there was no clear evidence as such that the use of OTT voice services actually impact the provision of traditional voice services (which are over managed telecom networks with assured reliability). **Moreover, BEREC observed that European end-users also distinguish between telecom voice services and OTT voice services based on factors such as quality, security, interoperability, etc.** Critically, as a part of the same review process the inputs of the European Consumer Organisation (BEUC) is instructive.¹¹

Specifically, the submission clarifies that a regulatory playing field is not a desirable end in itself especially if the regulatory parity leads to a reduction in consumer welfare (**See Response to Interception**). To this end, the BEUC goes on to note that consumer protection and welfare should be at the heart of any regulatory/governance overhaul of OTT services. The submission then goes on to detail the various reasons European consumers perceive OTT services distinct from those offered by telecom players:

- OTT services require a connection to the Internet which is not the case for traditional calling and SMS facilities. Here it must be noted that a majority of India’s population (58 per cent) is yet to have internet connectivity. As of September 30, 2018, the total number of internet subscribers in India stood at 560.01 million.¹²

⁷ *Vinod Kumar Gupta v. Whatsapp Inc.*, Case No. 99 of 2016. Available at <http://www.cci.gov.in/sites/default/files/26%282%29%20Order%20in%20Case%20No.%2099%20of%202016.pdf>

⁸ *Vilakshan Kumar Yadav and others v. ANI Technologies Private Limited*, Case No. 21 of 2016, CCI order dated 31 August, 2016. Available at <http://www.cci.gov.in/sites/default/files/212016.pdf>

⁹ *Shri Vishal Gupta v. Google LLC and others*, Case NO. 06 and 46 of 2014. Available at <https://www.cci.gov.in/sites/default/files/C.%20Nos.%2006%20%26%2046%20of%202014.pdf>

¹⁰ Body of European Regulators for Electronic Communications (BEREC)’s Report on OTT Services, January 2016, available at https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/5751-berec-report-on-ott-services

¹¹ The European Consumer Organisation (BEUC), BEUC Response to BEREC’s Consultation on OTT Services, available at https://www.beuc.eu/publications/beuc-x-2015-115_gbe_berec_draft_report_on_ott_services_0.pdf

¹² TRAI, Indian Telecom Services Performance Indicators, July - September, 2018, available at <https://www.trai.gov.in/sites/default/files/PIR08012019.pdf>



- Although some OTT players are developing solutions for feature phones in India, the European experience suggests that OTT communication services require technically demanding infrastructure/devices which are actually compatible with the service in question.
- OTT services provide numerous additional functionalities like video calls, recorded video or audio messages, file sharing, or group calls/chats, emojis, GIFs, status features, enhanced privacy features such as end-to-end encryption, etc. Moreover, SMSes (with built in character limits and unitary price features) act less as instant messaging chat rooms as compared to the OTT services.
- OTT communication/messaging services are accessible from smartphones, laptops, tablets, etc. Alternatively, SMSes and standard voice calls offered by telecom players can only be achieved through mobile phones.

Through these four aspects of connectivity, devices, functionalities, device flexibility, the European Consumer Forum concludes that **substitutability** is not a self-evident phenomenon and is in fact **very difficult to establish**.

Therefore, Koan Advisory proposes that TRAI undertake/commission a study keeping in mind Indian perspectives which analyse consumer and supply-side behaviour to evaluate the similarities and differences between telecom voice/services and OTT communication platforms.

Addressing the Issues of Investments in Telecom and Financial Health of the Sector

In light of the above analysis there is also a need to deconstruct the premise of **question 3** floated in the Consultation Paper which reads as follows:

- *Whether regulatory or licensing imbalance is impacting infusion of investments in the telecom networks especially required from time to time for network capacity expansions and technology upgradations? If yes, how OTT service providers may participate in infusing investment in the telecom networks?*

We submit that the framing of the above question is problematic leading to conceptual inconsistencies where such a lens fails to appreciate the complementarity/interdependency which exists between aligned telecom ecosystems. Suboptimal infusion of investments must be contextualised with the overall financial health of the telecom sectors and regulatory interventions must be designed to solve for specific bottlenecks to enhance sustainability without impeding innovation within the ecosystem. Therefore, stakeholders must remain mindful of two key aspects.

First, OTT service providers (communication and non-communication) are the drivers of demand for data consumption. To satiate this demand, they invest significantly in infrastructure (like Content Delivery Networks, Cloud Hosting Servers, etc) to enhance the consumer experience and make services accessible to end users. Moreover, attention must also be drawn to TRAI's own recommendations from October 2017 on regulatory frameworks for internet telephony.¹³ These state that India's telecom ecosystem is undergoing a period of unbundling of the network and service layers. The recommendations categorically state that increase in revenue from rising data consumption and internet traffic will replace and eventually supersede revenues earned by TSPs from conventional voice traffic. Further, data revenues present a significant opportunity to monetise on last mile access networks. The recommendations explicitly remark that the rise in data services, will aid with broadband penetration. This bodes well for the overall health/sustainability of the

¹³ https://www.trai.gov.in/sites/default/files/Recommendations_24_10_2017_0.pdf

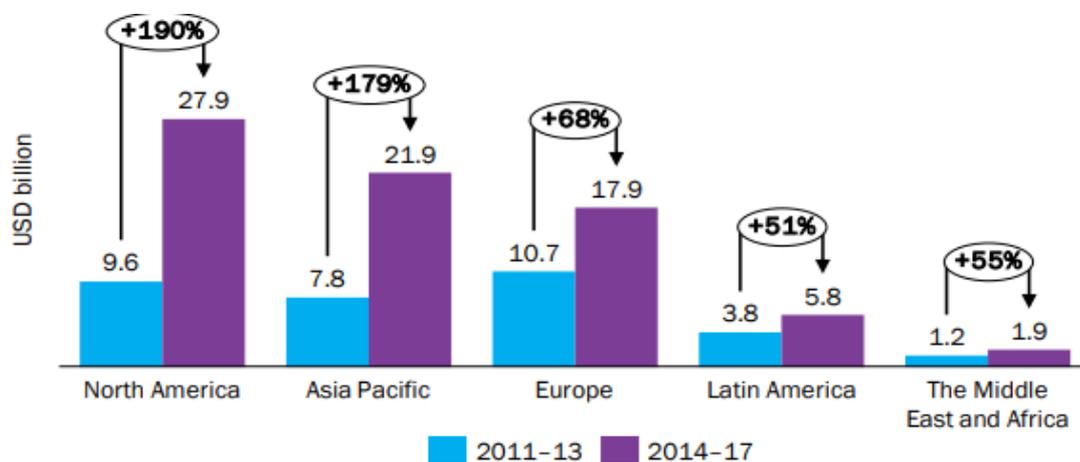


telecom sector. A key observation TRAI makes is that as a natural progression there will be “... a separation of network and service layers of telecom service offerings”. In this context, the regulator holds that frameworks should enable such technological advancements, innovations and overall growth/progression of the telecom sector. Additionally, Indian stakeholders would be well served to remain mindful of the overall positive impact of a well-functioning app economy on related hardware and network ecosystems. For example, China experienced an accelerate growth and infusion in advanced hardware markets as demand for next generation 2G/3G enabled applications rose among consumers.

At the same time, the Consultation Paper correctly notes that this surge in demand for data services raises costs for TSPs in terms of network architecture and design. These costs arise from network congestion and the uncertainty about the timing, type, and volume of traffic which arises when consumers use OTT services. This requires consistent investments in infrastructure from both online service providers and the network providers to solve for capacity and traffic management requirements. Owing to above discussed value proposition-- it is observable that OTT service providers are incrementally raising investments in internet infrastructure like equipment, networks and facilities. Illustratively, as per a December 2018 study¹⁴, in 2014-2017 online service providers have globally invested in around USD 75 billion (globally) in internet infrastructure. More specifically, the investments have been observed in:

- Hosting facilities (like hyperscale data centres to support content/cloud services)
- Equipment installation in third party colocation facilities
- Infrastructure to transport data across locations, like international submarine cables and terrestrial fibre networks
- Content Delivery Networks to support high Quality of Service

Average annual investment by region [Source: Analysys Mason, based on various sources, 2018]



The above figure demonstrates that investments from non-telecom players in internet infrastructure continues to rise and is particularly promising in growing internet/technology markets like Asia-Pacific. The study observes that market drivers for investment in internet infrastructure include (1) Increasing Online Users; (2) Expanding availability/accessibility of rich/diverse application content; and (3) expansion of cloud regions, and construction of announced data centres and submarine cables.

¹⁴<http://www.analysismason.com/contentassets/7f0a13bfc9744806ae8424c4df834ba1/infrastructure-investment-by-online-service-providers---20-dec-2018---web.pdf>



Considering the above analysis, attributing insufficient investments to a regulatory imbalance/licensing conditions in favour of OTT service appears misplaced. Further, TRAI's internet telephony recommendations also make it apparent that there remains enough long term economic value for TSPs to similarly continue infusing capital into requisite infrastructure and technology upgradations. Moreover, the expansion of different applications adding interactive communication elements to the service layer to the network should drive revenue as opposed to a deplete it.

Based on this, if the government concludes that TSP investment is insufficient, focus must turn to the core financial health of India's telecom sector. This has been adversely affected by challenges with extreme indebtedness and intense price competition which has led to the swift exit of market players and rapid consolidation across the ecosystem. **Further, obstacles to investment include prohibitively high spectrum usage charges, excessive roll-out obligations, onerous licensing fees, difficult in gaining of right-of-way clearances, spoor spectrum rationalisation/liberalisation, etc.** Indeed, an Inter-Ministerial Group looking into the issues with TSPs has recommended the restructuring of deferred payment liabilities for spectrum and the computation of interest be changed from prime lending rate to marginal cost of fund-based lending rate regime.¹⁵

Finally, it must be highlighted that the recently adopted National Digital Communications Policy, 2018 sets specific targets in relation to infusing USD 100 billion of investment into the overarching digital communications sector. Here, the Policy determines that in order to attract long-term, high quality and sustainable investments, there is a need to implement forward thinking reforms which embrace principles of transparency and accountability. Notably, there is no reference (despite a comprehensive consultation process) of any adverse implication OTT services have had on the convention telecom players. In fact, the proposed recommendations have instead focused on licensing and regulatory reform which review levies and fees including LF, SUC and the definition of AGR and rationalisation of Universal Service levy, and rationalisation of license fees.¹⁶

Apart from this, the health of the telecom sector also relies on robust ex-ante competition laws for sectoral challenges like predatory pricing which threaten the stability of the telecom ecosystem. In this context, there is a need for TRAI to modernise the regulator's current understanding of concepts like Significant Market Power (SMP) and align it with global norms such as those propagated across forums like the International Telecommunications Union (ITU) and EU. Here it must be noted that global ex-ante SMP norms tend to be largely aligned with traditional understanding of dominant position in competition laws. As such, it is advisable for TRAI to interface with the CCI in order to create formidable standards for SMP for India's telecommunications ecosystem.

Evaluating Interoperability

The Authority has suggested mandating interoperability among OTT platforms, and between OTT platforms and TSPs in order to promote competition in the market for communication services. Here, question 4 raises the following issue for consultation:

- *Would interoperability among OTT services and also interoperability of their services with TSPs services promote competition and benefit the users? What measures may be taken, if any, to promote such competition? Please justify your answer with reasons.*

¹⁵ Ministry of Communications, Cabinet Approves Recommendations of Inter-Ministerial Group on Stressed Assets in Telecom Sector, Press Information Bureau, March 7, 2018, available at

<http://pib.nic.in/newsite/PrintRelease.aspx?relid=177127>

¹⁶ <http://dot.gov.in/sites/default/files/EnglishPolicy-NDCP.pdf>



While this may be a lucrative proposition which purports to give consumers greater choice and accessibility, on careful examination, one realises that the impact might not be so straightforward.

Interoperability by itself doesn't have a very clear definition, and hence evaluating its costs and benefits would require a clear context in which it's being applied and the degree of interoperability which we are looking at. Although the authority's consultation report unequivocally specifies that such analysis should be restricted to OTT communication services, the degree of interoperability between these services remains unclear and undefined.

Assuming that the authority is referring to complete interoperability in the consultation paper, its claim that non-interoperability among such services leads to network effects with lock-in isn't necessarily valid. This concern is misplaced as it overlooks some important characteristics of OTT communication platforms, which are as follows:

1. **Low costs of multi homing:** In the Indian OTT market, most consumers 'multihome', which essentially means that they access multiple OTT platforms without incurring significant switching costs for doing so. This allows consumers to communicate with other consumers across all OTT platforms, without being subject to any significant inconveniences or extra monetary costs.
2. **High degree of differentiation:** The OTT communications market today offers services that cater to varied consumer requirements, which is one of the reasons why people choose to be present on more than one of these platforms. This acts as a strong incentive for firms to innovate.
3. **Low barriers to entry:** With the enforcement of the principles of net neutrality, barriers or costs to entry for new OTT players are extremely low. This ensures lower risks for innovators, and hence encourages them to invest in innovation and take risks. This has spurred innovation in the OTT industry, and has resulted in fulfilling a wide variety of consumer demands.

These characteristics ensure a vibrant competitive landscape in the market for OTT services. Most importantly, these characteristics ensure that network externalities in the OTT market do not lead to lock-in (Kerber & Schweitzer, 2017). Consumers can choose among different platforms at very low costs, which in turn drives OTT platforms to constantly strive to improve the quality of their services, which are the specific objectives that pro-competitive measures aim to achieve.

Notably, above mentioned characteristics (namely multi-homing, product differentiation, and low entry barriers) do not exist for TSPs. Pertinently, the rationale for requiring TSPs to interconnect and interoperate does not apply to OTT communications services. Since TSPs act as gatekeepers to a consumer's access communication services, and have exclusive right to access spectrum, lack of interoperability among TSPs can adversely impact user's ability to access communication services.

Moreover, unlike TSPs, mandating interoperability may not be the best way to enhance competition in the market for OTT services. Complete interoperability may require setting standards to ensure that users on different platforms can interact with each other seamlessly. Such standard setting may lead to homogeneity among communication services being offered. As services become less differentiated, many OTT platforms might lose the unique features which drive users to their platforms, forcing them to exit the market. Consequently, this reduces incentives for OTT platforms to innovate. Therefore, implementing interoperability might reduce competition in the OTT market (Evans and Schmalensee, 2007). The Specialist Group for Regulatory Issues (WAR) in Germany, which advises the Bundesnetzagentur, has also supported this view in its opinion on the regulatory challenges associated with OTT markets.



Lastly, it is important to highlight that the telecom regulator's proposal to mandate interoperability, basis the potential abuse of dominant position is misplaced. Determining dominant position, a concept which is well known in anti-trust regulations, is a complex procedure based on evidence in respect of a large number of relevant factual and legal aspects. Additionally, the issue of 'level playing field' between OTT services and TSPs, and mandating interoperability basis potential anti-competitive behaviour are distinct issues. The latter issues are generally dealt by a specific anti-trust authority - Competition Commission of India (CCI).

In this context, it is worth noting TDSAT's recent order in *Bharti Airtel Ltd. and Anr. v. TRAI*, dated December 13, 2018 (Telecommunication Appeal No. 1 of 2018), wherein the appellate tribunal underlined the distinction between the administrative/executive decision-making power of TRAI, and quasi-judicial power of CCI. The TDSAT further noted that TRAI cannot assume the role of an adjudicator of contested issues such as determination of dominant position, a role which requires pronouncing rights/obligations on the basis of rival contentions and evidence, and in the light of relevant laws and rules operating in the field.

The Tribunal in its order stated that evaluating *"complex concept of predation dependent upon determination of intent with the requirement of evidence by TRAI is neither desirable nor objective. TRAI's required role is without the backing of adequate provision for such a role in the (TRAI) Act. The procedural safeguards for such a role also do not exist under the Act or the Rules or Regulations framed thereunder."*

Therefore, we submit that concerns related to anti-competitive behaviour should be dealt via a well-established competition law i.e. Indian Competition Act, 2002.

Even if TRAI's proposal to mandate interoperability is desirable in principle to prevent market harms, the technological feasibility of the same remains unclear. Moreover, it is important that uniform global standards precede mandatory interoperability between OTT services, which differs from product design and software development perspective. Further, the impact of such (interoperability) proposal on critical issues such as user privacy, and data protection are also not considered by the telecom regulator. In this regard, it is recommended that a distinct consultation paper on the issue, evaluating the technological feasibility of the interoperability is floated by the telecom regulator.

Contextualising Lawful Interception within the Right to Privacy

While considering the lawful interception obligations for OTTs, question 5 specifically seeks a response to the following:

- *Are there issues related to lawful interception of OTT communication that are required to be resolved in the interest of national security or any other safeguards that need to be instituted? Should the responsibilities of OTT service providers and TSPs be separated? Please provide suggestions with justifications.*

The extant framework under the Telegraph Act, Rule 419A of the Indian Telegraph Rules, the Information Technology Act, 2000 and the Rules prescribed under it, and the licensing conditions for telecom service providers encompass the provisions for interception of communication applicable to telecom service providers (TSPs). Under this framework, authorised government agencies and departments may submit requests to carry out the interception, decryption, and monitoring of communications. The framework under the Telegraph Act, including the Rules, and the licensing



conditions specifically applies to TSPs, whereas the IT Act applies broadly to information transmitted through any computer resource which covers both TSPs and internet companies.

While these frameworks have existed alongside and are relied on heavily by intelligence agencies and law enforcement agencies, the safeguards available under each are distinct. Specifically, the Telegraph Act framework first requires the occurrence of a public emergency or the interests of public safety as pre-conditions to an interception request. These mechanisms remain absent from the IT Act framework.¹⁷ Furthermore, the constitutionality of this framework has specifically been addressed in the Supreme Court in the 1996 PUCL case. Here, even where the right to privacy was not yet recognised as a standalone fundamental right within Article 21 of the Constitution, it was recognised by the Court that *“the right to hold a telephone conversation in the privacy of one’s home or office without interference”* falls within the right to privacy encompassed within the right to life. The Court accordingly held that state powers to intercept must be restricted/guided by *“... duly established legal procedures”* and further framed guidelines laying down the procedure of authorisation requests, the period of interception, et al.¹⁸ These guidelines were ultimately superseded by the framing of the procedure under Rule 419A of the Telegraph Rules.

Even so, the framework has been fraught with procedural irregularities. Research exercises undertaken by independent legal scholars and research organisations have revealed a virtual lack of transparency with respect to the interception requests and orders made. The absence of judicial review mechanisms inhere biases within the procedure, where requests for interception are made and evaluated by the same arm of the government. This coupled with the volume of interception requests made and authorised further raise concerns regarding the effectiveness of the evaluation process. In an RTI reply to SFLC, it was stated that 7500 - 9000 interception orders are issued by the Central government each month. Given the relative limitations on resources and institutional capacity at the executive level to evaluate each request, the efficacy of a purely executive-based process for determining the validity of an interception order is accordingly found to be questionable.

With recognition of the right to privacy as a fundamental right under the *Puttaswamy* judgement, the current framework for interception will need further review in light of the three part test prescribed by the Supreme Court, where restrictions to the right to privacy are concerned. While these restrictions are certainly prescribed by law, the procedural safeguards for evaluating necessity and proportionality remain limited in scope owing to a lack of judicial oversight. Even where periodic reviews are prescribed, the Review Committee continues to be constituted by senior Executive officers.

India also lacks a legislative framework governing intelligence agencies and law enforcement agencies, including their constitution, composition, powers, accountability measures and legal processes expected to be followed by them. The need for legislation to this end has also been underlined in the Report of the Srikrishna Committee, which has recommended bringing in a law to this effect in order to effectively implement the data protection framework. Such law/laws should ensure appropriate reporting and transparency requirements are implemented pertaining to all surveillance activities. These requirements may differ depending on the nature of information and the entity to which it is being provided. As such, the extant framework for TSPs itself requires revision given the recognition of the right to privacy as a fundamental right.

Furthermore, it is necessary here to keep in mind the international human rights obligations which bind OTT service providers when evaluating regulatory frameworks for them. The global nature of online services has meant that OTT services available in India also provide services in foreign

¹⁷ <http://docs.manupatra.in/newsline/articles/Upload/E90FA90F-0328-49F2-B03F-B9FBA473964F.pdf>

¹⁸ <https://www.epw.in/engage/article/can-government-continue-unhindered-wiretapping-without-flouting-right-privacy>



jurisdictions. As such, the global nature of their operations has necessitated compliance with global human rights standards. As such, the UN Guiding Principles for Business and Human Rights directly bind businesses to ensure compliance with the *International Bill of Human Rights*.¹⁹ Notably, privacy is a core component of the International Covenant on Civil and Political Rights (ICCPR), to which we are party, and the Universal Declaration of Human Rights (UDHR). It must also be noted that these Principles are stipulated to apply over and above State laws.

While evaluating whether OTT service providers should also be subject to lawful intercept obligations applicable to TSPs, the TRAI must also remain mindful of the specific technical differences between TSPs' network infrastructure and the technical architecture of OTT services. For instance, where licensing conditions stipulate the provisioning of wiretapping facilities for TSPs, a similar provision may be unsuitable for OTT service providers which do not control the transmission over telecom networks. At the same time, where lawful interception for law enforcement and national security purposes is concerned, the Ministry of Electronics and Information Technology (MeitY) has already formulated a revision of the extant intermediary guidelines, and amendments to the same have already been put up for public consultation. The proposed amendments, inter alia, provide for traceability of origin of content, while also mandating monitoring of communications for unlawful content. As such, these nullify the need for a separate regulatory framework which imposes incongruent regulatory conditions on OTT service providers.

Desirable Framework Approaches – Justifying TRAI's Intervention

Here, it is expedient to consider **questions 7, 8 and 9** of the Consultation Paper which read as follows:

- *Is there an issue of non-level playing field between OTT providers and TSPs providing same or similar services? In case the answer is yes, should any regulatory or licensing norms be made applicable to OTT service providers to make it a level playing field? List all such regulation(s) and license(s), with justifications.*
- *In case, any regulation or licensing condition is suggested to made applicable to OTT service providers in response to Q.7 then whether such regulations or licensing conditions are required to be reviewed or redefined in context of OTT services or these may be applicable in the present form itself? If review or redefinition is suggested, then propose or suggest the changes needed with justifications.*
- *Are there any other issues that you would like to bring to the attention of the Authority?*

Here, we would like to clarify that Koan's contention is not that OTT digital/communication services should remain completely unregulated. On the contrary what is required is for digital services with communication functionalities to be regulated in a manner which offers/promotes strong consumer protections. However, we submit that these protections are already provided across a litany of disaggregated legal frameworks across various governmental authorities. Some of the key aspects which consumers are concerned with in relation to online communication services are choice, privacy, security, access, and varied product availability. These are the features of a market which a government should aim to promote. As stated at the outset of our submissions, regulatory interventions must be aligned with promoting economic growth and consumer interest objectives and must specifically solve for market harms/failures.

In this regard, the legal frameworks like the Information Technology Act (which is undergoing amendments under relevant provisions like Section 79 governing intermediaries); Competition Act (which is undergoing a process of review); the forthcoming Personal Data Protection Bill, 2018;

¹⁹ https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf



forthcoming Consumer Protection Bill; *et al* can be expected to adequately cover these challenges. Considering the adequate coverage of online consumer issues (such as privacy, security, access and choice) distributed across these various frameworks, the need for TRAI to specifically intervene within the ecosystem is questionable at this stage. Indeed, regulators like TRAI should be circumspect in initiating ex-ante regulatory interventions in markets, the success of which is critical to the future sustainability of her online and telecommunication ecosystems. This is particularly important as interventions can have the adverse effect of homogenising solutions or reducing choice which can lead to reduced creation of differentiated interactive products and solutions. Further, there is the risk that this can have the cumulative effect of lowering user engagement and demand with data services which will stunt the revenue potential of network providers. These considerations reinforce the need for **Regulatory Impact Assessments**.

Resolving Localisation

Lastly, we acknowledge the Consultation Paper's reference to cross-border investigations and law enforcement access to data stored in foreign servers and accompanying jurisdictional challenges. In this context, the paper makes a reference to policies of data localisation and government impulses to erect barriers against the cross-border flows of data. Such an approach is even reflected in India's Draft Personal Data Protection Bill, 2018 which proposes strict restrictions to cross-border data transfers whilst mandating local storage of personal data. Given that law enforcement access and jurisdictions are primary motivations behind such a move, it is important for TRAI to appreciate the economic implications of such a measure. Specifically, it can have the adverse impact of raising market entry/participation costs and can stifle the growth of the OTT ecosystem which is integral in sustaining your ICT and telecom economies. Nevertheless, these measures have the competing interest of facilitating investigations, law enforcement processes, etc. It is here where TRAI has the opportunity to play a pivotal role in encouraging the Government of India to assume a nuanced position. This position could simultaneously recognise the inherently borderless nature of the internet (thereby leading to efficient allocation of resources) whilst preserving the efficacy of investigation processes and solving jurisdiction related concerns. To this end, Koan proposes India should actively explore engagement with international frameworks like the Budapest Convention; modern executive data sharing agreements under frameworks like the US' Clarifying Lawful Overseas Use of Data (CLOUD) Act; and the EU's Proposal on *European Production and Preservation Orders for electronic evidence in criminal matters*. **Further, it is also in the interest of Indian markets to quickly develop and implement similar frameworks which allow data to smoothly traverse across borders with limited economic costs.**