

Comments from MediaNama's discussion on OTT regulation on 11th January 2019

To,
Shri. Asit Kadayan,
Advisor (QoS),
Telecom Regulatory Authority of India (TRAI),
Mahanagar Door Sanchar Bhawan,
J.L. Nehru Marg, (Old Minto Road)
New Delhi - 110002, India
Email: advqos@traigov.in

Sir, the following are comments that were made at MediaNama's discussion on regulation of OTT services, a discussion that was supported by Microsoft, Google, Facebook and STAR India, held under Chatham House Rule, with attendance of around 100 people. Comments made by participants at the discussion are quoted/summarised below, with paraphrasing for brevity.

*

The relationship between telecom operators and OTT services has changed, since the TRAI's first consultation on regulation of OTT services in March 2015. "It's a symbiotic relationship," a participant in MediaNama's discussion on OTT services said, saying that the two are not in an adversarial relationship, or that "the OTT guys are eating our lunch and therefore we need to bring in all these encumbrances on the OTT folks." From the telecom ecosystem, the demand is that OTTs gain from utilisation of network, and they want to enhance that, but also have a "minimal sets of rules and regulations that should be considered by the regulator in terms of a fairness approach" for a level playing field.

Definition of OTT

According to a participant:

- The issue of definition of an OTT services is seen as being critical to the entire discussion on regulation of OTT services: how OTT's are defined by the TRAI, in the context of regulation, will impact which entities are regulated and which aren't. However, this is a global issue and regulators globally are trying to define these services to regulate them, whether from the perspective of taxation, fake news, and regulation of intermediaries.
- The European Commission defines an OTT service as an interpersonal communication service, meaning, a service that allows direct interactive interpersonal exchange of information via an electronic communications network between a finite number of people, where the persons initiating/participating in the interaction determine its recipients.

Comments from MediaNama's discussion on OTT regulation on 11th January 2019

- It's not clear as to how one would look at apps like Quikr or OLX or Tinder or BharatMatrimony which have a chatting feature, where people can interact with each other via messaging. Would they be expected to also to take licenses? How is a regulator going to regulate them?
- We can't talk about OTTs and intermediaries in the same breath. There could be some that are not the other. Netflix is not an intermediary, but it's an OTT.

The issue of Substitutability & competition

- VoIP or messaging are integral parts of many different types of services, like gaming, the electronics communication, and any regulation would also apply to two people playing a game and messaging each other or chatting to each other while playing that game. The characteristics of VoIP are very different from other OTTs: they're not perfect substitutes.
- How easy is it to actually isolate what an OTT communication service is? I understand there's a substantial functionality vs ancillary functionality and all that. But Instagram and a lot of other features, communication is key but the main purpose is something else. The line is so blurred.
- The telecom industry is not asking for the imposition of license fees, spectrum usage charges. What they're saying is that once you see an OTT as a licensed operator, or a licensed service provider, that offers same or similar or substitutable— bring them on a very minimalistic and get rid of the same set of onerous regulatory requirements that are imposed on us other than these legal enforcement requirements that are now imposed on the operators for obvious requirements.
- The fact that someone took revenue away from a telecom operator does not sufficiently indicate substitutability: that's not enough for the kind of definition we would look for in technology today. VoIP is different from a phone call because the technology is different, and the fact that VoIP calls cannot be made without using the telecom operators network. Telecom operators have direct access to spectrum, you have direct ownership of the customer. There is limitation in terms of how many players can actually provide telecom services, as opposed to infinite competition on the Internet.
- What really matters is whether the same preferences are being substituted here — whether the same preferences are being satisfied by these two different service providers, and it's not intuitively say the same. This needs actual empirical study. It is substitutable if we find that indeed there has been movement — the quality of the service being provided there is different. A movement — one can draw analogies between landline and mobile, people didn't call them substitutes then.
- On the question of revenue decline for telecom operators: it is not clear whether that is linked to a shift from voice to VoIP or because the nature of communications has changed, because the consumption patterns and interactions has changed, cost structure and business has changed, where instead of monetizing interactions

Comments from MediaNama's discussion on OTT regulation on 11th January 2019

individually you monetize bulks? Or is it because the price per unit for every interaction has dropped significantly over time?

- OTTs are not same or similar as TSPs. OTTs are in the application layer while TSPs are in the network layer. TSPs have certain exclusive rights because of which the regulations are attributed to them. The right to interconnect with the PSTNs, the right to number resources, right of way to build infra, many regulations attributed to them are because of that.
- There are several mobile services which are also allegedly substitutable for traditional services, like mobile radio, which can be seen as substitutable for traditional radio, but isn't licensed unlike traditional radio.
- Why don't telecom operators increase the data rates if they're bleeding so much?
- What the telecom ecosystem began with was that you had both the service and the network. And now there's an unbundling that's taking place. There needs to be an unbundling of the network from the service, and have licensing only for the network, and let the service be unlicensed from that perspective.
- Grayness in regulation could lead to another non-level playing field among OTT players? Anything is possible, there will be unintended consequences.
- The beauty of the internet is that everything defies definition because it's a remix that keeps evolving by mixing audio-video in ways that you have never seen before. I'm concerned that this flexibility to change and evolve — WeChat is also an e-commerce platform today — that will get limited if you start restricting it by defining what an online service can and cannot do. In the telecom world you traditionally had defined services; that's all gone out of the window.
- Should substitution even be a factor considered by the regulator when it comes to regulation of OTT services in the first place?
- The FCC has a category of interactive voip. i-VoIP. This category looks at replaceability. So FCC says that if I can completely replace one device with the PSTN phone, and that device, I should be able to make calls to PSTN, receive calls from PSTN, those features, with cloud telephony enabled, that they call it as replaceability. For that they have light license. But for all pure VoIP calls, there is no regulation, which industry and telcos have agreed to. There can be number-based and number-independent ECSs. The rules for number-based are more rigorous. But it's not to say that number-independent has no rules. They're talking about USO funding, definitely about security. They're talking a lot about consumer-related transparency requirement. Those which are the service related rules, may be required to be put on similar services.
- Where if there is a 100% replaceability, you can have a VNO kind of model. If I take out a phone and put a device which can do exactly all the things a telephone can do, which means making and receiving a PSTN call, being subject to the numbering scheme regulation. But if all those features is there, in the US you have a very light licensing regime, and they are subject to all the things that a telco is subject to.

Comments from MediaNama's discussion on OTT regulation on 11th January 2019

Regulatory framework & Lawful interception

- How can TRAI regulate the internet in the first place? It got into privacy without jurisdiction. There is talk about it becoming a digital communications regulator. But TRAI Act doesn't allow it.
- I think we have to see whether TRAI has a locus standi. Because there is one thing which is the infrastructure, and second is apps. We are seeing TRAI move into cloud services, as far as you have data centers, interconnection between data centers, that is well within TRAI remit. But in apps domain, that is MeitY and IT Act's domain.
- The challenge of regulation here is the dual nature of content and communications. Where does one draw the line in regulating communications but not content, is a tricky point for TRAI. There is still no regulator for content as such. At least online content there is no regulator. There is no regulatory code yet. And it's not necessary for us to have one.
- Challenge with regulating internet is it's always been a mix. In messaging, when it's in the public domain it's both communication and content. And so, because, when messages get forwarded, it becomes content, instead of communication between two individuals. Which department regulates it?
- One participant said that a regime for OTTs that can be considered is that similar to that of an MVNO: it does not own spectrum, networks, nothing of the sort, but rides on someone else's network. A new category can be carved out. However another said that there has been a market failure in MVNOs: it hasn't even taken off. A licensing framework would be harmful to the OTT ecosystem. Yet another participant said that there has been no market failure in the MVNO space.
- Telecom operators face significant costs, in terms of expenses for ensuring that legal enforcement happens, de-encryption, access to records, connectivity to the LEA, and the centralised monitoring, and the fact that you need to have a nodal officer and do 24/7 responses etc. OTTs have a regulatory advantage that they don't have such costs.
- A participant asked about why is the telecom ecosystem asking for these regulations to be applicable to OTTs when it really doesn't impact the telecom operators, whether OTTs provide law enforcement access or not? Instead of focusing on less regulation for themselves, they are focused on more regulation for OTTs.
- Is regulation of OTT's the right place to discuss lawful interception and encryption issues?
- There's a need to amend the TRAI Act and the Telegraph Act for the TRAI to be able to regulate OTTs. They can recommend MeitY to create a licensing framework.
- Regulation is usually used by incumbents to prevent competition from new entrants. Regulation is an exclusionary approach and it reduces market competition from that perspective. It might reduce competition to a few significant players. The open

Comments from MediaNama's discussion on OTT regulation on 11th January 2019

competition environment that we have in case of the internet, that will clearly get impacted if there is licensing that comes in. And larger players like WhatsApp or Skype will probably be able to sign up, but not others.

- If Sharechat, a very successful messaging and social media business from India, had to get a license to enter the market before they got funding, they wouldn't have been able to even launch. So there is an impact on innovation that licensing brings in at least in an open market scenario.
- There needs to be a global level of agreement regarding how we deal with the internet, and this will be the only thing that will solve this issue. Otherwise we're going to be stuck at this disagreement on the question of how much regulation, from where, and on whom.
- If these platforms don't work with the government, the government already has the right to block them. You don't need new regulations to do that. However, the blocking orders have procedural safeguards. The government hasn't sent WhatsApp any notice formally and legally under Section 69 of the IT Act. There's thankfully a due process framework that we still have in this country and that needs to be followed.
- On the issue of surveillance, a good way forward is for India to come up with a Comprehensive National Surveillance Law in which adequate checks and balances built in. We see aspects of surveillance being crept into various different legislations. For instance, data protection law has localisation, we're seeing something on the lines of traceability in the intermediary liability rules. We're seeing lawful interception come up in OTT. We need a national surveillance law for all these issues.