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To:

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

We thank the Telecom Regulatory Authority of India (TRAI) for the opportunity to submit comments on the Consultation Paper on Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services.

About Access Now

Access Now is an international non-profit organisation which works to defend and extend the digital rights of users at risk globally. Through presence and expertise based in over 20 countries across six continents, Access Now provides thought leadership and policy recommendations to the public and private sectors to ensure the internet's continued openness and the protection of fundamental rights.

Access Now engages with a global community of individuals from over 162 countries in our annual RightsCon summit series, in addition to operating a 24/7 digital security helpline that provides real-time, direct technical assistance to users around the world. We coordinate as part of CiviCERT (Computer Incident Response Center for Civil Society) a Trusted Introducer accredited CERT, and are a member of the global Forum of Incident Response and Security Teams (FiRST). We have special consultative status at the United Nations.¹

In India and globally, Access Now has consistently engaged with stakeholders including governments and regulatory authorities on matters pertaining to digital rights, including intermediary liability, content governance, cybersecurity, data protection, internet shutdowns, surveillance and digital security.

Of the issues we work on, Access Now has long prioritised the protection of net neutrality.

¹ Access Now, *About us*, <https://www.accessnow.org/about-us/>.



We submitted comments to TRAI in response to the pre-consultation paper on net neutrality in May 2016.² We also submitted comments on the development and implementation of the net neutrality and zero rating rules in the Brazilian Marco Civil³, to the US Federal Communications Commission (FCC) 2015 Open Internet Order⁴, and to the Body of European Regulators for Electronic Communications' (BEREC) stakeholder dialogue on net neutrality.⁵ Access Now helped coordinate the Global Net Neutrality coalition, a global platform for cooperation and the advancement of net neutrality protection worldwide.⁶

We write to you to provide our comments based on our experience and expertise on digital rights. Our submissions are in response to Part A - Questions 5 and 6, and Part B - Questions 11, 13, and 14.

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

We respectfully submit that at this time, there is no need for TRAI to introduce a regulatory mechanism for OTT communication services. Further, we submit that selective banning of OTT services will adversely impact individuals' rights and freedoms as well as the overall development of the telecommunications and OTT sector.

As the world's largest democracy, with the largest internet user base⁷ and a notable market for innovation, India has a unique opportunity to be a global leader in the digital space. Conflating OTT communication services with licensed telecom service providers for regulatory purposes, requiring them to pay user or access fees, or permitting selective banning of internet-based services would squander this opportunity. It would obscure the real nature of OTT services, subject them to stifling and ill suited legacy telecom regulation, and hinder the country's access, connectivity, privacy, security, free expression, and digital innovation.

In addition to the comments in our present submission, we also submit as an attachment

² Access Now, *Access Now comments to TRAI pre-consultation paper on net neutrality*, https://trai.gov.in/sites/default/files/AccessNow_30_05_2016.pdf.

³ Access Now, *Submission on zero rating and the Marco Civil da Internet*, https://www.accessnow.org/cms/assets/uploads/archive/Access_ZeroRating_Marco_Civil.pdf.

⁴ Access Now, *Comments on the FCC Notice of Proposed Rulemaking on protecting and promoting the open internet*, <https://www.accessnow.org/cms/assets/uploads/archive/docs/NPRMFinal.pdf>.

⁵ Access Now, *Written submission for the BEREC stakeholder dialogue on Net Neutrality*, https://www.accessnow.org/cms/assets/uploads/2015/12/BERECsubmission_NN_2015.pdf.

⁶ Global Net Neutrality coalition, <https://www.thisisnetneutrality.org/>.

⁷ Indian Express, *India has more than 800 million internet users, says Rajeev Chandrasekhar*, <https://indianexpress.com/article/technology/tech-news-technology/india-has-more-than-800-million-broadband-users-says-rajeev-chandrasekhar/>.



to this document our position paper on *Proposals for Regulating Internet Apps and Services: Understanding the Digital Rights Impact of the Over the Top Debate*.⁸ We request that this document may please be perused as forming part of our substantive feedback on the creation of a rights-respecting data protection framework.

Access Now respectfully urges TRAI to consider the following top level recommendations:

1. To recognise that OTT services cannot be regulated in the same manner as TSPs and to not bring them within the framework for licensing or impose any fees for network usage, which would hurt free and open internet access;
2. To protect and strengthen net neutrality, and refrain from implementing any measures that would undermine this crucial rights-respecting principle and reflect a regression in TRAI's policy positions, which have previously strongly supported net neutrality;
3. To prevent selective banning of platforms, as it would perpetuate the harms of internet shutdowns, and take away from the goal of an open, safe, trustworthy and accountable internet;
4. To recognise that selective banning is not necessary, proportionate, or the least restrictive measure, and would do more harm, including to people's rights and freedoms, than good;
5. To protect end-to-end encrypted communication services and prohibit any temporary or permanent ban of such services, as they play a critical role in enabling people to stay safe online and exercise fundamental rights, including the right to privacy and free expression;
6. To consult on and enable progress on the rights-affirming recommendations of Parliament's Standing Committee on IT in its 26th Report on suspension of telecommunication services. TRAI must urge the Department of Telecommunications to engage with these recommendations – such as the creation and maintenance of a database of all instances of suspensions – and not selectively with the ones that are in fact rights-damaging, such as the one encouraging selective banning of platforms.

⁸ Access Now, *Proposals for Regulating Internet Apps and Services: Understanding the Digital Rights Impact of the "Over-the-Top" Debate*, <https://www.accessnow.org/ott-digital-rights>.



Our initial detailed comments and recommendations responding to the questions framed in the consultation paper, in anticipation of further opportunities to engage, are below.

Response to Questions 5 and 6

Question 5: Please provide your views on the following aspects of OTT communication services vis-a-vis licensed telecommunication services in India:

- (a) Regulatory aspects;*
- (b) Economic aspects;*
- (c) Security aspects;*
- (d) Privacy aspects;*
- (e) Safety aspects;*
- (f) Quality of service aspects;*
- (g) Consumer grievance redressal aspects; and*
- (h) Any other aspects (please specify).*

Question 6: Whether there is a need to bring OTT communication services under any licensing/ regulatory framework to promote a competitive landscape for the benefit of consumers and service innovation?

The regulation of OTT communication services must be distinct from that of licensed telecom services and for the benefit of people's rights and innovation, there is no need for TRAI to regulate OTTs.

TRAI does not have the legislative competence to regulate OTT services:

The Department of Telecommunications (DoT) governs telecommunication services which provide access to communication networks - including voice calls, SMSes, and internet access - in the country. OTT platforms provide services related to a wide range of activities online - including content hosting, communication, commerce, or some hybrid of different types of activities. OTT communication services which are essentially computer-based digital communications do not fall within the mandate of the DoT or of TRAI under the TRAI Act, 1997 and the Indian Telegraph Act, 1885.

Significant legislative changes would be required to the TRAI Act and the Telegraph Act if DoT or TRAI were to be granted powers to regulate OTT communications services in the same manner as telecom service providers (TSPs) were to be brought about, and such changes would be a regressive step adversely affecting easy and free access to the internet in India.



TRAI’s role is linked to licensing of the providers of networks required for communication and fixing tariffs for data, which is separate from OTTs:

TRAI’s competence is derived from the TRAI Act to regulate the provision of telecommunication services⁹ and is connected to the framework for licensing by the DoT under the Telegraph Act. A reading of the TRAI Act and the functions allotted to TRAI under Section 11 suggests that TRAI’s authority to make recommendations is inextricably linked with the licensing of TSPs and tariff fixing.

- TRAI’s role as a recommending authority under Section 11(1)(a) is limited to seven specific matters, all related to spectrum licensing and the technologies used by TSPs.¹⁰
- TRAI’s other functions under Section 11(1)(b and (d) are also linked with licences, their conditions and compliance, and technical matters related to provision of telecom services.
- TRAI’s power to fix rates for telecommunication services under Section 11(2) and to levy fees under Section 11(1)(c) must be read in the context of the other enumerated functions, which are specifically linked to the licensing and allocation regime for spectrum.

OTT communication services are distinct from the provision of telecom networks:

OTT communication services are not contemplated as being within TRAI’s jurisdiction. The Consultation Paper appears to consider regulating applications which provide communication services over the internet like WhatsApp, Facebook, and Telegram.

The Consultation Paper makes the incorrect assumption that “OTT communication service providers offer voice call, and messaging and video call services similar to the services provided by TSPs”.¹¹ There are more differences than similarities between traditional TSP offerings and OTT communication services, a fact also now recognised by the International Telecommunications Union (ITU). The ITU in its *Output Report on ITU-D Question 3/1* (2021)¹² noted that:

⁹ TRAI Act, https://www.indiacode.nic.in/bitstream/123456789/1929/1/AA1997__24tele.pdf.

¹⁰ TRAI Act, Section 11, https://www.indiacode.nic.in/show-data?actid=AC_CEN_37_58_00002_199724_1517807323214§ionId=16711§ionno=11&orderno=11.

¹¹ Para 2.66 of the Consultation Paper.

¹² International Telecommunication Union, *Emerging technologies, including cloud computing, m-services and OTTs: Challenges and opportunities, economic and policy impact for developing countries: Output Report on ITU D Question 3/1 for the study period 2018-2021*, Section 4.2.1., <https://www.itu.int/hub/publication/D-STG-SG01.03.2-2021/>.

“Furthermore, it is important to distinguish OTTs from traditional services, recognizing that OTTs are generally complementary to traditional services, rather than substitutes for them. For instance, communications-based OTTs typically differ in a number of ways from traditional telecommunication services. For example, OTTs generally do not provide connection to a public network and instead create a type of closed-user group within the application. Thus, OTTs do not require scarce numbering resources, nor do they require interconnection agreements with traditional operators.”

OTT communication services differ from those provided by TSPs significantly, and because of the inherently different nature of the former, bringing them under a licensing framework will not promote a competitive landscape and will not be to the benefit of consumers. People have a greater ability to choose different types of services under the current framework.

OTT communication services bridge gaps and protect rights:

Many OTT communication services bridge a crucial gap in the market by providing services that enable people to exercise their fundamental rights, such as the right to free expression and freedom of assembly through social media platforms, and the right to privacy through end-to-end encrypted messaging services. These are by no means equal substitutes for traditional telecommunication services.

Advances in technology also mean that OTT communication services provide unique and changing forms of communication. For example, users can share documents, pictures, and videos in different formats and with one or many people through general purpose platforms. These are not substitutes for services provided by the TSPs.

The innovation and security that benefits consumers is made possible at least in part owing to the difference in the governance structure for traditional communication services as opposed to OTT platforms. The licensing and interception regime for telecommunication services would thwart innovation and deprive people of the ability to communicate freely and safely, without fear of surveillance.

The cost to individuals/users, and barriers to access, will increase if OTT services are subjected to licensing or required to pay licensing fees to TSPs:

Presently, most OTT communication services do not charge users any fee. Any imposition of a telecom style fee or licensing requirement would create barriers to access. OTT service providers may be forced to limit their offerings or pass on the fee to users - both of which



would adversely impact people’s ability to use the internet to exercise their fundamental rights. They would be deprived of the necessary security, privacy, and choice in communications that they presently enjoy.

Affordable mobile internet data and the free availability of OTT services have been key to helping India become “Digital”, and for the development of its image as a leading nation for technology and digital services.¹³ However, rural-urban and gender divides still exist when it comes to internet access, and any monetary or other barriers would exacerbate those divides and undermine the steps taken to close the gap.¹⁴

Given that the data cited in the Consultation Paper shows that TSPs are not suffering losses because of the advent of OTT communications services, there is no need to increase the monetary burden on consumers by proposing payment of fees.¹⁵

Clarity on classification of internet-based intermediaries is possible only through a detailed, independent inter-departmental multi-stakeholder consultation:

If at all a regulatory framework is to be created for OTT communications services, the first and foundational step must be to define and classify intermediaries through an inter-departmental process and detailed consultation with stakeholders, including the public at large - framed in an approach built on the rule of law and aimed at safeguarding the fundamental rights of individuals..

OTT services which may appear to provide some communication facilities may overlap with some other facility. Modern web development services such as WebRTC result in nearly any digital application or service being able to add a communication layer.¹⁶ A separate dedicated process for classification is required because of this overlap in services. Even within platforms which are primarily thought of as providing “communications” services, there may be other functionalities. For example, WhatsApp contains payment facilities which may be crucial for small businesses. Facebook contains facilities for users

¹³ Fortune India, *How low-cost data is powering India*, <https://www.fortuneindia.com/macro/how-low-cost-data-is-powering-india/102740>.

¹⁴ The Economic Times, *Only 30% of internet users in India are women: Report*, [https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/only-3...;](https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/only-3...)
The Hindu BusinessLine, *PM WANI is key to affordable internet for all*, <https://www.thehindubusinessline.com/opinion/pm-wani-is-key-to-affordable-internet-for-all/article35176396.ece>.

¹⁵ Para 2.58 of the Consultation Paper: “In the Indian context, in the period from the year 2012 to 2022, the monthly average revenue per user (ARPU) for wireless service grew by about 44% from Rs. 98 (For GSM service in Quarter Ending December 2012) to Rs. 141.14 (for wireless service in Quarter Ending December 2022)”.

¹⁶ WebRTC, <https://webrtc.org/>.



to store and access news and run businesses, as well many other features which are unrelated to direct communication but are more similar to content-hosting.

The need for this clarity is evident from the references in the Consultation Paper. The Paper notes that the DoT Committee Report on Net Neutrality from May 2015 had divided OTT services into “communication services” and “application services”, with the former comprising “real-time person to person telecommunication services” and the latter comprising all others, including Facebook and YouTube.¹⁷

However, the Parliamentary Standing Committee on Communications and Information Technology (the Standing Committee) in its 26th Report titled ‘Suspension of telecom services/ Internet and its impact’ noted that: “The Department have also informed the Committee that Facebook, WhatsApp, Telegram etc. are basically categorized as over the top telecom services, OTT services in short.”¹⁸ In this context, the Standing Committee made its suggestion that DoT and TRAI “explore the option of banning selective services, such as Facebook, WhatsApp, Telegram etc. instead of banning the Internet as a whole.”

TRAI should maintain its *status quo* with respect to OTT services as it has previously decided to do after consultations:

In September 2020, TRAI recommended against regulatory intervention from itself or the Department of Telecom in respect of the privacy and/ or security of OTT services and stated that it was not an “opportune moment” to recommend any comprehensive regulatory framework beyond the existing laws.¹⁹ It further stated that the matter may be examined if some clarity emerged in international jurisdictions, “particularly the study undertaken by ITU”. Since this recommendation was made, there have been two specific developments which bolster the suggestion that no regulatory framework from TRAI for OTTs specifically on privacy and security is required:

- The Digital Personal Data Protection Act, 2023 (DPDP Act) was enacted, providing a horizontal digital data protection legislation which would cover OTT services; and
- The ITU in its *Output Report on ITU-D Question 3/1* advised that, among other things, that “OTT regulations, if proven necessary, should be based upon actual

¹⁷ Department of Telecommunications, *Net Neutrality: DoT Committee Report*, https://dot.gov.in/sites/default/files/Net_Neutrality_Committee_report%20%281%29_0.pdf.

¹⁸ Parliamentary Standing Committee on on Communications and Information Technology, *Twenty Sixth Report on Suspension of Telecom Services/Internet and its impact relating to the Ministry of Communications (Department of Telecommunications)*, https://loksabhadocs.nic.in/lssccommittee/Communications%20and%20Information%20Technology/17_Communications_and_Information_Technology_26.pdf.

¹⁹ TRAI, *Recommendations on Regulatory Framework for Over-The-Top (OTT) Communication Services*, https://traigov.in/sites/default/files/Recommendation_14092020.pdf.



evidence of harm to consumers and be designed to address that harm. They should also be based on a quantitative analysis of the socio-economic effects of such regulation.”²⁰

There is at present no evidence of harm to consumers, and no dedicated quantitative analysis of the socio-economic effects of such regulation has been undertaken.

The DoT Reference Letter²¹ has referred to TRAI’s 2018 statement²² that OTT entities are “not governed by the licence conditions” which apply to telecom service providers and therefore there is a need for some regulation to “ensure protection of consumers’ privacy and data security”. However, the present Consultation Paper does not deal with privacy or data security. Nor has the DoT indicated in its reference letter its view on the application of the Digital Personal Data Protection Bill (now the Digital Personal Data Protection Act, 2023) on the issue of OTT entities and any shortcomings it specifically wishes TRAI to address. The issues discussed in the Paper (licensing and selective banning) do not come within TRAI’s authority, nor do they benefit users’ privacy or data security. By increasing barriers to access to encrypted communications services, the proposal to regulate OTT communication services would hinder individuals’ privacy, not ensure it. As noted, the recently enacted DPDP Act is meant to be a comprehensive legislation for data protection and covers some of these concerns, even though it requires strengthening in substantive provisions and effective implementation in order to fully protect users. Further, the IT Act also contains some provisions for security and privacy relating to electronic communications, further making it unclear why only telecom specific regulations are needed on this issue.

Response to Questions 11 and 13

Question 11. Whether there is a need to put in place a regulatory framework for selective banning of OTT services under the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 or any other law, in force? Please provide a detailed response with justification.

²⁰ International Telecommunication Union, *Emerging technologies, including cloud computing, m-services and OTTs: Challenges and opportunities, economic and policy impact for developing countries: Output Report on ITU D Question 3/1 for the study period 2018-2021*, <https://www.itu.int/hub/publication/D-STG-SG01.03.2-2021/>.

²¹ Department of Telecommunications, *Letter dated 07 Sept. 22 Sub: Reference back on recommendations of TRAI on ‘Regulatory Framework for Over-The-Top (OTT) Communication Services — regarding*, annexed within Consultation Paper, https://www.trai.gov.in/sites/default/files/CP_07072023.pdf.

²² TRAI, *Recommendations on Privacy, Security and Ownership of the Data in the Telecom Sector*, https://traigov.in/sites/default/files/RecommendationDataPrivacy16072018_0.pdf.



Q13. Whether there is a need to selectively ban specific websites apart from OTT services to meet the purposes? If yes, which class(es) of websites should be included for this purpose? Kindly provide a detailed response with justification.

Q14. Are there any other relevant issues or suggestions related to regulatory mechanism for OTT communication services, and selective banning of OTT services? Please provide a detailed explanation and justification for any such concerns or suggestions.

Selective banning of OTT services or websites must not be permitted. Doing so would violate fundamental rights and hurt economic interests.

Selectively banning OTT communication services (Facebook, WhatsApp, Telegram etc.) perpetuates the harms of internet shutdowns and will have an adverse impact on people's essential needs.

The Supreme Court in *Anuradha Bhasin v. Union of India* (2020) held that “the right to freedom of speech and expression under Article 19(1)(a), and the right to carry on any trade or business under Article 19(1)(g), using the medium of internet is constitutionally protected.”²³ Foreclosing access to parts of the internet, including OTT communication services on which people rely to exercise fundamental rights, would be in clear violation of the Supreme Court's judgement.

Selective bans are being proposed as less restrictive than full shutdowns, but the extent to which OTT platforms are used shows that in fact banning them would be an extremely restrictive measure, impacting millions of Indians. A slightly less restrictive measure is still not Constitutionally justified unless it is the “least” restrictive measure.

India has over 500 million WhatsApp users²⁴ and 367 million Facebook users as of July 2023 - the largest number of users per country in the world.²⁵ By one estimate, “[t]his represents around 22.1% of the population.”²⁶

Selective banning of entire platforms aimed at an unknown number of users allegedly using the platforms for unlawful purposes would amount to treating millions of Indians using OTT services for lawful purposes as criminals. The mere and ubiquitous fact that

²³ Supreme Court of India, *Anuradha Bhasin v. Union of India* 2020 INSC 31, https://main.sci.gov.in/supremecourt/2019/28817/28817_2019_2_1501_19350_Judgement_10-Jan-2020.pdf.

²⁴ Techcrunch, *Brands are spamming WhatsApp users in India, Facebook's largest market*, <https://techcrunch.com/2022/10/10/in-india-businesses-are-increasingly-spamming-users-on-whatsapp/>.

²⁵ DataReportal, *Digital 2023 July Global Statshot Report*, <https://datareportal.com/reports/digital-2023-july-global-statshot>.

²⁶ DataReportal, *Digital 2023: India*, <https://datareportal.com/reports/digital-2023-india>.



certain lawful services may sometimes be misused for unlawful purposes by some bad actors – such as payment platforms being misused for fraud – does not justify banning the entire platform. Banning such services deprives people of effective communication and has practically the same effect as a full internet shutdown. Even if there are some other applications that may not be banned, they cannot be adequate alternatives.

The Standing Committee on IT also expressed concern that “financial services, health, education, and various other services” should be permitted to continue to operate over the internet. It is important to note that increasingly, people access these services through OTT services. Taking this into consideration, the Government of India has issued Telemedicine Practice Guidelines in 2020 which provides guidance for doctors giving medical advice over OTT platforms.²⁷ People use WhatsApp for business communications and payments, making it essential for their livelihoods.²⁸ Given the reliance interest that businesses and ordinary people have built on these platforms, which they have become comfortable using, there would be no adequate and equally effective alternatives in case of a ban. It would therefore amount to a shutdown.

The push for a Digital India is also linked with these OTT services, because of their widespread use. For example, the Government of India has linked with WhatsApp in particular to set up a MyGov Helpdesk for people to access DigiLocker, practically making it an essential service.²⁹ Therefore, the impact of any ban would not be “selective” or less restrictive but affect multiple aspects of peoples’ lives.

A ban on OTT services - whether on specific services or categories of them - will do more harm than good by making important data and facilities unavailable, and depriving people of the ability to share information and find safety in difficult situations. The Standing Committee’s recommendation to selectively ban internet access as an alternative to wholesale internet shutdowns emphasised the need to minimise “inconvenience”. However, it is crucial to first consider the negative impact on fundamental rights.

²⁷ Government of India, Ministry of Health and Family Welfare, *Telemedicine Practice Guidelines*, <https://www.mohfw.gov.in/pdf/Telemedicine.pdf>.

²⁸ The Verge, *How India runs on WhatsApp*, <https://www.theverge.com/23320306/whatsapp-india-messaging-business-privacy-land-of-the-giants>; MoneyControl, *WhatsApp Business India revenue set to cross \$1 billion by next year, experts see WeChat moment*, <https://www.moneycontrol.com/news/business/whatsapp-business-india-revenue-set-to-cross-1-billion-by-next-year-experts-see-wechat-moment-9426421.html>.

²⁹ Press Information Bureau of India, *Citizens can now access DigiLocker services on the MyGov Helpdesk on WhatsApp*, <https://pib.gov.in/PressReleasePage.aspx?PRID=1827554>.



Authorities must implement the rights-affirming recommendations of the Standing Committee and the guidelines in the Supreme Court’s judgement, and steer away from creating new mechanisms to block the internet.

The experience of internet shutdowns imposed since the Supreme Court’s judgement in *Anuradha Bhasin* shows that governments are not following the rights-affirming guidelines laid down in that judgement to protect fundamental rights and prohibit arbitrary, prolonged shutdowns.³⁰

Further, although the DoT has taken note of the Standing Committee’s suggestion for selective banning, the rights-affirming recommendations in that report have also not been complied with. The Committee noted that the internet “...is the lifeline which is propelling businesses and services, permitting students to enrol for important examination, and enabling home delivery of essentials.” The Committee made several recommendations to improve safeguards against internet shutdowns, including:

- More amendments to bring the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 in line with the Supreme Court’s judgement;
- Creation of a mechanism to determine the merit or appropriateness of shutdowns;
- Defining the parameters of what constitutes a public emergency and public safety to avoid ambiguity;
- Maintaining official records of shutdowns and of the cases reviewed by the Review Committee;
- Ensuring independent members on the Review Committees.

Given that several inadequacies have been highlighted in the text and operation of the Suspension Rules, the safeguards must be implemented before new methods to shut down the internet are created under the Rules. Selective banning cannot be introduced in order to sidestep these obligations and the requirements of proportionality, transparency, and accountability. The issue of internet shutdowns should in fact be studied by TRAI as part of this consultation or on its own initiative.

³⁰ Access Now, *Open letter: the government of India must review and reform of the legal and regulatory framework governing internet shutdowns*, <https://www.accessnow.org/press-release/open-letter-india-framework-internet-shutdowns/>.



Banning OTT services or any websites has no proven connection with stated objectives:

For any action which violates the fundamental rights under Article 19, there must be a proven connection between the action and the objective. Selective banning has been suggested by the Standing Committee on the assumption that OTT services are “likely to be used by the terrorists or anti-national elements to ferment trouble in the specified regions”.

There are several problems with this assumption. First, it is referring to a likelihood or probability without any factual evidence. There was no comprehensive study and analysis of usage of any OTT service by “terrorists” before the Standing Committee to determine whether there is any need to shut down access to these services. Without identifying a pressing need supported by data, any ban would be an unsuitable measure with no connection to achieving the desired goal. It would also be impossible to measure the effectiveness of the ban.

In fact, even full-scale internet shutdowns aimed at stopping communications are ineffective at achieving any of the state aims, and only serve to aggravate the crisis and violate fundamental rights.³¹

Further, there is some material to show that terror groups actually do not use large platforms like WhatsApp because they are vulnerable to state interception.³² This would make the measure completely counter-productive.

A ban would also be counterproductive because bad actors would simply devise their own communication channels to circumvent the ban, thereby preventing the availability of any content, metadata and other information that would aid investigations and enforcement. Hate speech and misinformation or disinformation on smaller communications apps or platforms with less self-regulation is harder to track and stop.³³

³¹ Wired, *An Internet Shutdown Means Manipur Is Burning in the Dark*, <https://www.wired.co.uk/article/internet-shutdown-manipur-burning-in-the-dark>; Time, *How Internet Shutdowns Wreak Havoc in India*, <https://time.com/6304719/india-internet-shutdowns-manipur/>.

³² Mint, *'No WhatsApp, FB messenger': Terror groups in Pak switch to new messaging apps*, <https://www.livemint.com/news/india/no-whatsapp-fb-messenger-terror-groups-in-pak-switch-to-new-messaging-apps-11611497424498.html>.

³³ Politico, *Fringe social media networks sidestep online content rules*, <https://www.politico.eu/article/fringe-social-media-telegram-extremism-far-right/>.



Second, the phrase “anti-national” is not a legal phrase with any definite meaning.³⁴ A ban on communications applications which infringes the right to free speech of millions cannot have any nexus with a vague and undefined objective.

The ITU guidance that regulation must be based upon actual harm to consumers and on quantitative study of the socio-economic effects of the action³⁵ can also be applied to any proposed selective banning of OTT communication services. In the absence of any such identified harm and study, selective banning is a speculative and inappropriate measure.

In addition to the above, the issue of including OTT services within the meaning of “telecom services” in the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 which are framed under Section 7 of the Telegraph Act, 1885 would be beyond the scope of that section.

Response to Question 14

Q14. Are there any other relevant issues or suggestions related to regulatory mechanism for OTT communication services, and selective banning of OTT services? Please provide a detailed explanation and justification for any such concerns or suggestions.

Selectively banning OTT communication services violates the principle of net neutrality:

Net neutrality requires that internet-based services be treated alike without unreasonable discrimination which would create smaller, fragmented internets. Selectively banning some OTT communication services is a form of network discrimination, which is not only anti-competitive but also affects fundamental rights.

Net neutrality comprises three principles: end-to-end connectivity, best efforts in traffic delivery, and permission-free innovation. It means keeping the internet open, secure, and accessible in order to promote innovation in ideas, commerce, culture, and expression worldwide. A crucial component of this principle is that users must have equal access to all websites and platforms.

India must not regress on its commitment to net neutrality:

³⁴ Government of India, Ministry of Home Affairs, *Lok Sabha Unstarred Question No.3685 to be answered on the 21st December 2021*, <https://www.mha.gov.in/MHA1/Par2017/pdfs/par2021-pdfs/ls-21122021/3685.pdf>.

³⁵ International Telecommunication Union, *Emerging technologies, including cloud computing, m-services and OTTs: Challenges and opportunities, economic and policy impact for developing countries: Output Report on ITU D Question 3/1 for the study period 2018-2021*, <https://www.itu.int/hub/publication/D-STG-SG01.03.2-2021/>.



India has a demonstrated record of committing to net neutrality. In February 2016, TRAI prohibited discriminatory practices like zero rating,³⁶ and Access Now commended the move to protect net neutrality.³⁷ In November 2017, TRAI released its recommendations supporting net neutrality,³⁸ which have been hailed as bringing India closer to the “world's most progressive policy on equal internet access for all.”³⁹ Access Now participated in the consultation process and submitted its comments⁴⁰ in support of net neutrality, and commended TRAI’s decision to protect net neutrality.⁴¹

The present proposal to selectively ban platforms will be a regression in India’s global leadership in network neutrality. It will harm people’s rights and the country’s leadership in the digital space, and divide the internet into fragments, which would also be in contravention to the government’s commitment to promoting an “open, safe, trustworthy and accountable” internet.⁴²

Selective banning will imperil secure communication channels such as end-to-end encrypted (E2EE) platforms:

Selective banning will endanger secure, encrypted communication services that people rely on to communicate privately, especially amid crisis. E2EE communication is mischaracterized by some authorities as enabling bad actors, despite consistent pushback and arguments backed by data from civil society, security experts and tech platforms on the importance of encryption to protect human rights, national security and the economy.

Any banning of encrypted services would be to the detriment of millions of people in India. This would affect online safety and the right to privacy under Article 21, because selectively banning communication services with E2EE would deprive people of

³⁶ TRAI, *Prohibition of Discriminatory Tariffs for Data Services Regulations 2017*, https://traigov.in/sites/default/files/Regulation_08022016.pdf.

³⁷ Access Now, *Indian regulator stands up for Net Neutrality, rules against zero-rated services*, <https://www.accessnow.org/press-release/indian-regulator-stands-up-for-net-neutrality-rules-against-zero-rated-services/>.

³⁸ TRAI, *Net Neutrality*, <https://www.traigov.in/telecom/net-neutrality>.

³⁹ BBC, *India net neutrality rules could be world's strongest*, <https://www.bbc.com/news/world-asia-india-42162979>.

⁴⁰ Access Now, *Access Now comments to TRAI pre-consultation paper on net neutrality*, https://traigov.in/sites/default/files/AccessNow_30_05_2016.pdf.

⁴¹ Access Now, *A step forward for Net Neutrality in India; a leap ahead for the open internet*, <https://www.accessnow.org/press-release/step-forward-net-neutrality-india-leap-ahead-protecting-global-open-internet/>.

⁴² Indian Express, *Govt wants to keep internet open, safe & accountable: Union minister Rajeev Chandrasekhar*, <https://indianexpress.com/article/cities/ahmedabad/govt-keep-internet-open-safe-accountable-union-minister-rajeev-chandrasekhar-7929307/>



confidential communication channels that preclude surveillance, including from the service provider itself, thereby compelling them to expose personal data to interception.

The unavailability of such platforms would disproportionately affect the safety of certain groups within society, who are often targeted for their identity, for what they, and for whom they speak with, including for instance, human rights defenders, journalists, women, and the LGBTQI+ community.

It is important to note that public servants, security and law enforcement officials also use end-to-end encrypted OTT communication platforms for secure communications and banning them would undercut efforts to maintain/restore stability and law and order. Similarly, journalists would not be able to communicate safely with their sources, making reporting, and therefore accountability, difficult to achieve.

Several people rely on encrypted OTT communication services to carry out their trade and earn a livelihood. For instance, through WhatsApp, businesses offer services, fulfil orders and facilitate payments. The adverse and astronomical economic costs of internet shutdowns, to individuals as well as the state, are well documented.⁴³ Selective banning of platforms would paint a similar picture.

In 2020, TRAI rightly acknowledged the importance of encrypted services by noting that *“Imposition of any requirements to cater to get the details of communication in an intelligible form or clear text would either lead to change in the entire architecture of such OTT services which might not provide same level of protection as offered today or would require to introduce provisions which may make the agents involved in the communication vulnerable to unlawful actors.”*⁴⁴

Summary recommendations:

Access Now respectfully urges TRAI to consider the following recommendations:

1. To recognise that OTT services cannot be regulated in the same manner as TSPs and to not bring them within the framework for licensing or impose any fees for network usage, which would hurt free and open internet access;
2. To protect and strengthen net neutrality, and refrain from implementing any measures that would undermine this crucial rights-respecting principle and reflect

⁴³ Mint, *The cost of internet shutdowns in India, in charts*, <https://www.livemint.com/economy/internet-shutdowns-are-a-costly-affair-and-india-leads-in-them-11651475862075.html>.

⁴⁴ TRAI, *Recommendations on Regulatory Framework for Over-The-Top (OTT) Communication Services*, https://tra.gov.in/sites/default/files/Recommendation_14092020.pdf.



a regression in TRAI's policy positions, which have previously strongly supported net neutrality;

3. To prevent selective banning of platforms, as it would perpetuate the harms of internet shutdowns, and take away from the goal of an open, safe, trustworthy and accountable internet;
4. To recognise that selective banning is not necessary, proportionate, or the least restrictive measure, and would do more harm, including to people's rights and freedoms, than good;
5. To protect end-to-end encrypted communication services and prohibit any temporary or permanent ban of such services, as they play a critical role in enabling people to stay safe online and exercise fundamental rights, including the right to privacy and free expression;
6. To consult on and enable progress on the rights-affirming recommendations of Parliament's Standing Committee on IT in its 26th Report on suspension of telecommunication services. TRAI must urge the Department of Telecommunications to engage with these recommendations – such as the creation and maintenance of a database of all instances of suspensions – and not selectively with the ones that are in fact rights-damaging, such as the one encouraging selective banning of platforms.

Conclusion

We thank you for the opportunity to participate in this consultation. We remain available for any clarification or queries in relation to this feedback, and hope to be of further assistance in this important process.

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PROPOSALS FOR REGULATING INTERNET APPS AND SERVICES: UNDERSTANDING THE DIGITAL RIGHTS IMPACT OF THE “OVER-THE-TOP” DEBATE

By Javier Pallero and Raman Jit Singh Chima

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INTRODUCTION

The “Over-the-Top” telecom regulatory debate impacts the open internet and human rights

Over the past two years, national regulators in the telecommunications and broadcasting sectors have often discussed regulatory proposals to impose new rules for what is known as “Over-the-Top” or “OTT”) services. These technical and acronym-laden regulatory discussions have significant implications for the future of the open internet and the digital rights of users.

Many proposals have specifically argued that so-called OTT services — comprising many of the internet applications and services that we all use every day — should be regulated in a manner similar to legacy telecommunications and internet access provider services. Initiatives to establish telecom sector-style regulation of “OTT” services are likely to have a significant impact on Net Neutrality specifically, as well as more widely on users’ rights to free expression, access to information, and the capacity of societies to harness the internet’s benefits for economic, social, and cultural development.¹

Without permissionless innovation and Net Neutrality (including the end-to-end principle), the internet would not be what it is today. And without smart policy responses to the OTT regulatory debate, we risk closing off avenues for innovation and free expression as technology advances, when we should be opening them.

What is “OTT”? Be cautious using this term

The term “Over-the-Top” or “OTT” is a tricky umbrella term. Many telecom regulatory discussions are based on a definition of OTT services as referring to “applications and services, which are accessible over the Internet and ride on operators’ networks offering Internet access services.”² This definition implies that internet applications are like traditional telecommunications applications, when they are not. As the International Telecommunication Union (ITU) “ICT Regulation Toolkit” states:

“OTT services are enabled by the de-layering of the industry. IP has separated carriage from content and allowed ‘over-the-top’ content and applications providers to deal directly with end users over networks whose owners and operators are excluded from these transactions.”³

The ITU’s ICT Regulation Toolkit doesn’t provide an exhaustive list of what constitutes “OTT,” instead indicating that Voice-over-Internet Protocol (VoIP) was the first “OTT concept,” a phrase demonstrating the nebulousness of the term. Other telecommunications regulators have noted that the definition needs work, and acceptance of the term can vary. Indeed, the national regulators chairing the ITU’s study group on this topic (ITU-T Study Group 3)⁴ stated:

“As yet there is no widely accepted definition of OTT. It is important that this is addressed by ITU, given that the definition will affect the scope of ITU’s analysis of OTT. Our current discussions consider OTT to be any Internet application that may substitute or supplement

[1] For example, placing additional restrictions on the ability for users and other actors to easily create and distribute web content will likely result in less locally relevant content on the internet, in turn impacting its overall value as well as failing to address demand-related factors that would otherwise have helped increase internet uptake.

[2] Commonwealth Telecom Organisation, CTO OTT Study, <http://www.cto.int/consultancy/cto-ott-study/>.

[3] International Telecommunications Union, ICT Regulation Toolkit / Competition and Price / Regulating Over the Top Services, <http://www.ictregulationtoolkit.org/toolkit/2.5.2>.

[4] <http://www.itu.int/en/ITU-T/about/groups/Pages/sg03.aspx>

traditional telecommunication services, from voice calls and text messaging to video and broadcast services.”⁵

That definition is very broad. In effect, the current telecommunications regulatory sphere could see nearly all services provided over the internet defined as “OTT” (that is, offered over the top layer of the network).

Use of the term in regulatory proposals can correlate to the interests of the stakeholders involved. Telecommunication providers use it to differentiate the services they provide on their own networks and under their brand (such as SMS, licensed voice, or enterprise communication services) from similar services that run over the internet and use internet protocols (e.g., services like WhatsApp, Viber, Skype). This can have regulatory advantages, favoring some players over others. For example, in some cases, those using the term can leverage it as a catch-all banner to push for more regulation of the internet services and content they choose, given that nearly everything on the application layer could be called “OTT.” Indeed, in some countries the debate over regulating so-called OTT services is taking place with regard to a wide variety of applications and services such as intermediation apps (e.g., Uber or Airbnb), and large online platforms (e.g., discussions about antitrust and web search, content quotas for video on demand, or social networks moderating user access to information).

With respect to telecommunications regulation, participants in the “OTT” discussion should use the term cautiously, since it can serve to understate the impact proposed regulations can have on the internet services, applications, and content that we use every day. We must recognize that when we use “OTT” in this context, we are referring not to a specialized subset of services but a broad spectrum of applications, services, and content that millions of people rely on. In this paper, we will refer to these services simply as “internet applications or services” where it does not cause confusion, since the phrase more accurately describes that broad spectrum.

Understanding what is at stake

In this paper, we focus primarily on the “OTT” regulatory debate in relation to the internet and telecommunications sector. Our specific area of interest is the debates before national authorities and in the international telecom regulatory sphere — often arising from arguments advanced by telecoms operators and some traditional content carriers — on whether to regulate “OTT services” in the same way that traditional communications and media technologies are regulated. Some of these proposed regulatory measures include:

-
- ▶ Licensing or registration requirements with telecom authorities

 - ▶ Local content production requirements

 - ▶ Local data retention, storage, and law enforcement access requirements

 - ▶ Taxation as broadcasting services or telecommunications services

 - ▶ Universal Service Fund contributions

 - ▶ Local content funds contributions

 - ▶ Public service regulation (including telecom levies and license fees, government control and public service obligations)

[5] ITU Blog, Q&A: What’s the economic impact of ‘over-the-top’ (OTT) players, <https://itu4u.wordpress.com/2017/03/15/qa-whats-the-economic-impact-of-over-the-top-ott-players/>.

Within this framing, our primary concern is the impact proposed measures may have on human rights. In this regard, we are most concerned by proposals that would require companies that offer “OTT” internet applications or services to get a license or register with the government before they can make their services available in a country, mandating that they be deployed in the same highly controlled way that legacy telecommunications access services are deployed.

This type of regulation is a poor fit for internet applications or services, and would have negative consequences for internet users, potentially impacting free expression and the capacity for innovation. Specifically, requiring individuals or companies to obtain a license in order to provide an internet application or service would interfere with the right to free expression under the current human rights law interpretation of Article 19 of the International Covenant on Civil and Political Rights (ICCPR). A landmark report by the United Nations Special Rapporteur on the Freedom of Expression in 2011 spoke to this point, indicating that:

“Furthermore, unlike the broadcasting sector, for which registration or licensing has been necessary to allow States to distribute limited frequencies, such requirements cannot be justified in the case of the Internet, as it can accommodate an unlimited number of points of entry and an essentially unlimited number of users.”⁶

Some proposals for regulating “OTT” applications or services would also impact Net Neutrality. As the Global Network Neutrality Coalition states, “net neutrality requires that the Internet be maintained as an open platform, on which network providers treat all content, applications and services equally, without discrimination.”⁷ Mandating an “OTT” license or registration in order to be able to offer internet applications or services directly implicates these core principles. Internet users would no longer have an open platform for access to these applications or services without discriminatory interference at the telecommunications network level. Instead, their choices would be limited to the applications or services licensed or registered with telecommunications authorities.

In order to avoid regulatory outcomes that harm the open internet and the human rights of users, we propose the following high-level policy recommendations to guide engagements in OTT debates, which we explain in detail in the following section:

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- I. Avoid applying one-size-fits-all telecom-style licensing frameworks onto internet applications or services.**
-
- II. Shape regulatory intervention of internet applications or services on a foundation that considers the public interest and human rights.**
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[6] United Nations - Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 16 May 2011, http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf (while noting that “this does not apply to registration with a domain name authority for purely technical reasons or rules of general application which apply without distinction to any kind of commercial operation”)

[7] Global Net Neutrality Coalition, This Is Net Neutrality, <https://www.thisisnetneutrality.org>.

How debate on regulation of “OTT” services is unfolding around the world

Listed are key policy and regulatory debates that illustrate the spectrum of discussion on so-called OTT services globally.

— LATIN AMERICA —

In **Brazil**, lobbyists have pushed for regulating or otherwise restricting the public availability of internet messaging applications such as [WhatsApp](#). Cinema regulatory agencies are also looking for authority to [tax](#) and [regulate](#) internet video-on-demand (VOD) services.

In **Uruguay**, lawmakers have proposed [new taxation rules](#) for internet applications and services. This follows a bill introduced last year to regulate “internet applications” [in general](#).

In **Colombia**, cable operators are [asking](#) for content quotas and broadcasting regulation for VOD services.

— ASIA - PACIFIC —

In **India**, lobbyists have campaigned before the Telecom Regulatory Authority of India (TRAI) to push for [a telecom licensing frameworks for “OTT” services](#). TRAI held [a regulatory workshop on the issue in August 2014](#) and issued a [consultation on “OTT” services and Net Neutrality](#) in March 2015. A committee of experts under the Union Government’s Department of Telecommunications prepared [a draft proposal to require licensing/oversight of communications application services](#) in August 2015. TRAI’s [most recent consultation paper on Net Neutrality](#) (issued in January 2017) delinks the issue of “OTT” regulation from the current policy and rulemaking exercise, though [industry groups have made submissions on “same service, same rules”](#) regulatory proposals to the Department of Telecommunications as it solicits input on drafting a new National Telecom Policy.

In **Vietnam**, the government issued a [draft “OTT” circular](#) in November 2014, which included regulations for internet-based voice and text messaging services and data localisation and mandates for local partnership. This regulatory circular appears not to have been enforced by Vietnamese authorities.

In **Thailand**, regulators are considering a proposal for “OTT content providers” that emerged in April 2017. The National Broadcasting and Telecommunications Commission (NBTC) [indicated](#) at the beginning of the summer 2017 that it would initiate a detailed regulatory consultation on the proposal, which is based on [a background document prepared by an external consultancy group](#), later in the year, and is considering implementing its approach here via its legislative proposals regarding the Telecom Business Act, the Broadcasting Business Act, and the Frequencies and Allocation Act. The NBTC has proposed a registration requirement for “OTT” video services, but as of late July 2017, it [appeared to reconsider and delay](#) the proposal for three months of further study and consideration.

In **Indonesia**, regulators [issued a set of rules for “OTT” applications and services s in 2016](#), covering [a range of areas](#). In addition to setting forth rules for legal registration and permanent establishment in the country, the regulations also obligate providers of internet applications and services established outside of Indonesia to carry out content monitoring and comply with all government-issued requests.

How debate on regulation of “OTT” services is unfolding around the world

Listed are key policy and regulatory debates that illustrate the spectrum of discussion on so-called OTT services globally.

— MENA —

In **Morocco**, the Telecommunications Regulatory National Agency (ANRT) ordered [telcos to block Voice over IP \(VoIP\) services](#) in 2016 on the grounds that companies must have a telecommunications license for VoIP services to be made available in the country.⁸ After a court challenge, the block was lifted in November 2016.⁹

— SUB-SAHARAN AFRICA —

In **Kenya**, policymakers are considering proposals to require broadcast sector regulations for online video services like Netflix and [discussing “OTT” regulatory proposals or guidelines](#) for the ICT sector targeting internet services and online platforms.

In **Nigeria**, the Nigerian Communications Commission released a study titled [“An overview of provision of over-the-top services”](#) that analyzes the state and implications of “OTT” services in Nigeria. The commission proposes conducting “a stakeholder’s consultative forum on the provision of over-the-top services in Nigeria to determine if regulation is required for such services and its impact on the growth of the Nigerian Telecoms industry.”

In **South Africa**, the South African Parliament’s Committee on Telecommunications and Postal Services held [a hearing on “OTT Policy and Regulatory Options” in January 2016](#), with presentations by the government, the Independent Communications Authority, telcos, tech companies, and other interest groups. The [final report of the committee](#), published in March 2016, did not provide any specific recommendations or findings on the issue.

— GLOBAL: INTERNATIONAL TELECOMMUNICATIONS UNION —

The **ITU-T (ITU Telecommunication Standardisation Sector)** Study Group 3 has been tasked to study the economic impact of “OTT” services. [The work area is publicly listed](#) to include developing an “international standard on OTT,” and new work on two topics, namely the “Impact of OTT bypass” and “Partnerships between OTT players and mobile network operators.”

In June 2017, the **ITU’s Council Working Group on International Internet-related Public Policy Issues** [opened a consultation](#) on “Public Policy considerations for OTTs,” focusing on five topics for written input by August 2017 and a public meeting in September 2017:

- ▶ What are the opportunities and implications associated with OTT?
- ▶ What are the policy and regulatory matters associated with OTT?
- ▶ How do the OTT players and other stakeholders offering app services contribute in aspects related to security, safety, and privacy of the consumer?
- ▶ What approaches might be considered regarding OTT to help the creation of environments in which all stakeholders are able to prosper and thrive?
- ▶ How can OTT players and operators best cooperate at local and international level? Are there model partnership agreements that could be developed?”

[8] Middle East Eye, Morocco banned Skype, Viber, WhatsApp and Facebook Messenger. It didn’t go down well, 9 March 2016, <http://www.middleeasteye.net/columns/boycotts-appeals-petitions-restore-blocked-voip-calls-morocco-1520817507>.

[9] TeleGeography, Morocco lifts ban on OTT VoIP services, 7 Nov 2016, <https://www.telegeography.com/products/commsupdate/articles/2016/11/07/morocco-lifts-ban-on-ott-voip-services/>

OUR RECOMMENDATIONS

Our discussion above shows that in considering regulating “OTT” services, there are legitimate concerns for regulators, technical operators, businesses, and users. In that context, policymakers could apply a number of regulatory solutions, but these ought to address the particularities of the issues and service under scrutiny, rather than applying a single predetermined “fix.” Regulations could be applied ex post or ex ante, but the goals, the local context, and the interests at play should determine what they will be (versus, for example, applying new rules on a theory of achieving regulatory “parity” with telecommunications providers). Regardless of the regulatory proposal in question, stakeholders must take care to safeguard the fundamental rights of users and preserve the open internet as an engine for innovation and development. To achieve a rights-respecting, user-empowering regulatory model, we offer the following recommendations:

I. Avoid applying one-size-fits-all telecom-style licensing frameworks onto internet applications or services

Regulatory regimes should be fit-for-purpose. We ought not to apply telecom-style licensing regulations to internet services or mobile apps — even those offering online communication services — if they are not being launched or commercially offered as telecom services (which are precisely defined in most national telecommunications legal frameworks). This would subject them to licensing requirements or pre-government authorisations specific to the telecom or broadcast sector, and this can harm free expression and the open internet.

Be cautious about seeking to “level the playing field”: the difference between telecom services and internet applications or services

— TELECOM SERVICES —

There are strong public interest reasons for regulating telecommunications services and imposing specific obligations (such as “must carry,” neutrality, regulated pricing, etc.) For instance:

Telecommunications industries exploit scarce resources that belong to the “eminent domain” of states: namely telecommunications spectrum and in some cases infrastructure that was built by governments.¹⁰ This earlier thinking of “scarcity” in broadcast spectrum is key to understanding the “must carry” regulations often enforced on telecommunications,¹¹ and cable TV and the “content quotas” that are imposed on audiovisual service providers.¹² There is a public interest in protecting freedom of expression in all its facets and pluralism via “positive discrimination” when private players are granted exclusive or semi-exclusive rights to use public resources such as radiofrequency spectrum and common telecom physical infrastructure.

Additionally, the **exploitation of public resources by telecommunications operators implies an economic advantage** that is there from the beginning and that justifies regulations about investment quotas, universal service obligations, social tariffs, etc.

[10] This is especially true in the case of Latin America before the telecommunications liberalisation in the 90s.

[11] “Must-carry obligations... require certain television and or radio channels to be carried over certain networks” <https://www.twobirds.com/en/news/articles/2003/mustcarryrules>;

[12] “Countries with massive domestic markets like the United States and India have considered there is no need to protect the output of their cultural sectors and have not introduced content regulation... Other countries have responded with measures that include content quotas, direct subsidy, taxation concessions and the establishment of publicly funded broadcasters. Many have used a mix of measures.” http://musicinaustralia.org.au/index.php?title=Broadcasting_Content_Quotas_%E2%80%944_An_International_Overview

Be cautious about seeking to “level the playing field”: the difference between telecom services and internet applications or services

This advantage is economy of scale.¹³ This is particularly true these days when “triple-play” or “convergent” operators are appearing throughout the world. Not every company will be able to offer such efficient communications “bundles” or “packs”; meaning that the telecommunications markets have high barriers to entry and therefore are prone to cartelisation and concentration (lack of competition).

— INTERNET APPLICATIONS AND SERVICES (“OTT”) —

Meanwhile, in contrast:

The internet is defined by abundance, not scarcity.¹⁴ Even though there are services / protocols that serve the same function as telecommunications technologies (instant messaging, Voice over IP, video on demand, etc.), the reasons for regulating their use are different. The case for licensing-style regulatory intervention in the name of supporting either diversity or competition has not been made.

On diversity: On the internet, anyone who has access to the network can benefit from its neutral and open characteristics. Freedom and consumer choice are, by definition,¹⁵ often the main factor that decides what kind of content or service is popular. Moreover, since there are no fixed quotas or quantitative limitations to content, actors who have difficulty getting their own media outlets, or whose dissident or minority viewpoints deter broadcasters, can reach interested communities on the internet.¹⁶ In conclusion, the barrier of entry to the communications “market” on the internet is low enough that almost any interested party can operate a communications service or a media outlet, effectively supporting democratisation of speech. Where there are significant barriers to entry or network effects from dominant players impeding diversity or the functioning of the market, antitrust/competition law authorities certainly have a role and must engage.

On competition: In theory, economic actors “compete” to sell products or services that may offer similar value, and could serve as substitutes for one another. However, users are migrating in their choice of technologies rather than in the use of products or services; telecommunications services and services based on internet protocols are so different that they could barely be considered competing “substitutes.” Consider SMS vs. internet messaging apps like Viber, Signal, WhatsApp, or Snapchat: their business models are different (consumption vs. data exploitation); the technology they use is different; the barrier of entry to the market is different (and therefore the offering of alternatives is different); and their degree of availability to the public is different (there are messaging platforms that are open for everyone to use while others are closed or exclusive. Not having access to one of them does not imply endangering the right to communication, while not having access to SMS, for instance, leaves the user with very few or no available substitutes).

[13] During the telecommunications deregulation of the 90s in Latin America, telecommunications operators acquired privatized essential facilities that formerly belonged to the state and were provided with long-term concessions and territories for their exclusive exploitation. This led to *de facto* monopolies in different regions in countries which allowed them to set up very efficient cost structures. After the concessions ended and spectrum permits were put on public auction again, these players would count with a technological and cost structure that would allow them to be almost unbeatable.

[14] <https://www.wired.com/1997/09/newrules/>

[15] Violations of neutrality, shutdowns (on various forms), surveillance and its chilling effect, etc., are exceptions, but they also happen on telecommunications networks and other ICTs.

[16] This includes, but is not limited to: indigenous populations, citizen journalists, LGBTI collectives, localized / multilingual content creators, artists outside the copyright-driven production scheme, etc.

Safeguarding free expression and Net Neutrality requires treating “OTT” services — including Video on Demand (VOD), Voice over Internet Protocol (VoIP), mobile messaging, etc. — the way we treat any other kind of internet traffic. It is therefore crucial that we carefully examine proposals for new laws, regulations, or amendments to existing legal frameworks that would create telecom licensing-style rules for internet platforms and online services, as they would directly impact users’ capacity to enjoy their rights to free expression and access to information.

This does not mean that “OTT” services should never be subject to any regulation whatsoever. For instance, there may be exceptions if particular services use restricted public resources that integrate the licensed telecom layer. Such situations may require the adoption of some or all parts of national telecom regulatory requirements.

National governments may also consider economic regulatory proposals such as taxation measures for e-commerce or application/services sales taking place within their jurisdiction, as well as wider international regulatory discussions regarding transfer pricing with respect to ICT services. In any case, taxation schemes should consider the specific traits of different services and companies behind them so as not to represent a barrier of entry for small businesses.

II. Shape regulatory intervention of internet applications or services on a foundation that considers the public interest and human rights

Public policy for the internet (and convergent communications technologies) must consider the public interest in realizing fundamental rights and meet social needs in a manner that is respectful of local socio-cultural contexts. It is crucial to distinguish between a framework of regulating the technology itself and regulating human behavior while using the technology. Regulating the technology itself — without considering its social role and implications — can introduce inequalities. Regulating conduct can be easier, more targeted, and less a danger to technological innovation.

Nevertheless, not every attempt to regulate new technologies or business practices retards innovation or damages free expression. Legal frameworks and regulatory regimes can enable users to realize their digital rights and enjoy the other benefits the internet brings. Examples of a positive regulatory discussion include helping to clarify that companies running user-generated-content services should not be required to police and censor speech outside of legal process;¹⁷ or that rule-based smart spectrum allocation advances innovation and the public interest; or that policies that protect users’ data increases trust in new communication services.¹⁸

[17] A common illustration of this are frameworks to define and limit the liability of internet intermediaries, often referred to as intermediary liability laws.

[18] For instance, several telecom regulators have been acting to try to safeguard and strengthen legal measures to protect user data and privacy in telecommunications and mobile messaging. In the U.S., the Federal Communications Commission passed broadband privacy rules in 2016, though these were later repealed by the U.S. Senate after the 2016 elections (see <https://www.accessnow.org/access-now-condemns-u-s-senate-measure-gut-internet-privacy/>). The European Union is currently considering reforms to its e-Privacy package which would include a measure to clarify and strengthen oversight of “OTT” messaging services in order to safeguard user rights to privacy and confidentiality of communications (see <https://www.accessnow.org/europes-eprivacy-regulation-must-level-playing-field-users/>). The Indian TRAI also launched a new consultation process in August 2017 on the issue of privacy, security, and ownership of data in the telecom sector (see <http://traigov.in/consultation-paper-privacy-security-and-ownership-data-telecom-sector>).

When considering proposals to regulate internet applications or services, we must consider issues such as privacy and data protection, in addition to cross-cutting regulatory regimes such as consumer protection law, tax and transfer pricing, emergency and disaster response protocols, and antitrust scrutiny. Those issues and broader general-conduct legal standards are beyond the scope of this current paper, but they should be addressed, separately from the question of whether we should regulate “OTT” services the way we do telecom services.

We must be skeptical of arguments that telecom services and internet applications or services are perfect substitutes for one another. While they can offer similar functionality, they are based in different technologies that relate to state-level interests in a different manner.¹⁹ **We must also remember that many of the economic arguments advanced to further telecom licensing-style regulation for internet applications or services have been contested, with research finding, for example, that the expanding use of data services might actually benefit telcos.**²⁰

As a May 2017 paper from the consultancy Communications Chambers noted, there is a “free rider” fallacy generally at play in this debate, arising out of a failure to recognize that **internet applications can create demand for network access**, and that **application providers are in fact investing in telecom networks particularly with respect to servers and network infrastructure.**²¹

[19] I.e. telecommunications regulation is based on the exploitation of public goods (land use easements; exploitation of spectrum, etc.) that are have scarcity or interference-related concerns. The regulation of internet services is related to specific protocols (TCP/IP; SMTP, P2P, etc.) and to the content of communications that travel through physical infrastructure. In the case of internet applications and services, there are no technical limits for the existence of multiple providers / suppliers.

[20] See e.g.- Deepak Shenoy, *Telcos are NOT Losing Money To Data Services*, MediaNama.com, 16 April 2015 <http://www.medianama.com/2015/04/223-net-neutrality-telcos-are-not-losing-money-to-data-services-deepak-shenoy/>; SaveTheInternet.in filing to Telecom Regulatory Authority of India consultation paper on differential pricing, <http://www.savetheinternet.in/files/diffpricing-cc.pdf> (pages 5 - 9, speaking to telco earnings call with respect to India and confidence in being able to grow and afford capital investments despite online services).

[21] Brian Williamson: Communications Chambers, Deconstructing the “level playing field” argument – an application to online communications, May 2017, available at <http://static1.1.sqspcdn.com/static/f/1321365/27575015/1495793366237/LPFMay24.pdf?token=AxPym8wn4wb%2BAPWBXfpxyAkqLUE%3D>

CONCLUSION

“OTT” requires fact-based regulation that supports innovation and safeguards human rights

As we have noted, stakeholders in this debate must use the term “OTT” cautiously, since it can serve to understate the impact that some regulatory proposals can have on the internet applications or services that we use every day. Overbroad, telecom-style regulation and licensing can harm the open internet and the principles that sustain our enjoyment of digital rights, impacting in particular permissionless innovation, Net Neutrality (including the end-to-end principle), and low barriers of entry.

Thus, we should counter the trend towards the commoditization of the internet, where applications are licensed separately and offered in “bundles” with internet connection packs — the trend we are seeing with “zero rating” and Internet.org-style connectivity solutions. We must safeguard the basic principles and narratives of the free, open, neutral, and interoperable internet. It is those features that enabled the growth and development of this technology in the first place.

Nevertheless, we cannot assume a universally libertarian, anti-regulation position. Instead, we should **push for context appropriate, fact-based regulatory models** that defend and extend the rights of users, without jeopardizing the core principles that keep the internet free and open for innovation.

Examples of regulation that would **benefit users and protect rights** include:

- ▶ **Safeguarding Net Neutrality in the law;**
- ▶ **Protecting principles to keep the internet open to innovation and free expression, such as the end-to-end principle, open protocols, and the ability to communicate securely;**
- ▶ **Advancing meaningful data protection and privacy laws and measures to safeguard the rights of users;**
- ▶ **Extending connectivity through rights-respecting, equitable programs and infrastructure;**
- ▶ **Fighting corporate and government surveillance mechanisms and fostering the improvement of technical measures to protect privacy (including strong encryption);**
- ▶ **Maintaining clear emergency services communication solutions; and**
- ▶ **Holding companies accountable to their human rights obligations, particularly those relating to preventing harm to users — failing which, ensuring a focus on remedy and redress.**

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Access Now defends and extends the digital rights of users at risk around the world. By combining innovative policy, global advocacy, and direct technical support, we fight for open and secure communications for all.

We are a team of 40, with local staff in 10 locations around the world. We maintain four legally incorporated entities — Belgium, Costa Rica, Tunisia, and the United States — with our tech, advocacy, policy, granting, and operations teams distributed across all regions.