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Inclusion or Exclusion of OTT from the definitions of Telecommunications in Telecommunications Act

Background

The recently approved Telecommunications Act of 2023 has sparked significant controversy. This legislative milestone, aimed at revitalizing and consolidating the regulatory framework for telecommunications, represents a crucial decision by the parliament to promote sectoral growth. Introduced for public consultation in 2022, the act's primary objective is to repeal outdated laws such as the Indian Telegraph Act, 1885, and the Indian Wireless Telegraphy Act, 1933.

A notable aspect of the Telecommunications Act 2023 is the intentional exclusion of references to Internet-based and Over-the-Top (OTT) communications from the definition of telecom services. However, it maintains comprehensive definitions for 'telecommunication' and 'message.' This has raised concerns about the potential application of the Act to a wide range of Information Technology (IT) and digital services.

The issue at hand has been a source of disagreement, leading to extensive discussions among various stakeholders in the industry and the Department of Telecommunications (DoT). In the initial draft of the telecommunications bill, Over-the-Top (OTT) providers were explicitly included in the definition of 'telecommunication service,' making them subject to authorizations and related conditions. However, the current version of the Telecom Act no longer contains such a provision.

Despite this omission, the definition of 'telecommunication' remains broad, encompassing all forms of message communication, particularly the transmission and reception of messages through electromagnetic systems—a crucial aspect of Internet technology essential for OTT players like social media apps, video and media apps, and voice call services to offer their services. This comprehensive definition has raised concerns within the OTT industry.

One perspective argues that, given this definition, most OTT technologies may not independently transmit or facilitate the reception of messages (relying on a combination of the Internet network and the mobile/computer device). Therefore, it could be contended that OTTs might not be considered as providing telecommunication services. Additionally, the official clarification from Information Technology Minister Ashwini Vaishnav on December 22, 2023, asserts that the Telecom Act does not regulate the OTT industry and that MeitY (Ministry of Electronics & Information Technology) will continue to oversee it. This clarification provides further insight into the regulator's stance.

However, considering the wording mentioned earlier, a case-specific evaluation of OTT technological capabilities and any efforts by OTT players to expand telecommunication networks in connection with their services will be crucial for a thorough examination of potential regulatory implications.

The Act reignites the longstanding debate on Net Neutrality with the exclusion of OTTs from the Telecommunications Act. This has sparked concerns among Telecom Service Providers, arguing that OTTs enjoy an unfair advantage by not being subject to the same rigorous regulations and licensing fees. Telecom Operators assert that OTT platforms impact their revenue streams. On the flip side, OTTs view this as a significant stride towards fostering innovation and growth in their sector, promoting an internet free from discriminatory regulations and fostering a fair online environment.

The decision by the Department of Telecommunications (DoT) to exclude OTT applications from the teleservice's definition signifies a notable shift in the dynamic landscape of digital services in India. This regulatory move reflects a thoughtful strategy aiming to balance the interests of various stakeholders, including telecom operators, consumers, and content providers. As the digital landscape continues to evolve, discussions and examinations regarding the roles and regulations of OTT applications are expected to endure. While this amendment serves as a crucial starting point, it is poised to fuel an ongoing and active debate among industry stakeholders, setting the stage for continued scrutiny and discourse in the ever-evolving arena of digital services.

Legal Position

Contextual Basis for the Distinction

Before exploring the potential impact of the amendment, it is essential to examine the rationale behind the differentiation made prior to the enactment. In the realm of contemporary communication services, the juxtaposition of Over-the-Top (OTT) communication services and traditional telecommunication services has become a central focus of analysis. This examination, carried out in collaboration with the Department of Telecommunications (DoT) and the International Telecommunication Union Development (ITU-D), delves into the changing dynamics shaped by the integration of Internet Protocol (IP) in communication networks.

The transformative impact of IP is particularly evident as it enables OTT entities to directly provide services to end-users. This departure from conventional hierarchical telecommunication structures lies at the heart of the evolving landscape between OTT and traditional services.

Traditional telecommunication services, characterized by their reliance on dedicated, circuit-switched networks, are undergoing a fundamental shift. The Department of Telecommunications (DoT) emphasizes the importance of IP-based communication networks, where the Internet, primarily propelled by IP, serves as a conduit for a diverse range of services, including voice and messaging.

The International Telecommunication Union Development (ITU-D) adds depth to the discussion by unravelling the various dimensions of this transformation. The integration of IP in communication networks empowers OTT providers to emerge as direct competitors, offering services that traditionally belonged to established telecommunication entities. This

intricate interplay between innovation, regulation, and consumer choice demands a nuanced understanding.¹

The TRAI Consultation Paper, issued on 07.07.2023, titled "Consultation Paper on Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services²," offers a comprehensive analysis of the intricate relationship between Over-the-Top (OTT) communication services and traditional telecommunication services. Exploring the regulatory framework of traditional telecommunication services, governed by acts like the Indian Telegraph Act, the document traces the transition from voice-centric to data-centric services, indicating significant shifts in revenue compositions.

Emphasizing the disruptive impact of OTT communication services, the paper meticulously categorizes OTTs based on definitions and classifications, highlighting their direct substitution for traditional telecommunication services. The comparative section underscores the transformative role of OTTs, enabled by the delayering of communication networks through Internet Protocol. This presents a nuanced understanding of how OTT applications operate independently, establishing closed-user groups within applications and eliminating the need for traditional interconnection agreements.

Changes brought in

The recent amendment brings about a significant restructuring in the regulatory oversight of Over-the-Top (OTT) platforms, designating regulatory control to two key ministries—the Ministry of Electronics and IT (MeitY) and the Ministry of Information and Broadcasting (MIB)³. MeitY takes on the role of the nodal authority responsible for regulating specific OTT players like WhatsApp, focusing on aspects related to electronic and information technology. Concurrently, streaming applications such as Netflix fall within the jurisdiction of the MIB, traditionally overseeing broadcasting and media-related matters.

¹International Telecommunications Union, *Collaborative Framework for OTTs*, Recommendation ITU – T D. 262 (2019), https://www.itu.int/rec/dologin_pub.asp?lang=e&id=T-REC-D.262-201905-I!!PDF-E&type=items.

² Telecom Regulatory Authority of India, *Consultation Paper on Regulatory Mechanism for Over-The-Top (OTT) Communication Services*, released on 07.07.2023, https://www.trai.gov.in/sites/default/files/CP_07072023.pdf

³ Section 2(t) Telecommunications Act, 2023; Clause 2(21) Telecommunications Bill, 2022.

This division reflects a nuanced approach, recognizing the distinct characteristics of different OTT services. The Ministry of Electronics and IT actively participates in crafting the Digital India Act⁴, tailoring regulatory measures to address the intricacies of electronic and information technologies. Conversely, the Ministry of Information and Broadcasting is leading the way with the Broadcasting Services Bill, aligning regulations with established norms for broadcasting and media services.

The division of regulatory responsibilities highlights the diverse nature of OTT platforms and their content. This allows MeitY and MIB to customize their regulatory frameworks according to the specific requirements of the platforms under their supervision, ensuring a more nuanced and effective oversight. This shift not only simplifies regulatory processes but also improves the adaptability of regulations to the ever-changing landscape of digital services. In essence, the amendment provides clarity and specificity to regulatory control, paving the way for a more comprehensive and specialized approach in governing the dynamic realm of OTT services in India.

Issues being contested

Substitutability

OTT Communication Service Providers distinguish themselves by delivering services over the internet rather than through proprietary networks. The determinative factor in deciding whether regulatory or licensing norms applicable to Telecom Service Providers (TSPs) should be applied to OTTs is their substitutability⁵. However, it's crucial to avoid a blanket extension of these TSP norms to OTT communication service providers. The regulatory framework for OTTs needs to be specifically tailored to accommodate their internet-based communication services, drawing inspiration from the existing regulatory framework for TSPs.⁶

⁴ **Sanhita Chauriha**, "Explained: The Digital India Act 2023," *Vidhi Legal Policy Blog*, August 8, 2023, <https://vidhilegalpolicy.in/blog/explained-the-digital-india-act-2023/>

⁵ Supra Note 2.

⁶ **Telecom Regulatory Authority of India**, '*Recommendations on Regulatory Framework for Internet Telephony*' (2017), : "The separation of network and service layers of telecom service offerings is the natural progression of the technological changes in this domain. It is now possible to separate provision of service contents, configuration and modification of service attributes regardless of the network catering to such service https://www.trai.gov.in/sites/default/files/Recommendations_24_10_2017_0.pdf

The TRAI Consultation Paper on this matter makes reference to the European Union's proposed test under the draft Electronic Communications Code, which assesses the 'substantial or ancillary' nature of functionality.

Identifying functionality proves challenging, particularly when OTTs provide multiple services with diverse functionalities. The ever-changing nature of OTT business models adds complexity to this evaluation. The assessment of substitutability should focus on determining whether the service is akin to a communication service provided by TSPs and if it is offered independently, without supporting a distinct service that doesn't meet the criteria for a communication service.

Telecom Service Providers (TSPs) Advocacy for Equitable Regulation in OTT Communications:

The call for uniform regulations by Telecom Service Providers (TSPs) in the realm of Over-The-Top (OTT) Communications, adopting the "same service, same rules" paradigm, arises as a response to challenges within the existing licensing framework. The chosen licensing model significantly shapes the trajectory of sector growth, influencing market entry, competition dynamics, and the accessibility of networks and services. To ensure regulatory effectiveness without imposing unnecessary entry barriers, an approach grounded in the examination of international best practices is crucial.

Currently, TSPs face obstacles in the regulatory landscape governing telecommunication services. The existing framework mandates TSPs to acquire a Unified license, involving intricate compliances and a prolonged process reminiscent of the historical "License Raj," which persists in the telecommunications sector despite liberalization in other domains.

The solution to these challenges doesn't involve imposing outdated regulations on OTTs. Instead, a more effective approach entails a comprehensive overhaul and simplification of the existing regulatory framework applicable to TSPs. Recognizing the unique nature of services provided by both TSPs and OTTs is crucial within the current regulatory frameworks. Separate regulatory paradigms exist due to inherent differences in services, with further distinctions within OTT services based on service types such as social media, gaming, online curated content, or intermediary services. Despite potential overlaps, technological disparities

and usage nuances necessitate distinct regulations. Drawing an analogy, just as different modes of transportation share a common purpose but are regulated differently, TSPs and OTTs require nuanced regulations based on their unique characteristics.

Expanding the "Same Service, Same Rules" Perspective:

The absence of a defined term 'telecom service provider' in relevant legislation prompts an examination of the term 'telecommunication service' as defined under the Telecom Regulatory Authority of India Act, 1997. In essence, any entity providing telecommunication services qualifies as a telecom service provider ("TSP"). Consequently, certain services offered by Over-The-Top service providers ("OTTs") can be deemed similar or identical to those provided by TSPs.

Messaging services delivered through internet-based applications closely resemble text messaging services by TSPs, highlighting a parallel in communication mediums that do not necessitate internet connectivity. Voice calling services, a primary offering of TSPs, find equivalence in OTTs providing voice and video calling services over the internet. VoIP services offered by OTT communication service providers serve as direct substitutes for licensed TSPs' internet telephony services.

Crucially, the definition of 'telecommunication services' specifically excludes broadcasting services, requiring a clear delineation of 'communication services' provided by OTTs. It is vital to distinguish between OTT communication services and application services offered by OTTs. While application services disseminate content to the general public, OTT communication services involve real-time, person-to-person telecommunications, similar to services provided by licensed Internet Service Providers (ISPs). This distinction underscores that OTTs should not be perceived as offering services similar to TSPs in terms of one-to-one communication. Instead, OTT communication services align precisely with the nature of telecommunications services provided by licensed ISPs.

Increased Financial Burden on the TSP

Licensing Inequities :

Telecom Service Providers (TSPs) operate within a structured licensing framework, overseen by the Department of Telecommunications (DoT) and Telecom Regulatory Authority of India (TRAI). This regulatory landscape imposes an 8% Adjusted Gross Revenue (AGR)-based license fee on TSPs, coupled with additional government-prescribed fees. In contrast, Over-The-Top (OTT) players navigate a more lenient regulatory environment, exempt from the high fees and stringent regulatory obligations faced by TSPs. This fundamental contrast creates an inherently uneven playing field, impacting the financial dynamics of the industry

Data Protection Challenges

Telecom Service Providers (TSPs) are bound by stringent data protection mandates, compelling them to ensure the confidentiality of customer information. They must adhere to content regulations, prohibiting objectionable or unauthorized content on their networks. Additionally, TSPs are obligated to obtain explicit and informed consent from customers before collecting and processing their personal data. These measures include safeguarding data against unauthorized access, disclosure, or destruction. In contrast, Over-The-Top (OTT) platforms operate without equivalent regulatory constraints, exposing customer data to potential privacy risks. The absence of specific regulations governing data protection for OTTs exacerbates the financial disparities between TSPs and OTT players."

Bank Guarantees Discrepancy

Telecom Service Providers (TSPs) are obligated to furnish Performance and Financial Bank Guarantees to the Department of Telecommunications (DoT), acting as a financial safeguard for compliance. These guarantees encompass violations of license conditions, ensuring proper performance under the license agreement, and securing payments related to license fees and spectrum dues. In contrast, Over-The-Top (OTT) platforms are exempt from providing such guarantees, contributing to an imbalance where TSPs bear significant financial obligations for compliance, while OTTs operate without these commitments."

Record Keeping and Methodology Obligations

Telecom Service Providers (TSPs) are subject to meticulous financial record-keeping obligations. They are required to compile and maintain detailed accounting records, submit auditors' reports, and provide quarterly revenue accounts. Additionally, TSPs must furnish the Department of Telecommunications (DoT) with a comprehensive account of inter-operator settlements. Conversely, Over-The-Top (OTT) platforms face less stringent financial record maintenance requirements and are not subjected to the same level of scrutiny by the DoT, contributing to regulatory disparities.

Payment Obligations (LF, SUC, USOF Levy):

Telecom Service Providers (TSPs) bear a substantial tax burden, encompassing an 8% License Fee (LF), a 3% Spectrum Usage Charge (SUC), and contributions to the Universal Service Obligation Fund (USOF). These financial obligations are uniformly applicable to all licensees in the telecom sector. In contrast, Over-The-Top (OTT) platforms are exempt from these levies, despite offering services comparable to TSPs. This asymmetry violates the principles of a level playing field, affecting the financial balance within the industry.

Other Tax Payments:

In addition to the License Fee and associated charges, Telecom Service Providers (TSPs) contribute to various government taxes, including corporate tax, VAT, and GST, totaling over 26% of their revenue outflow. Conversely, Over-The-Top (OTT) platforms are not subject to such taxes, leading to a financial imbalance. Governments globally are considering methods to tax digital services offered by OTT platforms, recognizing the necessity for a fair tax system to ensure equitable contributions from both TSPs and OTT players.

Global Tax Considerations:

Telecom Service Providers (TSPs) contend with diverse tax obligations on a global scale, making substantial contributions to the exchequer and complying with tax regulations in different jurisdictions. Conversely, Over-The-Top (OTT) platforms enjoy exemptions in specific regions, exacerbating regulatory disparities. Achieving harmony in global tax

considerations is imperative for promoting fair competition and financial balance in the telecom sector.

Infrastructure Contribution:

Internet Service Providers (ISPs) make considerable investments in network infrastructure, making substantial contributions to the national exchequer. Their investments play a crucial role in driving economic and social development. In contrast, Over-The-Top (OTT) platforms are currently not required to directly contribute to network expenses. Acknowledging the vital role of digital infrastructure in national development, there is a compelling need to establish a fair and proportionate mechanism, ensuring that OTT service providers contribute directly to network expenses through bilateral arrangements with Telecom Service Providers (TSPs).

This approach would address existing financial disparities and promote equitable infrastructure development in the telecom sector.

The exclusion of Over-The-Top (OTT) services from the regulatory scope of the Telecommunications Act 2023 and the oversight of the Department of Telecommunications (DoT) exacerbates the existing imbalance between OTT service providers and Internet Service Providers (ISPs). This regulatory shift widens the gap in the regulatory framework, as ISPs, governed by the stringent provisions of the Telecommunications Act, continue to adhere to comprehensive licensing structures, financial obligations, and data protection mandates.

The disconnect in regulatory oversight provides a distinct advantage for OTT service providers, who, now operating in a less regulated environment, face reduced financial obligations and compliance burdens compared to their ISP counterparts. This asymmetry not only undermines the principles of a level playing field but also introduces challenges in ensuring fair competition, data security, and financial equilibrium within the broader telecommunications ecosystem. The implications of such regulatory divergence warrant careful consideration to maintain a harmonized and equitable regulatory landscape for both OTT service providers and ISPs.

Impact on Industry

Learning from international experience

Examining the international landscape reveals that various jurisdictions have adopted a nuanced approach, acknowledging the distinct nature of Over-The-Top (OTT) services compared to traditional telecom operators.

In the European Union (EU), the Body of European Regulators for Electronic Communications (BEREC) delved into the fair contribution debate, rejecting claims of large OTTs freeloading on telecom networks. The European Electronic Communications Code (EECC) broadly defines the term “electronic communications services” to include (i) internet access services; (ii) interpersonal communications services; and (iii) services whose main purpose is to convey signals (such as the conveyance of signals used for the provision of broadcasting). The incorporation of such broad categories in the definition of the term “OTT Services” for use by the TRAI and the DoT will aid regulators in establishing clearer limits to the extent of their regulation and prevent regulatory overlap with ministries such as the Ministry of Electronics and Information Technology (“MEITY”), which is already involved in regulating OTT streaming services.

Meanwhile, in Thailand, the National Broadcasting and Telecommunications Commission (NBTC) withdrew a revenue-sharing framework proposal following concerns raised by consumer and industry experts. There was apprehension that implementing such a mechanism could increase costs, impede economic growth, and potentially lead Over-The-Top (OTT) providers to pass on additional expenses to end consumers.

In Australia, the competition regulator, the Australian Competition and Consumer Commission (ACCC), conducted a comprehensive inquiry in April 2018, determining that there was no justification for requiring equivalent regulatory treatment of OTT and traditional

voice services. The ACCC not only dismissed the notion of full substitutability between OTT and voice services but also regarded OTT services as a positive development for consumers, fostering a pro-competitive environment.

Across the Atlantic, the United Kingdom's regulatory body, Ofcom, emphasized the absence of sufficient close substitutes for call termination to mobile numbers, contributing to a nuanced market definition. In Austria, distinctions were made in the definitions of 'number-based interpersonal communication services' and 'number-independent interpersonal communication services,' specifically concerning communication services, not broadly applying to Over-The-Top (OTT) services.

Turning attention to the Americas, both Brazil and the United States have adopted regulatory frameworks where OTTs are not explicitly regulated as telecom services. In Brazil, OTTs are classified as "Value Added Services," distinct from both telecommunication and broadcast services. The United States, guided by a commitment to preserving a vibrant and competitive free market on the internet, has refrained from imposing federal or state legislation on OTTs. Notably, instances of internet shutdowns are rare, occurring only in specific cases related to national security or emergencies, reinforcing the prioritization of freedom of the press and expression.

Analysis

Over-The-Top (OTTs) and Telecom Service Providers (TSPs) offer distinct services that are non-substitutable, establishing a symbiotic relationship between them. While TSPs can provide content and application services, OTTs lack the capacity for network connectivity provision. TSPs derive revenue from OTT services, where users are charged for data consumed during OTT service usage, while OTTs do not earn revenue from TSP services. Notably, OTT services lack interoperability compared to TSP services, as users of one network operator can communicate with those of another, while OTT users typically interact within the same app or service.

This symbiotic interdependence underscores the need for a collaborative framework between OTTs and TSPs based on mutually agreed commercial terms, rejecting regulatory measures

like mandating network usage fees. OTTs actively contribute to infrastructure expansion through initiatives like Content Delivery Networks (CDNs) and deep-sea cable projects.

The dynamics of network connectivity rest with Telecom Service Providers (TSPs), while Over-The-Top (OTTs) provide content that stimulates user demand for such connectivity. This mutual interdependence becomes evident as the absence of compelling content would render the provision of connectivity unviable for TSPs, just as creating content without the means to transmit it would be nonviable for OTTs. TSPs and OTTs leverage this symbiotic relationship, allowing OTTs to utilize the internet provided by TSPs and, in turn, bolster the revenues of TSPs by driving demand for transmission capacity—essential for users consuming OTT services requiring internet access. With the surge in bandwidth-intensive OTTs, such as video streaming services, consumers willingly pay for higher-tiered services offering enhanced speeds and greater bandwidth. TSPs strategically capitalize on OTTs to augment their revenues, fostering higher investments in TSP networks. This intricate interplay exemplifies the symbiotic nature of the OTT-TSP relationship, underlining the necessity for a cooperative framework driven by commercial agreements rather than regulatory impositions.

The exclusion of Over-The-Top (OTTs) from stringent regulatory measures, especially the Telecommunications Act, paves the way for unhindered innovation and robust growth within the OTT sector. This exclusion acknowledges the distinct nature of OTT services and recognizes their symbiotic relationship with Telecom Service Providers (TSPs) without imposing regulatory burdens that might stifle innovation. This regulatory freedom fosters an environment conducive to innovation, allowing OTTs to explore new technologies, content formats, and business models. The absence of onerous regulations ensures that OTTs can swiftly adapt to changing market dynamics and consumer preferences, fostering a culture of continuous improvement and experimentation. Moreover, without the regulatory encumbrances, OTTs can allocate resources more efficiently toward research and development, content creation, and technological advancements. This, in turn, fuels the creation of high-quality, diverse content and innovative services, contributing to a vibrant and competitive digital ecosystem.

The exemption from telecom regulations empowers Over-The-Top (OTTs) to pursue strategic partnerships, collaborations, and business agreements with Telecom Service Providers (TSPs) on mutually beneficial terms, rather than being constrained by regulatory mandates. This

flexibility promotes creative solutions and synergies that can improve the overall user experience and stimulate industry growth. Furthermore, the regulatory relief enables OTTs to attract investment more readily, fostering financial stability and scalability. Investors are more likely to back companies operating in an environment that promotes agility and innovation, channeling capital into the sector and driving expansion.

Conclusion

In conclusion, the exclusion of Over-The-Top (OTT) services from the stringent regulations of the Telecommunications Act represents a pivotal development in the evolving landscape of digital communication. The regulatory framework has historically treated OTTs and Telecom Service Providers (TSPs) differently, recognizing their distinct services while acknowledging their distinct relationship.

The impact of excluding OTTs from telecom regulations is multifaceted. Economically, this move recognizes the substantial contributions of OTTs to infrastructure development, with significant investments in network expansion projects. The symbiotic relationship between OTTs and TSPs is further emphasized, illustrating how OTTs drive demand for TSPs' transmission capacity, ultimately contributing to revenue growth.

Exclusion from stringent regulations also positions Over-The-Top (OTTs) for unhindered innovation and growth. The regulatory freedom allows for agile responses to market dynamics, fostering a culture of continuous improvement and experimentation. Strategic collaborations with Telecom Service Providers (TSPs) can be pursued on mutually agreed commercial terms, encouraging creative solutions that enhance user experiences and contribute to industry expansion.

By recognizing that OTTs contribute significantly to infrastructure development and innovation, the amendment fosters an environment conducive to the flourishing of digital services. This shift in regulatory approach not only respects the dynamic nature of the digital landscape but also positions India as a proponent of technological innovation and a hub for the creative growth of OTTs. It opens doors for these entities to continue investing in network infrastructure, fostering deep-seated collaborations and ensuring that India remains at the forefront of the global digital evolution.

