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Analysing developments impacting business

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The Telecom Regulatory Authority of India (TRAI) issued its recommendations on regulatory framework for 'over-the-top' (OTT) communications services on 14 September 2020 (Recommendations). The Recommendations have been issued pursuant to a reference letter from Department of Telecommunications (DoT) dated 3 March 2016 by way of which DoT had sought recommendations of TRAI on net neutrality and other related aspects such as economic, security and privacy issues, and regulatory framework for OTT services, etc. Over the course of the last 4 years, TRAI has issued different sets of recommendations addressing these aspects and the present Recommendations lay emphasis on regulation of OTT communication services.

Background

In the past decade, OTT services have *inter alia* changed the way we communicate. In the era of advanced smartphones and plummeting data tariffs, OTT communication services have played a crucial role in lives of people.

OTTs and telecom service providers (TSPs) have been at loggerheads for a considerable period of time. This is mainly because new forms of communications offered by OTTs, which are similar to the services provided by TSPs, have directly impacted the revenue earned by TSPs. OTT services are much easily accessible (there is no robust subscriber verification mechanism) and affordable (in fact many OTT services are offered without any charges). To add to it, OTT services utilise the underlying telecom resources and network of TSPs. Such factors have prejudiced the interests of TSPs at large and accordingly, governments across the world and top telecommunications bodies have been brainstorming to create a balance between the interests of TSPs and general public who find it convenient to utilise OTT services.

Key issues dealt by TRAI and ensuing deliberations

TRAI has noted suggestions of certain industry members who have opined that services provided by OTT have "functional substitutability" with services such as voice telephony, messages (SMS), video calls etc. that are provided by conventional TSPs. According to this faction, this should trigger regulatory or licensing norms for OTTs as well. A contrarian view in this regard is that OTTs and TSPs operate in different spheres and are not "substitutable" *per se*. Rather, the OTTs are *dependent* on TSPs for network access and TSPs retain certain exclusive rights like access to spectrum, network infrastructure and allocation of numbering resources, which sets OTTs and TSPs apart.

The issue of non-level playing field between the OTTs and TSPs is another bone of contention. Few stakeholders have advocated that given the similarity in nature of services, OTTs should be subject to regulatory framework and compliances, as is the case with TSPs. However, another perspective is that most OTTs work on a “zero pricing” model unlike TSPs who charge for their services. In any case, TSPs have benefitted from increased data usage by customers on account of extensive usage of OTT services, and that is sufficient to address the decline in revenue from conventional telecom services.

TRAI has also considered aspects relating to interoperability, lawful interception and accessibility of emergency services in relation to OTT communication services in the following manner:

- Conventional telecom services offer a degree of interoperability where a user/subscriber can exit from a particular service provider and seamlessly opt for another service provider. This is not possible in most OTT platforms and prejudices interests of users. An approach to deal with this aspect is that it should be left to market forces.
- With regard to lawful interception, concerns have been raised as to how OTTs collect and store personal data of users in servers outside India, which make it difficult to access by Indian law enforcement agencies. A majority of stakeholders expressed that existing legal provisions are sufficient to facilitate such access.
- Lastly, regarding whether emergency services should be made available via OTT platforms, consensus could not be reached in this regard.

Recommendations

Based on the discussions with industry stakeholders and on an assessment of position adopted by other countries, the following recommendations have been issued by TRAI:

- No regulatory intervention required and developments to be monitored: TRAI has recommended that increase in usage of OTT services has led to growth in data traffic for the telecom sector. Any regulatory prescription would therefore lead to an adverse effect on the entire industry. It has recommended that market forces should be allowed to respond to the situation and developments will be monitored. It has not prescribed any regulations for the time being and shall intervene at an appropriate time if necessary.
- No regulatory prescriptions around privacy and security: TRAI has declined to introduce any regulations on issues related to privacy and security as the matter is under examination in various international jurisdictions and it has also observed that the architecture of OTT communications is evolving to protect end users.
- Matter to be revisited in future: TRAI has noted that a comprehensive framework for OTT services is not required as of today beyond the extant laws and regulations. DoT and TRAI are actively engaging with International Telecommunication Union (ITU) on this issue and based on outcome of ITU, the matter may be looked into afresh once more clarity emerges.

Comment

On account of overlap between communication services offered by OTTs and TSPs, there is a worldwide debate on whether to regulate OTTs or not. Similar to the initiatives of TRAI and DoT in India, other jurisdictions around the world are in the process of reviewing the framework that may be applicable to OTTs or have already done so.

Notably, many countries that are similarly placed (economically, socially and demographically) as India have ceased from prescribing a regulatory framework for OTT communication service providers.

The Recommendations indicate a light touch approach by TRAI and suggest that any regulatory intervention is unwarranted at least for next couple of years. In fact, TRAI has commented that any subsequent action is contingent on how law or regulatory framework shapes up around the world. Importantly, the Recommendations have pointed out that the extant laws and regulations are sufficient to deal with material issues arising out of operations of OTTs. Undoubtedly, the Recommendations would be a setback for the TSPs that have been struggling on multiple fronts. It remains to be seen as to how DoT will deal with the Recommendations to salvage the telecom industry.

On the other hand, it would be incorrect to suggest that OTTs are completely unregulated in India. Pertinently, the Central Government has broad powers under Indian laws to take necessary action against OTT platforms or apps in specific cases pertaining to national security and defence of India. The only notable privilege that OTT may enjoy at this stage is that they are not subject to any license, registration or any compliance requirements from a telecom regulatory perspective.

In parallel, the Government is mulling over a new set of proposed rules and regulations in relation to intermediaries as well as data protection and it will be interesting to see how such changes will impact the functioning of OTTs in India in the near future.

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