

SUBMISSION OF COMMENTS

REGULATORY FRAMEWORK FOR OVER-THE-TOP COMMUNICATION SERVICES

Background

Consumer Unity & Trust Society (CUTS International) expresses its gratitude to the Telecom Regulatory Authority of India (TRAI), for its latest consultation paper on the ‘Regulatory Framework for Over-The-Top (OTT) Communication Services’.

About CUTS

In its 36 years of existence, CUTS has come a long way from being a grassroots consumer-centric organisation based in Jaipur, to opening overseas Resource Centres in Hanoi,¹ Nairobi,² Lusaka,³ Accra,⁴ Geneva⁵ and most recently in Washington DC⁶. It continues to remain an independent, non-partisan and non-profit economic policy think tank, while opening various programme centres, namely: Centre for International Trade, Economics & Environment (CITEE);⁷ Centre for Consumer Action, Research & Training (CART);⁸ Centre for Human Development (CHD);⁹ and Centre for Competition, Investment & Economic Regulation (CCIER).¹⁰ It has been working towards enhancing the regulatory environment through evidence-backed policy and governance related interventions across various sectors and national boundaries. For further details regarding CUTS, please visit: <http://cuts-international.org/pdf/About-CUTS-2018.pdf>

Being a consumer-oriented organisation, CUTS humbly submits its response to this consultation paper.

CUTS User Perception Survey

CUTS had commissioned a user perception survey on OTT consumers in Rajasthan, with *the objective of examining the perceived impact of OTT services on consumers’ economic and social lives*.¹¹

The study was executed as a combination of desk and field research. While existing literature was scouted for data, a gap analysis was also undertaken. Accordingly, primary data collection was carried out through surveys and stakeholder interactions. To get a better understanding of OTT services’ impact, both end consumers and business owners of internet were considered as ‘users’ while conducting the sample survey, as consumption of OTT services by business owners would also increase their profitability and productivity, even though they may not be end consumers.

¹ <http://snip.ly/y4dwyf>

² <http://snip.ly/1bxvfu>

³ <http://snip.ly/cikv0x>

⁴ <http://snip.ly/zqgfc0>

⁵ <http://snip.ly/w8sejy>

⁶ <http://snip.ly/1nr8co>

⁷ <http://snip.ly/hm676l>

⁸ <http://snip.ly/fxoqia>

⁹ <http://snip.ly/wkh3kf>

¹⁰ <http://snip.ly/hu3naj>

¹¹ <http://snip.ly/9lwj1l>

The survey was conducted on 600 OTT users, out of which 496 were end consumers, and 104 were business owners. It covered 5 districts of the state, namely: Alwar, Kota, Jaipur, Jhunjhunu and Jodhpur, which were selected based on higher literacy rates.

Chapter 1: Definition of OTT

1. Which service(s) when provided by the OTT service provider(s) should be regarded as the same or similar to service(s) being provided by the TSPs. Please list all such OTT services with descriptions comparing it with services being provided by TSPs.

The consultation paper has undertaken a commendable work of reviewing approaches proposed in different jurisdictions to classify different types of OTT services. However, it might not be prudent to study different proposals without understanding respective contexts and objectives.

For instance, the Body of European Regulators or Electronic Communications (BEREC), while proposing its classification of OTT services noted that: *“The range of services to which any specific obligation should apply, must be considered in light of the goals of the obligation and the proportionality of that obligation being applied to any specific service or service type. The proportionality of that obligation and its scope follows from whether the social benefits of the obligation are proportionate to the economic costs entailed for each regulated provider, and the static and dynamic competition effects of partial or universal application of the obligation. A preference for a level playing field can be part of the assessment of proportionality, but it is only one of the many elements”*.

BEREC goes on to suggest factors such as impact on operator’s activity and position, and their relationship with end users, as factors that need to be taken into account by regulators when analysing market situations, and consequently classifying different services.¹²

Since the release of consultation paper, the European Electronic Communication Code (EECC) has been finalised. Article 3 of the ECC lays down its objectives. It includes: *“promoting interests of citizens...by enabling maximum benefits in terms of choice, price, and quality on the basis of effective competition by maintaining the security of networks and services, by ensuring a high and common level of protection for end-users through the necessary sector-specific rules and by addressing the needs, such as affordable prices, of specific social groups, in particular end-users with disabilities, elderly end-users and end-users with special social needs, and choice and equivalent access for end-users with disabilities.”*¹³

It is clear from the above that interests of users are paramount in making decisions on regulating OTT services, including determining the need for classification of different OTT services, and considering if some OTT services should be regarded as same or similar to services of TSPs.

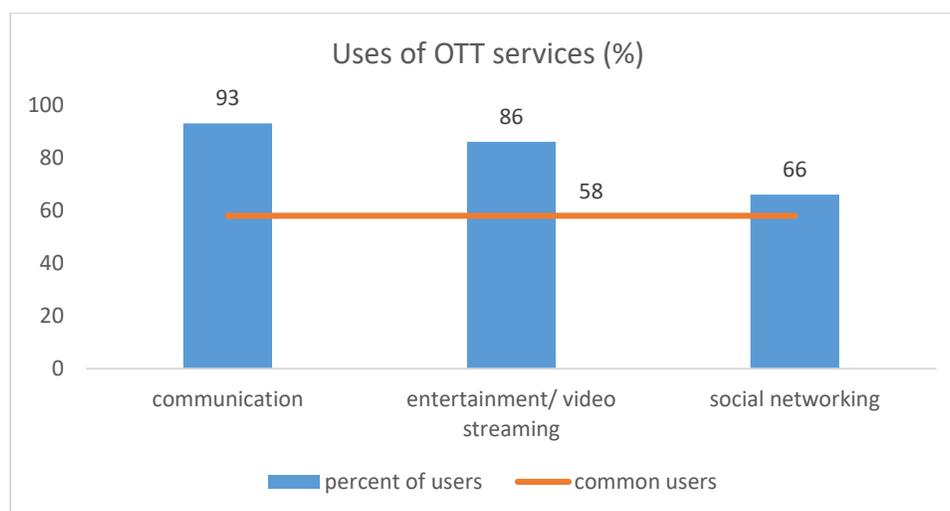
CUTS user perception survey revealed that OTT services were most commonly used for the purposes of communication, entertainment and social networking. For each of these purposes, most users preferred a single service provider while other service providers were preferred by a minority of users. This is unsurprising given the existence of network effects in these services. Moreover, a substantial proportion

¹² BEREC Report on OTT services, January 2016, at

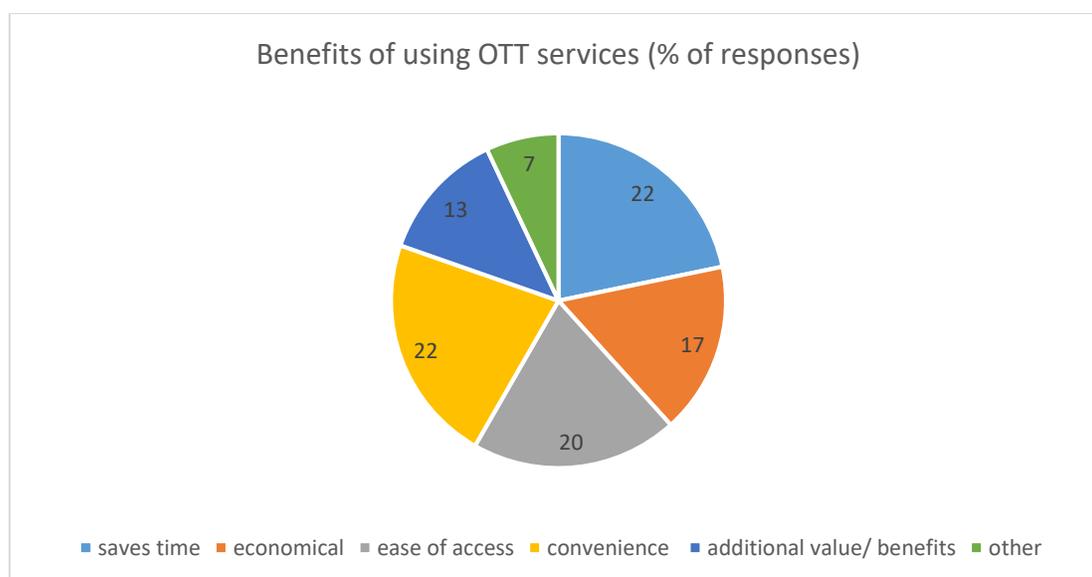
https://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/5751-berec-report-on-ott-services_0.pdf

¹³ DIRECTIVE (EU) 2018/1972 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018 establishing the European Electronic Communications Code, at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.321.01.0036.01.ENG&toc=OJ:L:2018:321:TOC

of users were using OTT services for all these purposes. Consequently, the number of unique users for any single purpose was very less.



It appears that key reasons for using OTT services may not be limited to their similarity with services of TSPs. Multiplicity of factors such as: time and cost savings, value added services, convenience and ease of access, are making OTT services popular among users. Presumably, features such as conference video calling, document sharing, etc, are making communication OTT services extremely popular and ubiquitous among users.¹⁴



OTT applications have enabled small businesses to grow in India. As part of CUTS user perception survey, we also documented use-cases of OTT applications among entrepreneurs and small businesses.

¹⁴ “With over 50 million video calling minutes per day, India has become the top country for video calling via WhatsApp”, News18, 07 May 2017, at <https://www.news18.com/news/tech/whatsapp-video-calling-india-top-country-for-video-calls-1395763.html>. Also, <https://indianexpress.com/article/technology/social/whatsapp-stickers-group-video-calling-to-pip-mode-top-new-features-of-2018-5510399/>

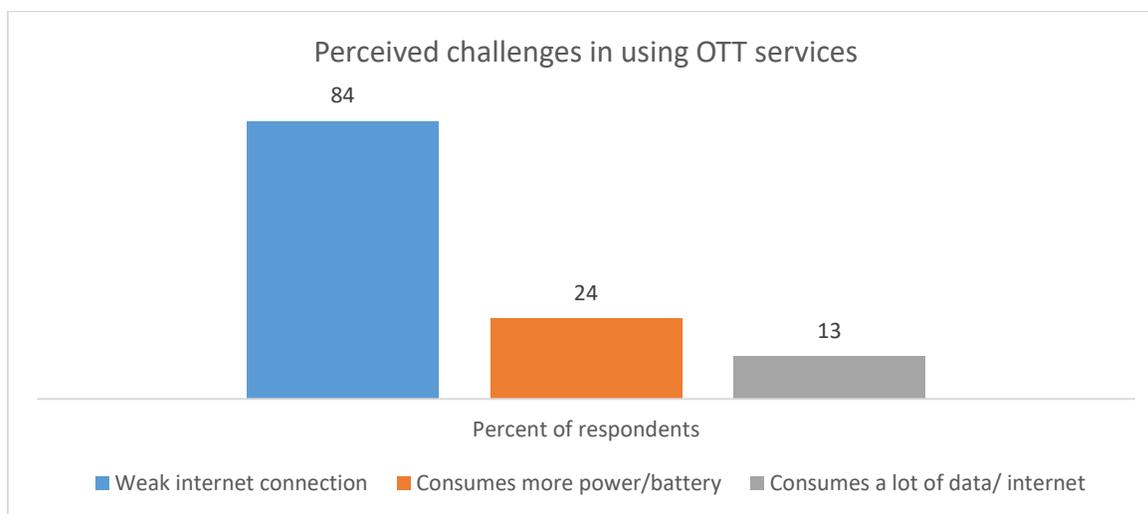
Promotion of entrepreneurship and small business growth through OTT applications

Among the hustle and bustle of Jaipur’s urbanisation, Tatkaleshwar Puri colony in Heera ki Modi locality near Ramganj is a semi-urban area that represents mostly lower-income population and is making efforts to match the rapid pace of Jaipur’s development. In one of the many lanes of this colony, Anita Sharma¹⁵ is also making efforts to nurture young minds in their *Anganwadi* (rural child care centre).

Under the state government’s project, she was provided a mobile device in November 2017 that was pre-loaded with the e-Sakhi¹⁶ and the ICDS-common application software (ICDS-CAS)¹⁷ mobile applications to enable her in running the *anganwadi* efficiently and effectively. While the e-Sakhi app guides her in conducting a structured schedule to educate and train children, the ICDS-CAS app helps her in record-keeping, monitoring and coordinating with the local departments.

Anita says that she feels privileged to be able to use these applications, which have brought significant changes in the way she operates the *anganwadi* and manages her students. In her relentless mission of nurturing young minds, she feels tremendous confidence in being a change agent in her locality and feels that similar ICT initiatives would be beneficial in ensuring a better future for children, who are the future of this great nation.

However, users still face significant challenges in using OTT services. Weak internet connection is perceived by the users to be a key impediment. Consequently, it might be reasonable to presume that despite preferring OTT services users might not be able to use them at all time and have to fall back on traditional services provided by the TSPs.



Any attempt to classify and regulate OTT services in India must be informed by user experience and behaviour. As indicated earlier, on December 20, 2018, a directive establishing the EECC entered into force. It expands the concept of electronic communications services to include “interpersonal communications services” (ICS), i.e., services that enable interpersonal and interactive exchange of information over electronic communications networks between a finite, as opposed to a potentially

¹⁵ Monitoring Details of Anita Sharma's Anganwadi on ICDS National Portal are accessible at <<http://snip.ly/920r7v>>

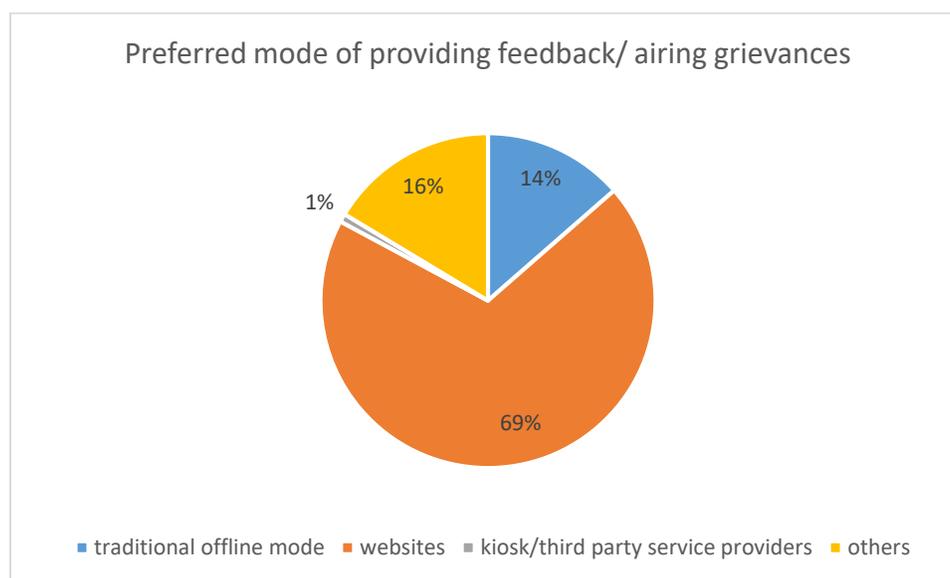
¹⁶ Government of Rajasthan's eSakhi Mobile Application is accessible at <<http://snip.ly/a2qmr3>>

¹⁷ ICDS-common application software (ICDS-CAS) Application is accessible at <<http://snip.ly/9rtpw9>>

unlimited, number of natural persons, which is determined by the sender of the communication. This is expected to cover services like voice calls between two individuals, all types of emails, messaging services, group chats, but does not include linear broadcasting, video on demand, websites, social networks, blogs or machine-to-machine communications. Also excluded are interpersonal communications facilities which constitute only a minor and ancillary feature to another service and cannot be used without that principal service (e.g., the chat facility of video games). The EECC makes a distinction between number-based and number-independent ICS.¹⁸

While it might be possible to segregate the nature of communication as interpersonal or social, segregating service providers based on this classification might lead to artificial distinction and may not stand test of time. This is because the service providers likely to be segregated as social communication providers allow users to have interpersonal communications. Similarly, service providers likely to be segregated as interpersonal communication providers can potentially allow social communications. For instance, several users run feedback and grievance redress services via Twitter¹⁹ (likely to be classified as social communication provider) which facilitate direct interpersonal communication between organisations and consumers. Facebook users also indulge in interpersonal communication on the social networking platform. Services like WhatsApp (likely to be classified as interpersonal communications provider) allow users to set display/ profile picture and multiple messages as status messages, which can potentially be viewed by anyone having contact number of such user, without the user being necessarily aware.

Consequently, irrespective of presumed nature of the service provider, it will be important to examine how users are utilising such service in order to decide on the nature of classification, if any. Respondents in the CUTS user perception survey also confirmed that website was the most preferred mode of providing feedback and availing grievance redress services to government, thus potentially turning a social communication service to interpersonal service.



¹⁸ Crowell and Moring LLP, *The European Union Adopts a New Telecoms Code*, 20 December 2018, <https://www.lexology.com/library/detail.aspx?g=f2b225c0-7890-4af2-8513-5c0fd7b19b67>

¹⁹ Such twitter seva. See, <https://economictimes.indiatimes.com/news/politics-and-nation/centre-to-launch-twitter-seva-to-reach-citizens/articleshow/57319374.cms>. It also facilitates direct messaging between users.

2. Should substitutability be treated as the primary criterion for comparison of regulatory or licensing norms applicable to TSPs and OTT service providers? Please suggest factors or aspects, with justification, which should be considered to identify and discover the extent of substitutability.

Substitutability is primarily a competition law concept traditionally used to determine relevant market for purpose of assessment of dominance of service provider(s) in the market, and consequently identifying abuse thereof. However, determining substitutability is increasingly becoming complicated with the emergence of multi-sided markets laced with network effects. Thus, relevance of concept of substitution (and the need for determination of relevant market itself) is being re-examined and a conscious shift is being witnessed from such a form-based approach to effects-based approach of market assessment. The effects-based approach deals with examining impact of different services on consumers and other stakeholders to determine the treatment it deserves from competition and regulatory authorities.²⁰

In such scenario, excessive reliance on substitutability criteria may not be advisable. In any case, similarity of certain services between OTT service providers and TSPs may not be sufficient to establish substitutability. It has been argued that by preferring OTT services over that of TSPs, users are “migrating” in their choice of technologies rather than in the “use” of products or services; and that telecommunications services and services based on internet protocols are so different that they could barely be considered competing “substitutes.” It has also been argued that not having access to one of them does not imply endangering the right to communication; while not having access to SMS or basic telecommunications services (including access to the internet, for instance) leaves the user with very little or no available substitutes.²¹

Such migration of consumers from traditional service providers to innovative technology based service providers is not limited to the telecom sector, and is visible in other sectors as well, such as finance and mobility. Users are migrating from cash to digital modes of payments and using prepaid payment instruments, differentiated bank accounts, instead of universal bank accounts to undertake financial transactions. Similarly, users are migrating from traditional offline (black/yellow) taxis and cool cabs to taxis linked to online app-based platforms. The value addition and niche created by such technology-based solutions has the potential to be treated as a separate market in itself which users may not like to substitute with incumbent services.²²

Nevertheless, as indicated earlier, consumer interest should be a pre-eminent criterion to determine the level of regulatory burden on OTT service providers as well as TSPs. EECC and BEREC have already endorsed this point of view. Issues which impact consumer interest include quality of service, grievance redressal mechanisms, unsolicited and untrue communication, privacy and data protection, access to emergency and safety services.²³ In other words, appropriate regulatory mechanisms need to be thought

²⁰ This is expounded in the CUTS submission to Competition Law Review Committee, at http://www.cuts-ccier.org/pdf/CUTS-CIRC_Submission_to_Competition_Law_Review_Committee.pdf

²¹ Chima and Pallero, *Internet vs. telecommunication services: differences that matter for users' rights*, 22 May 2017, Access Now, at <https://www.accessnow.org/ott-vs-telecom-services/>

²² Competition assessment in payments industry. See, <http://www.cuts-ccier.org/Payments-Infrastructure/Publication.htm>. We are currently implementing a project on competition analysis in ride sharing industry. See <http://www.cuts-ccier.org/Cars/>

²³ Also see, “*What is more important is that the consumers who are affected do not have appropriate redressal mechanisms similar to what are present in the case of licensed TSPs. Hence, along the lines of the Quality of Service (QoS) benchmarks set by the regulator for TSPs, QoS metrics and benchmarks need to be defined for OTT services as well.... Although one*

about areas of interaction between OTT service providers and consumers wherein unnecessary risks and inconvenience may be faced by consumers.

It also needs to be recognised that different service providers may pose different levels of risks. For instance, it was revealed during CUTS user perception survey that a single OTT service provider was catering to the needs of more than 90 percent consumers in respective service categories, leaving limited market for other service providers. Moreover, different service providers offering divergent services may potentially have common owners. Given the limited reach of smaller service providers, the regulatory framework applicable to such players having ‘less than sufficient market power’ could be less burdensome when compared with other service providers. This approach is consistent with approach in other sectors as well wherein entities with ‘significant market power’ are subjected to more stringent obligations when compared with other service providers. The determination of ‘market power’ is a competition law concept and would ideally require coordination between the competition regulator and the sector regulator.

In addition to consumer welfare, other legitimate reasons for extending regulatory approach to OTTs could include tax evasion concerns²⁴ and upholding national security.²⁵ However, appropriate checks and balances need to be put in place to ensure benefits of OTT services are not ignored while attempts are being made to deal with such risks.

Ensuring quality control and fixing accountability of OTT service providers does not necessarily require them to be subjected to stringent regulations. Costs of stringent regulation (intended for consumer welfare) are usually passed on to consumers and which may find themselves in catch-22 situation. Consequently, other less intrusive options such as market-based incentives, self-regulation and co-regulation need to be encouraged to ensure market development as well as consumer welfare. Already, it has been reported that OTT players are considering adoption of a voluntary censorship code, incorporating provisions relating to removal of unlawful content and a redress mechanism to enable users to complain violation of the code.²⁶

A consultative regulatory approach is necessary to achieve balanced regulation. For instance, it has been reported that the Association of Southeast Asian Nations (ASEAN) member countries are likely to form a joint consultation forum in early 2019 to discuss regulatory approach towards platform companies, including OTT players. This consultation forum will gather the public and private sectors that support innovative service growth, maintain consumer privacy, and ensure a healthy business competition

*might argue that OTTs do self-regulate in stopping UCC on their platforms, the “fake news forwards” and unwanted advertisements have come to haunt us...”. Raja and Sridhar, *Over the Top: To Regulate OTTs or not?*, Financial Express, 27 December 2018, at <https://www.financialexpress.com/opinion/over-the-top-to-regulate-otts-or-not/1425848/>*

²⁴ See, EU fair taxation of digital economy, https://ec.europa.eu/taxation_customs/business/company-tax/fair-taxation-digital-economy_en

²⁵ Recently, the lower house of the Australian parliament passed a bill through which security agencies can compel technology companies to grant access to encrypted messages. It has been reported that technology and ad companies like Google and Twitter have said that this legislation would create vulnerabilities in their products, which could be used by bad actors. See, Singh, *Australia passes a bill to access encrypted messages*, 11 December 2018, <https://www.medianama.com/2018/12/223-australia-surveillance-decryption-bill/> and Bloomberg, *Australia set to spy on WhatsApp messages with encryption law*, 06 December 2018, <https://telecom.economictimes.indiatimes.com/news/australia-set-to-spy-on-whatsapp-messages-with-encryption-law/66969000>

²⁶ *OTT platform may soon adopt self-censorship*, 28 December 2018, <http://www.indiantelevision.com/iworld/over-the-top-services/ott-platforms-may-soon-adopt-self-censorship-181228>

climate.²⁷ In its recently concluded Plenipotentiary Conference 2018, the International Telecommunication Union (ITU) also approved a resolution on OTTs recognising that mutual cooperation between OTTs and telecommunication operators can be an element to foster innovative, sustainable, viable business models and their positive roles in fostering socioeconomic benefits. The resolution also recognises the need to discuss policy issues, as well as the economic implications of OTTs. Given the global nature of many OTTs, it recognises that collaboration across multiple stakeholders needs to be strongly encouraged.²⁸

Consequently, a structured consultative framework which considers costs and benefits of different possible regulatory approaches for OTTs and appreciates the need to design optimal regulation is necessary. Such framework could be informed by the regulatory impact assessment framework implemented in different jurisdictions.²⁹ In order to examine linkages and interactions between diverse interests of different stakeholder groups, it will be necessary to adopt a whole-of-government systems approach.³⁰

Chapter 2: Economics Aspects of OTT

3. Whether regulatory or licensing imbalance is impacting infusion of investments in the telecom networks especially required from time to time for network capacity expansions and technology upgradations? If yes, how OTT service providers may participate in infusing investment in the telecom networks? Please justify your answer with reasons.

There are numerous suggestions that the poor financial health of the sector, and the resulting consolidation, is caused by factors other than the growth of OTT applications and services. Factors, such as cut-throat price competition between infrastructure providers which has hurt the margins of TSPs; and high taxation of TSPs by government including 5% USOF, 3% License Fee, ~5% SUC, high spectrum reserve price, 18% GST.

It has also been pointed out that the real reason for the drop in the TSPs' revenues, is not 'cannibalisation' of revenues by OTT services, but, on one hand, the failure of TSPs to adapt to evolving technologies, and on other, the failure of the government to provide a supportive regulatory regime. Subjecting new age services to traditional regulatory regimes will only have the impact of creating huge entry barriers, as opposed to supporting innovation and development. Instead of taking such a backward step, regulators and TSPs alike need to look forward and adapt their regulations and revenue streams accordingly.³¹

Recent massive investments in 4G networks are primarily due to revenue opportunities offered by OTT applications. OTT music, video functionalities continue to drive growth of data and the accompanying revenues for TSPs. The growth of OTT apps expands, not reduces, the avenues for greater revenues for TSPs. With OTTs offering progressively richer services, incentives for investment in networks will

²⁷ ASEAN to create joint regulation on OTT, 07 December 2018, <https://en.antaranews.com/news/121103/asean-to-create-joint-regulation-on-ott-company>

²⁸ ITU PP 2018, *Highlights – 15 November 2018*, at <https://www.itu.int/web/pp-18/en/news-highlights/highlights-15-november-2018>

²⁹ We have been advocating for adoption of regulatory impact assessment framework in India. see, <http://cuts-ccier.org/ria/>

³⁰ CUTS, in association with Mr. Arun Maira, Former Member, Planning Commission of India, has designed a framework of whole of government systems approach, accessible at <<http://snip.ly/hizg7f>>

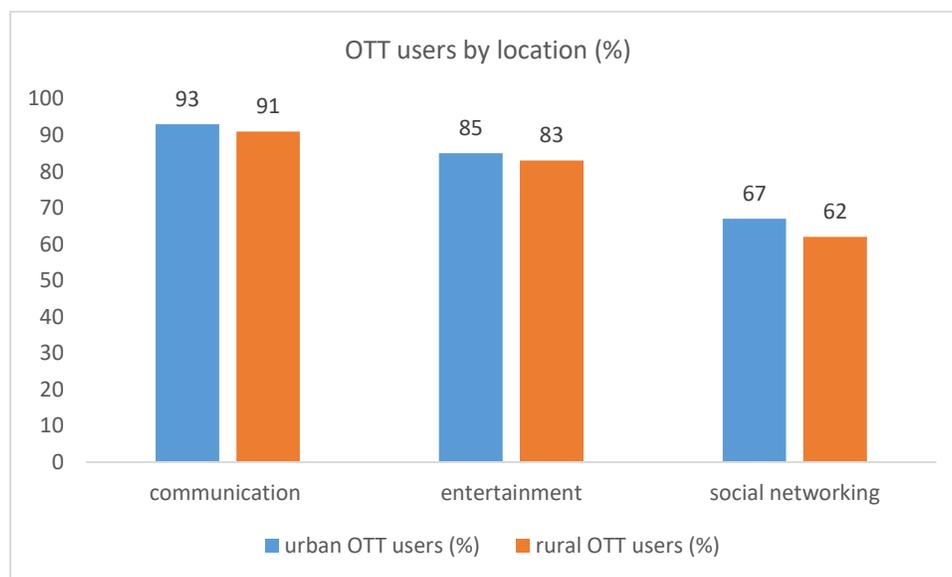
³¹ Regidi, *TRAI OTT consultation paper: Identifying and addressing falling voice revenues of telcos*, 19 November 2018, Firstpost, <https://www.firstpost.com/tech/news-analysis/trai-ott-consultation-paper-identifying-and-addressing-falling-voice-revenues-of-telcos-5574971.html>

increase further. This will attract and make available greater funds to enable deployment of newer technologies and investment in network capacity and quality.

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

Use of regulatory tools for promotion of interoperability has been a subject of intense debate across sectors. Non-interoperable systems allow service providers to retain customers and recoup investment costs while interoperable systems are likely to witness greater acceptance and functionality. The timing of interoperability is also crucial. Markets in which interoperability is introduced before time may discourage investments and unfairly benefit new entrants at the expense of incumbents. Similarly, markets wherein interoperability is delayed may witness entrenched market players with significant network efforts discouraging competition and innovation from potential competitors.³²

It is generally accepted that while smartphone penetration is increasing in the country at a phenomenal rate, a substantial population is still using basic feature phone for communication purposes.³³ This was also confirmed during CUTS perception survey wherein it was highlighted that a household typically has members who don't use smartphones. It was also revealed that several smartphone and internet users might not be OTT users.



Given that a significant proportion of population may not be using smartphone and even among those who use smartphone/ have access to internet, a significant number (around 10 percent users in rural areas) is unlikely to use OTT services for communication purposes, it might be a fit case for deeper investigation

³² Kulkarni, *Facilitating in Digital Financial Services in India*, Discussion Paper, May 2015 at http://www.cuts-ccier.org/pdf/Facilitating_Interoperability_in_Digital_Finance_Services%20_in_India.pdf and Kulkarni, *Enabling Effective Competition in Mobile Money Markets*, Briefing Paper, 2015, http://www.cuts-ccier.org/pdf/Enabling_Effective_Competition_in_Mobile_Money_Market.pdf

³³ TRAI, *The Indian Telecom Services Performance Indicators*, April – June 2018, at <https://www.trai.gov.in/sites/default/files/PIRJune03102018.pdf>

on the need for interoperability between TSPs and OTT services. Tools like Competition Impact Assessment could be utilised for such in-depth examination.³⁴

In relation to interoperability among OTT service providers, as indicated in CUTS perception survey, one service provider is likely to be highly preferred in each service category. This trend is location agnostic. In order to determine if interoperability needs to be pushed through regulations, there is a need to examine if competition is being unfairly throttled at the expense of smaller OTT service providers. The Competition Impact Assessment Tool might be useful in this regard as well.

Needless to mention, dealing with competition relation issues would require close coordination between the telecom regulator and the competition regulator.

Chapter 3: Regulatory Framework

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

As indicated earlier, there might be valid national security reasons to subject OTT service providers and TSPs to regulation. However, the regulatory tool used should be proportional to address the risk emanating from the relevant service provider. Also, appropriate checks and balances need to be put in place to ensure benefits of OTT and TSPs services are not ignored while attempts are being made to deal with the risks they pose.

Tools like Regulatory Impact Assessment can prove useful in designing and comparing costs and benefits different regulatory tools intended to achieve the regulatory purpose and select most appropriate tool. For instance, regulatory objectives likely to be met with tools like interception and access to encrypted messages may be achieved by less intrusive and expensive tools.

6. Should there be provisions for emergency services to be made accessible via OTT platforms at par with the requirements prescribed for telecom service providers? Please provide suggestions with justification.

Enabling access to emergency and safety services is necessary for public welfare. One of the globally suggested approaches to facilitate access to such services via OTT platforms is to require number-based interpersonal communication services (including similar OTT service providers) comply with such regulatory requirements.

However, the role of number-independent OTT services in emergency situations cannot be ruled out. Platforms like Facebook and Twitter are being increasingly used to inform users of emergencies, access essential services, and mark themselves safe. Such platforms have shown initiatives to help users in such critical conditions.

³⁴ See, CUTS Competition Impact Assessment Toolkit at http://www.cuts-ccier.org/compeg/pdf/CUTS_Compensation_Impact_Assessment_Toolkit-A_Framework_to_Assess_Competition_Distortions_Induced_by_Government_Policies_in_the_Developing_World.pdf

Consequently, there might be a scope to design voluntary codes for OTT service providers (whether or not number based) and TSPs to follow in case of emergencies.

Chapter 4: Possible regulatory and market approaches

7. Is there an issue of non-level playing field between OTT providers and TSPs providing same or similar services? In case the answer is yes, should any regulatory or licensing norms be made applicable to OTT service providers to make it a level playing field? List all such regulation(s) and license(s), with justifications.

As indicated earlier, the issue of level playing field between incumbent service providers and new/innovative players is not limited to the telecom sector, but is also visible in other sectors such as mobility and finance. However, a level playing field may not necessarily be achieved by increasing the costs of new market entrants to match the costs of incumbents but can also be achieved by reducing the costs of incumbents to match the costs of new entrants.

For instance, our regulatory impact assessment exercise in urban mobility sector in Maharashtra revealed that should the proposed rules to regulate online app-based taxi aggregators come in force (which were drafted to ensure convergence of regulation between incumbent taxi service providers and new online taxi aggregators), the daily cost of commute for drivers and riders may increase by upto 30 percent and 90 percent, respectively. We suggested revisiting the regulatory framework for incumbents to reduce their regulatory burden and bring them on par with new service providers.

A similar approach has been adopted in the United States of America wherein the Federal Communications Commission (FCC) recently voted 3:1 to deny requests to classify text messaging services as “telecommunications services,” which would have subjected them to harsher regulation. Instead, the FCC voted to classify SMS and MMS as “information services.” It was reported that Commissioner Michael O’Rielly said the classification as information services allows mobile service providers to better compete with WhatsApp, Facebook Messenger and other over-the-top (OTT) apps.³⁵

The TSPs also need to be encouraged to innovate to compete with OTT service providers. For instance, it was reported that Veon Platform app, which offers messaging and content in markets including Russia and Pakistan, has been designed to compete with OTT services including WhatsApp and Viber. It was reported that the strategy is not only a brutal admission of past operator failures in monetising mobile data and exploiting strengths such as scale, customer relationships, user data and branding but Veon is ahead of its peers in seeking to address two leading challenges: stagnant growth despite huge investment, and growing competition from internet giants with a global reach and a more innovative mindset. By removing the smartphone friction – types, taps, swipes, and waits – that slows users down, operators can engage their subscribers in new ways and compete with mobile advertising giants like Google and Facebook.³⁶

³⁵ Alleven, *SMS, MMS deemed information services, removing them from heavier regulation*, 13 December 2018, Fierce Wireless, at <https://www.fiercewireless.com/wireless/sms-mms-deemed-information-services-removing-them-from-heavier-regulation>. Also, Ludwig, *The Trump Administration Just Killed Net Neutrality for Text Messages*, 12 December 2018, <https://truthout.org/articles/the-trump-administration-just-killed-net-neutrality-for-text-messages/>

³⁶ Saleha Riaz, *Should operators take the Veon app route?*, 23 April 2018, at <https://www.mobileworldlive.com/apps/blog-apps/blog-should-operators-take-the-veon-app-route/>

In other words, there is a need to revisit the regulatory framework for incumbent TSPs and ensure that they are subject to reasonable and proportionate regulatory requirements to address relevant risks posed by TSPs in a manner that they are able to compete with OTT service providers.³⁷ The Authority could this consultation as an opportunity to lower the regulatory burden for TSPs, promote innovation and competition, and benefit consumers.³⁸

8. In case, any regulation or licensing condition is suggested to made applicable to OTT service providers in response to Q.7 then whether such regulations or licensing conditions are required to be reviewed or redefined in context of OTT services or these may be applicable in the present form itself? If review or redefinition is suggested then propose or suggest the changes needed with justifications.

9. Are there any other issues that you would like to bring to the attention of the Authority?

As indicated earlier, there is a need to focus on issues like quality of service, quality of experience, grievance redress, unsolicited communication, privacy and data protection, information asymmetry, consumer empowerment and capacity building of stakeholders, among others, in OTT services and TSP services categories, not necessarily in conjunction with each other, and design appropriate customised solutions for promoting consumer welfare and market growth.

CUTS look forward to assisting TRAI in its endeavours of preparing a regulatory framework for OTT communication services. We would also be happy to present a proposal for undertaking an evidence backed study to decisively answer select questions in this consultation paper.

For queries and suggestions, please write to:

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³⁷ CUTS Study on Urban Mobility, that compares incumbents with taxi aggregator platforms, is accessible at <http://snip.ly/gpi61u>

³⁸ Kesari, *OTT Regulation Redux – New facts, same old worries*, 15 November 2018, at <https://factordaily.com/ott-regulation-redux-new-facts-old-worries/>. Also, “The choice to regulate OTTs might not be the way to be strict on them but to deregulate the tradition one, one way or another”, by Kakhai, *Legal problems on regulating OTT service by national broadcasting and telecommunications commission*, May 2018, International Journal of Electrical, Electronics and Data Communication, at http://www.ijer.in/journal/journal_file/journal_pdf/1-471-153293357532-35.pdf