



ITU-D Study Groups

Question 3/1 and Question 4/1 joint session on the Economic Impact of OTTs on National Telecommunication/ICT Markets

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Regulation of OTTs-Striking the Right balance

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Most of us cannot imagine life without our favourite Over the Top Services (OTTs). We depend upon them to search for information (Google), shop (Amazon, eBay), plan holidays (Airbnb), commute (Uber, Lyft), keep in touch with our friends (WhatsApp, Facebook), stream music and video (iTunes, Netflix), improve our career prospects (Linkedin).

While there is no disputing the tremendous consumer value created by OTTs, the issue of whether, how and how much to regulate these services remains a difficult one. Regulators must be cautious about the impact of their actions on innovation and competition. While issues like security, consumer protection and taxation would need to be addressed, regulation of OTTs driven solely by the motivation of leveling the playing field between traditional and digital modes of service delivery would be detrimental to consumer welfare. Instead, a fresh look at regulation of the service concerned, regardless of the medium may be the answer. The result of this exercise could well be an easing of the compliance burden on traditional brick and mortar firms, while introducing more regulation for some digital firms such as large online platforms.

Technology companies should voluntarily self-regulate and collaborate with governments to prevent online harms. This would reduce the tendency to over-regulate online services in response to real or perceived harm. A good example of the need for such cooperation is OTTs in the sphere of social media where security considerations have caused governments across the world to seek to regulate at least some of these OTTs at par with traditional means of communications. It is evident that given their popularity and international reach, they are susceptible to misuse and thus, governments will continue to demand interception for security purposes. However, it is also important to implement checks and balances that safeguard privacy and limit surveillance, at least at par with those that have existed for interception requests on traditional modes of communication. Given that OTTs cut across borders, this is also an important area for international collaboration.

The problem of fake news and misinformation is a grave one and it is related to the speed and scale of influence of social media platforms. Traditionally digital platforms have been treated as intermediaries with limited liability, but off late governments across the world have begun to consider regulation ranging from adoption of self-regulation by intermediaries/platforms to regulatory enforcement of a code of ethics (UK), to imposing liability to screen out harmful content (UK, India¹) are being examined². It is being considered if new regulators need to be set up for this purpose. These bodies would also receive and settle consumer disputes and enforce accountability measures.

¹ https://www.meity.gov.in/writereaddata/files/Draft_Intermediary_Amendment_24122018.pdf

² Disinformation and 'Fake News': Final Report House of Commons Digital, Culture, Media and Sport Committee, Eighth Report of Session 2017–19, February 14, 2019

Technology itself can solve unique problems faced in relation to OTTs. India is WhatsApp's biggest market. The Indian government has worked along with the firm to handle the menace of fake news or misinformation by limiting the number of forwards and displaying prominently the fact that the message is not original but forwarded. Further, consumers can check the veracity of information with the help of a tip line number.³ Hence if digital technology firms providing OTTs cooperate with regulators and governments to find innovative solutions to address consumer protection issues, governments are less likely to overregulate.

Privacy and data protection are important concerns. Incidents of mining and misuse of sensitive consumer information have demonstrated equally the need for a sound accountability framework that digital firms must be held responsible to, as also, the acute need to create consumer awareness. International consensus on standards of data protection such as simplicity and clarity of consent is critical. Nations across the world are putting in place data protection frameworks, many of which lay emphasis on consent. However, consent as it exists today is complicated and asking a consumer to read/understand long agreements can be a meaningless exercise. There is a need to simplify and standardize disclosures to create greater transparency in use of personal data. Further, reducing compliance burden for cross border OTTs also demands that international data protection regimes have some degree of harmonization. This is another important area for international consensus and collaboration.

Competition authorities are already seized of complexity of trying to apply traditional competition law tools to digital markets. Clearly when services are offered free, the examination of anti-competitive behavior arising out of market power must shift focus from pricing to other measures of market power including how much personal data is collected as a part of the transaction/contract with consumers. It is important to appreciate the imbalance of power between the supplier of digital services and its individual consumer. Economies of scale, network effects and lack of interoperability of platforms also call to question the countervailing power of substitutes. Thus, if a consumer does not like the fact that her personal data is collected for advertising can she switch from a prominent social media platform when almost everybody in her social circle uses that platform? Consumer awareness is necessary but not sufficient, as individual consumers do not wield sufficient bargaining power in such situations. Competition authorities and e-commerce regulators must also address B2B (business to business) malpractices. These include preferential treatment to in-house brands/services vis-à-vis third party entities, and a variety of anti-competitive conduct ranging from tying and bundling, to exorbitant commissions for access to popular platforms.

New disruptive models of service delivery should not be regulated merely because they threaten an existing model, because such innovation and competition serve consumer interest. The OTT economy thrives on a business model that has no brick and mortar

³ <https://economictimes.indiatimes.com/news/elections/lok-sabha/india/whatsapp-finally-has-way-to-handle-fake-news-during-elections/articleshow/68684237.cms?from=mdr>

marketplaces, no physical records, less human labour, greater outsourcing and contracting. However, when market power leads to consumer harm such as discriminatory pricing, anti-competitive conduct, counterfeiting, breaches of privacy etc., regulators must step in. India, through its draft e-commerce policy, is contemplating rules to ensure competition on online retail platforms as well as the protection of consumers using these platforms including anti-counterfeiting measures and steps to ensure authenticity of ratings and reviews and better consumer redress.⁴

Interestingly, it can also be argued that if Governments were to design newer models of regulation that are light touch, flexible and recognize the scale and quantity of market impact of an OTT player, they may encourage more OTT players to conform to regulation. This would apply to various compliances such licensing and taxation. In its National Digital Communications Policy⁵, India has recognized the need for greater investment in Digital communications and its positive multiplier impact on GDP growth as well as the need to rationalize levies on telecom service providers as one of the means to incentivize investment. The Department of Telecom has also recently approved more flexibility in regulation of mobile virtual network operators⁶. It could be argued that OTT players may be more willing to submit, rather than resist, if regulation regimes were less onerous. It could also be considered whether the threshold for imposition of regulation on a service provider depended on market impact measured by market share regardless of the medium through which it operates. This would protect innovation by exempting startups/smaller firms while ensuring a level playing field between online and offline models. Why should a small taxi service or a small hotel chain have to bear different regulatory burden compared with a large digital platform offering similar services? Singapore's third-party taxi booking services Act⁷ is one such example of light touch regulation with a graded approach related to size of business. Such an approach acknowledges the cost of regulation and that over regulation of small firms can have a detrimental effect on innovation, both offline and online.

The Europeans Union's new Electronic Communication Code seeks to regulate certain categories of interpersonal services as Electronic Communication Services. This would encompass popular OTT services. The Indian telecom regulator too has issued a consultation paper on regulation of OTTs which inter alia asks if certain need to be regulated at par with licensed telecom service providers. The consultation process shall duly consider views expressed by various stakeholders.⁸

Ultimately, the answer lies in striking the right balance and international cooperation and capacity building can assist regulators across the world to find the golden mean.

⁴ https://dipp.gov.in/sites/default/files/DraftNational_e-commerce_Policy_23February2019.pdf

⁵ <http://dot.gov.in/sites/default/files/EnglishPolicy-NDCP.pdf>

⁶ trak.in/tags/business/2016/03/30/telecom-mobile-virtual-network-operators-mvno-approved/

⁷ ITU GSR 2016 discussion paper

⁸ <https://main.trai.gov.in/consultation-paper-regulatory-framework-over-top-ott-communication-services>