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IT'S TIME FOR A FUTURE-READY REGULATORY REGIME

The government must adopt a light licensing approach to create a level playing field for all CSPs, including the OTT communication service providers

The convergence and advancement of technologies and innovations have given rise to new breeds of services and products in today's digital age. ICT, which was formed as a union of telecom and IT services, has now further evolved into ICTEC, comprising complicated components of ICT, electronics and cyber.

Commercial offerings and applications of ICTEC solutions are bringing in newer segments with products for consumers and citizens. OTT is one such example of application services being offered on the application layer of the OSI model. The policy and regulatory environment in the country also needs to be simultaneously prepared and evolve to aptly accommodate the influx of such

innovations and services. That is one of the primary objectives of the draft Telecom Bill that the Government of India is bringing out.

A lot of effort is underway to implement simple unambiguous laws, policies, rules, and regulations that can last long-term and yet be responsive to the changing, but not fully predictable, requirements of the intervening period. A combination of clear strategically worded laws, that can last at least 10-20 years, is what we are seeing emerging in the telecom space. Efforts are on to supplement it with administratively formulated rules that can be modified on earlier timelines, depending on the changing environment but within the terms of reference of the legislation it is supplementing.



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It is in this context that we must analyse the new “boys” on the block, like OTT, specifically communication services which are not broadcast but are bi-directional or multi-directional as is the case with similar services provided by the TSPs. This comes within the telcos’ demand for “similar service, similar rules”. It would be only apt that they are brought under the Telecom Act with a light licensing approach, whereby the security and regulatory requirements of the nation and the sector can be taken care of.

FACTUAL POSITION

The argument that OTTs are governed by the IT Act and hence need not be governed by the Telecom Act, even for communication services, is misplaced as provisions of the IT Act, within its scope, are equally applicable to TSPs and OTTs. What is not articulated is that IT Act does not regulate communication services. If the rules must be skewed slightly, then they must tilt towards Indian companies based and operating out of India. As crystal gazing, I would like to believe that all laws impacting ICTEC components will eventually converge for policy, regulations, and organisations.

It is also important that we do not overlook the critical aspect of security, both for the nation and law-abiding citizens. While there are adequate safeguards in the law to prevent perceived misuse or inconvenience to law-abiding citizens, the prevailing environment demands that the state must be empowered to deal with non-law-abiding personnel or inimical entities.

A normal law-abiding citizen should have no fear of such provisions in the trinity of Judiciary-Legislative-Executive formulation in a democracy. Doing a KYC, for example, is meant to identify a user and if required to hold him accountable for inimical activities. The privacy of an individual is not invaded as this is more of a forensic tool. A similar argument applies to lawful interception or keeping CDRs.

So why the clamour?

Are we as a nation so enamoured with financial earnings that we are willing to sacrifice national security for the purpose? No right-thinking Indian will buy this argument of subjugating national security to commercial activities that have even a 1% of probability of anti-national activity. The alarmingly rise in cases of fraud and scams on OTT platforms makes it imperative to focus on the security and privacy of the users.

OTTs adhering to the security requirements like KYC, as done by telcos, will help prevent and counter this menace effectively, as the culprits can be identified and traced for taking appropriate legal action. The draft Telecom Bill aptly, provisions penalties and punishments for perpetrators of such unlawful activities via communication OTT platforms.

CONCERNS IN INDIA

It is globally known that besides cannibalising the services of the telecom operators, OTT platforms consume humongous bandwidth, which stresses the telcos’ networks and necessitates their continuous and speedy upgradation and development. This is in addition to the fact that TSP networks are already overstretched due to the growing volume of mobile and fixed broadband traffic. The network also needs to be expanded continuously to cover the connectivity requirements across the country and cope with the exponential growth in usage. This expansion involves the deployment of the latest technologies for a better customer experience.

Interestingly, while telecom services are strictly monitored and regulated by TRAI to ensure a quality experience is delivered to the customers, OTTs can upgrade and downgrade their services since they have no QoS obligations. Therefore, it is only a reasonable ask that OTT players contribute towards the creation of the telecom network infrastructure in India.

It is also a fact that OTT platforms earn colossal revenues from advertisements based on data analytics and other monetising strategies of data collected from

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subscribers of its platforms. Besides, enterprise or business customers are charged a fee by OTT players for using their platform for business and commercial purposes. To attract more subscribers, OTTs offer their services “free” but earn huge profits by monetising the user data.

Ironically, most of the OTT platforms are owned and operated by large foreign entities and, hence, the data of Indian consumers resides on foreign shores and is monetised to improve the GDP of their base countries. Since these platforms are not covered by the Telecom law, their revenues do not add up to India’s economy or the telecom sector growth because there is no Indian taxation on these operations.

The TSPs, on the other hand, are Indian companies and their revenues are subject to Indian taxation, levies, fees and laws. They must incur huge Capex to set up, maintain and technologically refresh their networks. Apart from the telecom network (on land), Indian TSPs have invested heavily in laying undersea cables for setting up international network connectivity, while the OTTs ride free on these networks. Moreover, the huge subscriber data captured by TSPs as part of their operations, and stored in India, cannot by law be monetised. But OTTs do that at will.

What this means is that even TSPs and OTTs provide similar communication services in India under similar prevailing environments engineered over the same application layer of 7-layer OSI-based IP networks set up by TSPs. However, the rules are different for them, which puts TSPs and the country at a disadvantage. The new Telecom Bill aims to rectify this anomaly.

PLAUSIBLE SOLUTION

A practical approach would be that OTT communication services pay a network usage charge to the TSPs fairly and equitably. This could be based on the actual measurable traffic carried by the OTTs on the TSP’s network. This usage charge will contribute towards the development, maintenance and upgradation of the

network infrastructure and can be mutually agreed upon by the TSPs and OTT players. In case a mutual agreement cannot be reached, an appropriate licencing and regulatory framework should be in place to govern the contribution of OTT players towards the creation of network infrastructure. This is somewhat similar to the way TRAI regulates SMS termination charges.

The revenue thus accrued by TSPs will count towards their AGR calculations. Hence, the OTTs will effectively be paying indirect dues based on AGR to the government through the TSPs, contributing to the Telecom Development Fund as proposed in the draft bill. This will benefit the citizens and the national economy.

At the same time, given the government’s position that a supportive framework needs to be provided to nurture startups, MSMEs and small enterprises in the OTT ecosystem, such smaller players with low usage need not be required to pay the usage charge, to aid their growth. In this way, innovation and entrepreneurship would not get affected; the objective is certainly not to discourage OTT services. The proposal for a usage charge has a simple objective to justly meet the funding requirements for creating a robust telecom infrastructure in India, increased revenue for the exchequer, and continued innovation. The fact that economies across the world are advocating the need for OTTs to contribute towards digital infrastructure development, hence, cannot be undermined.

India has set global precedents in taking forward-looking and prudent decisions in recent times. The rapid technological evolution that the country is witnessing may pose similar policy challenges in the future as newer services with more complex applications emerge. It is, therefore, desirable that appropriate provisions be made to ensure that the policy, regulatory, and security mandates of the nation are upheld in the emerging technological scenario. 🌟

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