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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 11684/2024, CM APPL. 48545-48546/2024**

WORLD PHONE INTERNET SERVICES PVT LTDPetitioner

Through: Mr. Sanjay Ghosh, Senior Advocate
with Mr. Bipul Kedia, Mr. Kumar
Ankur, Mr. Darian Francis and
Mr. Rohan Mandal, Advocates.

versus

UNION OF INDIA & ORS.

.....Respondents

Through: Mr. Arjun Natarajan and Ms. Kamana
Pradhan, Advocates for R-3/ TRAI.
Mr. Apoorv Kurup, CGSC with
Mr. Arnav Mittal, GP for R-1, 2.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

23.08.2024

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1. This is second round of litigation, initiated at the instance of the Petitioner, category "A", Internet Service Provider¹ (including providing services of Internet Telephony) operating under License Agreement dated 8th April, 2002, renewed on 26th September, 2019, issued by Department of Telecommunications², Ministry of Communications and Information Technology³, Government of India.

2. The Petitioner urges that it is adversely affected by the current regulatory framework, which allows unlicensed Internet Telephony Service

¹ "ISP"

² "DoT"



Providers⁴ and Voice-over-Internet Protocol⁵ service providers such as Facebook Messenger and WhatsApp to operate in India without any oversight. It is argued that under the existing licensing regime, Internet Telephony is a strictly regulated and licensed service under the Unified License⁶ and ISP (IT) License issued in accordance with Section 4 of the Indian Telegraph Act, 1885⁷. However, platforms such as Facebook Messenger and WhatsApp provide voice-calling services without holding any such license, thereby bypassing the Indian licensing regulations. The Petitioner, as a licensed ISP, is required to pay license fees from 1st January, 2006, while these unlicensed entities operate without any such obligation.

3. In such circumstances, being aggrieved by the selective implementation of the licensing regime, the Petitioner had approached this Court through W.P.(C) 11173/2019 titled as ***World Phone Internet Services Pvt. Ltd. v. Union of India & Ors.***, seeking a direction that the license regime applicable on Facebook Messenger and WhatsApp should in compliance with the same licensing regime as applicable to licensed TSPs/ ISPs etc. The said writ petition was disposed of by the Court on 8th December, 2022, noting that MEITY had not accepted the recommendations made by the Telecom Regulatory Authority of India⁸, that regulatory intervention was not required for Over-The-Top⁹ service providers. Rather, MEITY had sent the recommendations back to TRAI for re-examination and reconsideration of the issue. Accordingly, the writ petition was disposed of

³ “MEITY”

⁴ “ITSP”

⁵ “VoIP”

⁶ “UL”

⁷ “Telegraph Act”

⁸ “TRAI”



with the following directions:

“6. In view of the above stand of MEITY, ld. Senior Counsel for the Petitioner submits that in the reconsiderations and deliberations which may be held by TRAI, the Petitioner may be allowed to participate, both by means of written representation and oral submissions, if the need so arises, and the petition may be disposed of on this basis. Ld. Senior Counsels for Respondent Nos. 3 and 4, refute these assertions.

7. Considering the fact that the entire matter is to be reconsidered by TRAI, it shall now hold stakeholder consultations including from the Petitioner, Respondent Nos.3 & 4 and any other stakeholders, concerning the recommendations to be given.

8. Considering the extensive prevalence and use of internet telephony, TRAI would expeditiously conduct this stakeholders’ consultation and give its recommendations accordingly.

9. The present petition, along with all pending applications, is disposed of in these terms. It is clarified that the issues raised by the parties has not been considered on merits or adjudicated, by this Court.”

4. Following these directions, the Petitioner submitted several representations to TRAI, seeking updates on the consultation process. However, it is contended that without responding to these queries, TRAI issued a consultation paper on 7th July, 2023, titled ‘*Regulatory Mechanism of OTT Communication Services and Selective Banning of OTT Services*’.

5. The Petitioner challenges the consultation paper arguing that Chapter II incorrectly observes that the licensing regime for licensed TSPs does not apply to OTT service providers. Further, they urge that questions framed for consultation (Questions 5 to 9) are based on an inaccurate assessment of the current situation, thereby diluting the concerns raised in W.P.(C) 11173/2019 and revealing a bias by TRAI. The Petitioner emphasizes that multiple representations sent by them regarding these matters remain unanswered.

6. In the above background, being aggrieved by the inactions of TRAI,

⁹ “OTT”



the Petitioner has preferred the instant writ petition seeking the following reliefs:

“a) Pass a Writ/ Order/Direction in the nature of mandamus, directing Respondent No. 2 and 3 to amend the terms of the Consultation Paper on Regulatory Mechanism of Over- The-Top (OTT) Communication Services, and Selective Banning of OTT Services dated 07.07.2023, to state that the licensee fees are payable by OTT platforms such as WhatsApp and Facebook; and

b) Pass a Writ/ Order/Direction in the nature of mandamus, directing Respondent No. 2 and 3 to suitably amend / delete questions 5 to 9 under the heading issues for consultation of the Consultation Paper on Regulatory Mechanism of Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services dated 07.07.2023 in terms of prayer (a) hereinabove as the same being arbitrary and without due application of mind; and

c) Pass a Writ/ Order /Direction in the nature of mandamus, directing Respondent No. 2 and 3 to decide the representations / contentions of the Petitioner in a time bound manner; and

d) Pass a Writ/ Order/Direction in the nature of mandamus, directing the Respondent No. 2 & 3 to charge license fees from Facebook Messenger and WhatsApp till the representations of the Petitioner are decided; Or Alternatively

e) Pass a Writ/ Order / Direction in the nature of mandamus, directing the Respondent No. 2 & 3 to bar Respondent No. 4 and 5 from providing services, which are subject matter of a license by the Respondent no. 1, Union of India;”

7. The Court has considered the contentions urged by Mr. Sanjay Ghosh, Senior Counsel for the Petitioner and carefully perused the record. Mr. Arjun Natarajan, counsel representing TRAI, has clarified that the consultation process is still ongoing and the final recommendations of the TRAI are yet to be issued. He has also explained that the delay has occurred due to multiple extensions for receiving stakeholder comments and counter-statements.

8. In light of the above contentions, it is important to take note of the



questions included in the consultation paper, soliciting the responses from the stakeholders. These questions include, but are not limited to, definitions of OTT services, regulatory and economic aspects, privacy and security concerns, and potential collaborative frameworks between OTT and licensed telecommunication service providers:

A. Issues Related to Regulatory Mechanism for OTT Communication Services

Q1: What should be the definition of over-the-top (OTT) services? Kindly provide a detailed response with justification.

Q2: What could be the reasonable classification of OTT services based on an intelligible differentia? Please provide a list of the categories of OTT services based on such classification. Kindly provide a detailed response with justification.

Q3: What should be the definition of OTT communication services? Please provide a list of features which may comprehensively characterize OTT communication services. Kindly provide a detailed response with justification.

Q4: What could be the reasonable classification of OTT communication services based on an intelligible differentia? Please provide a list of the categories of OTT communication services based on such classification. Kindly provide a detailed response with justification.

Q5. Please provide your views on the following aspects of OTT communication services vis-a-vis licensed telecommunication services in India:

- (a) regulatory aspects;*
- (b) economic aspects;*
- (c) security aspects;*
- (d) privacy aspects;*
- (e) safety aspects;*
- (f) quality of service aspects;*
- (g) consumer grievance redressal aspects; and*
- (h) any other aspects (please specify).*

Kindly provide a detailed response with justification.



Q6. Whether there is a need to bring OTT communication services under any licensing/regulatory framework to promote a competitive landscape for the benefit of consumers and service innovation? Kindly provide a detailed response with justification.

Q7. In case it is decided to bring OTT communication services under a licensing/ regulatory framework, what licensing/ regulatory framework(s) would be appropriate for the various classes of OTT communication services as envisaged in the question number 4 above? Specifically, what should be the provisions in the licensing/ regulatory framework(s) for OTT Communication services in respect of the following aspects:

- (a) lawful interception;*
- (b) privacy and security;*
- (c) emergency services;*
- (d) unsolicited commercial communication;*
- (e) customer verification;*
- (f) quality of service;*
- (g) consumer grievance redressal;*
- (h) eligibility conditions;*
- (i) financial conditions (such as application processing fee, entry fee, license fee, bank guarantees etc.); and*
- (j) any other aspects (please specify).*

Kindly provide a detailed response in respect of each class of OTT communication services with justification.

Q8. Whether there is a need for a collaborative framework between OTT communication service providers and the licensed telecommunication service providers? If yes, what should be the provisions of such a collaborative framework? Kindly provide a detailed response with justification.

Q9. What could be the potential challenges arising out of the collaborative framework between OTT communication service providers and the licensed telecommunication service providers? How will it impact the aspects of net neutrality, consumer access and consumer choice etc.? What measures can be taken to address such challenges? Kindly provide a detailed response with justification.

B. Issues Related to Selective Banning of OTT Services

Q10. What are the technical challenges in selective banning of specific OTT services and websites in specific regions of the country for a specific period? Please elaborate your response and suggest technical solutions to



mitigate the challenges.

Q11. Whether there is a need to put in place a regulatory framework for selective banning of OTT services under the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 or any other law, in force? Please provide a detailed response with justification.

Q12. In case it is decided to put in place a regulatory framework for selective banning of OTT services in the country, -

(a) Which class(es) of OTT services should be covered under selective banning of OTT services? Please provide a detailed response with justification and illustrations.

(b) What should be the provisions and mechanism for such a regulatory framework? Kindly provide a detailed response with justification.

Q13. Whether there is a need to selectively ban specific websites apart from OTT services to meet the purposes? If yes, which class(es) of websites should be included for this purpose? Kindly provide a detailed response with justification.

Q14. Are there any other relevant issues or suggestions related to regulatory mechanism for OTT communication services, and selective banning of OTT services? Please provide a detailed explanation and justification for any such concerns or suggestions.”

9. Upon a detailed examination of the consultation paper, the Court finds that the concerns raised by the Petitioner are already addressed by the broad and inclusive nature of the questions posed by TRAI. Specifically, Question No. 14 is framed to encompass any additional issues or suggestions regarding the regulatory mechanism for OTT communication services, effectively allowing stakeholders, including the Petitioner, to express their viewpoints on any perceived gaps or omissions in the existing framework. Furthermore, other questions, such as Questions 5 to 9, directly solicit stakeholder feedback on the regulatory, economic, and security aspects of OTT communication services vis-à-vis licensed telecommunication services.



This indicates that the consultation paper has been designed to cover the full spectrum of issues relevant to the stakeholders, including those highlighted by the Petitioner.

10. The Court also observes that the Petitioner's allegation of bias and the assertion that the consultation paper is based on an incorrect assessment of the existing ground realities is unfounded. It is also crucial to recognize that the Court's jurisdiction in reviewing a consultation paper issued by a regulatory body is inherently limited. The consultation paper is a preliminary step in a broader regulatory process aimed at gathering stakeholder inputs to frame appropriate regulations. At this juncture, the Court must exercise restraint and avoid intervention unless there is a clear violation of statutory or constitutional mandates. The concerns raised by the Petitioner, which are primarily related to the framing of questions and the perceived bias of the consultation paper, do not justify judicial interference at this stage. Intervening in the consultation process would not only be premature but also an overreach into the domain of the regulatory authority, whose mandate includes framing and finalizing such consultation processes.

11. The process initiated by TRAI is inherently consultative, inviting inputs from all relevant stakeholders, including the Petitioner. The broad and open-ended nature of the questions allows for a comprehensive examination of the issues at hand, ensuring that the concerns of all parties, including those of the Petitioner, are adequately addressed. Thus, there is no justification for the Court to intervene by directing TRAI to amend the consultation paper or alter specific questions, as the regulatory authority is already acting within its mandate to solicit diverse stakeholder opinions.

12. Therefore, the Court finds no merit in the Petitioner's request for a



writ of mandamus directing amendments to the consultation paper. The Petitioner's concerns are sufficiently covered by the questions as formulated by TRAI, which provide ample scope for presenting their views and arguments. It is understood that the order passed by this Court in W.P.(C) 11173/2019, shall be taken into account by the TRAI while taking the final view and giving their recommendations in terms of the applicable regulatory framework for OTT Communication Services. Furthermore, since substantial time has lapsed since the consultation paper dated 7th July, 2023 was circulated, it is expected that TRAI shall now proceed to finalise the same expeditiously. It is made clear that in case the TRAI's final recommendations, are adverse to the interest of the Petitioner, they shall be free to explore their legal options, in accordance with law.

13. With the above directions, the present writ petition is disposed of, along with pending application(s).

SANJEEV NARULA, J

AUGUST 23, 2024

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