

**BIF RESPONSE TO TRAI CP ON REGULATING CONVERGED DIGITAL
TECHNOLOGIES AND SERVICES-ENABLING CONVERGENCE OF CARRIAGE OF
BROADCASTING & TELECOMMUNICATION SERVICES**

PREAMBLE

1. At the outset, we wish to laud the Authority for coming up with a CP on the very contemporary subject of Convergence of Carriage of Telecom & Broadcasting Services.
2. Convergence in the carriage of broadcasting and telecommunication services has increased sharply over the last decade and has made access to technology increasingly seamless for consumers, including businesses. We are seeing enhanced access (and usage) of technology and tech products by Indians. This ecosystem has allowed innovation in both carriage and content, bringing the idea of Digital India to life.
3. Before responding to the specific questions in the Consultation Paper on Regulating Converged Digital Technologies and Services – Enabling Convergence of Carriage of Broadcasting and Telecommunication services (the paper) we feel that it is important to set out certain broad points which offer alternate views to some of the fundamental assumptions made in the paper.
4. The offerings of OTT services are in addition to, and not in derogation of, traditional telecommunications (or broadcasting) services.
5. The paper operates on the assumption that all digital services are largely similar, and indistinct from telecom services (and therefore should be regulated similarly with telecom services). In actuality, the vast majority of online services, sometimes referred to as 'OTTs', are in addition to, and not in derogation or substitution of, traditional telecommunications (or broadcasting) services. Infact, it is suggested that they should be referred to as CAPs (Content & Application Providers) as termed appropriately by BEREC (EU Regulator for ICT). While adoption of online communications by users is already considerable, that does not imply product market substitution, and certainly not complete substitution for traditional telephony, or for mobile networks.
6. Over-the-top (OTT) services refer to applications and services which run 'over the top' of the telecommunication networks, through the public Internet. While the term can describe any Internet application or service, it is most often understood and used to refer to apps that enable either online communications or video viewing, which some contend are 'similar' or 'replacements' and 'substitutes' for telecommunications / telephony and broadcasting services, respectively.
7. Users of these products also typically subscribe to traditional fixed and mobile services, and use each of them as the circumstances and call types vary, depending on the use case (e.g. at home, on the road, personal use, professional use, intended call duration, combination with text, video and file transfer, unified communications, conference calls, business solutions, etc.).
8. Usage is therefore more complementary and accretive than substitutive. Essentially, everyone has a mobile phone and uses it for calling and SMS, even when they are also users of OTTs, 'unmanaged VoIP' and messaging solutions.
9. The symbiotic relationship between TSPs and technology companies is exemplified as below –

- 9.1 As use and reach of online ('OTT') services grows, more and more consumers are purchasing more and more of TSPs' products to access the internet. Therefore, a virtuous cycle exists in the online content space, which ultimately depends on consumers who buy high-speed internet access from TSPs (as Internet Service Providers - ISPs) in order to reach content and applications. Similarly, content providers are themselves reliant on a connected population for their business to work.
 - 9.2 This has delivered huge advantages to consumers and users who benefit from unfettered access to a rich ecosystem of online content, applications, and services, bringing socio-economic benefits and access to entertainment and information that enriches consumers' lives as well as economic opportunities. The government should continue to encourage this kind of symbiotic relationship for the benefit of all actors in the ecosystem, beginning with end-users.
 - 9.3 In a Report to be shortly released, 3 IIMA Professors have found that
 - a) The App economy contribution to GDP has a CAGR of nearly 32%, (over 2020-2030) almost 4 times that of the GDP growth rate during the same period.
 - b) The estimates of the contribution of the App Economy for 2022 at 3% of GDP need to be seen in the light of similar estimates for the EU and the UK. These were at 0.75 and 1.50% respectively as of 2021.
 - c) Nearly 85% of the total digital transactions in India (that include credit and debit cards, Internet banking etc) are mobile payments.
 - 9.4 OTT companies contribute significantly to investment in networks and to supporting TSPs and the telecom value chain. Their services and infrastructure are a major benefit for TSPs, other online companies, and consumers.
 - 9.5 It should be noted that ISPs customers who are pulling the content (CAPs) for his use and that not the other way around. CAP is not forcibly pushing it to the customer. By doing so, the customer is drawing a huge benefit. Also the CAPs are already regulated under MeitY. Any additional regulations for this sector may be dealt with by MeitY.
 - 9.6 It must also be noted that TSPs would have remained empty pipes if there was no demand pull for CAPs by its customers. This was clearly demonstrated during the pandemic where people hugely benefited due to availability of CAPs. The TSP/ISPs also benefited due to availability of content from CAPs as they are charging the customer for the data consumed.
- 10.
- 10.1 Related Investments include large data centers for storing content; purchased capacity from Internet backbone providers to transport the data over long distances, in peering and content delivery infrastructure at the edges of the network where the data packet gets to the local internet service provider.
 - 10.2 They invest in subsea cables that connect global internet traffic and provide networks with high speed content delivery, resilience, and capacity. They often directly partner with local carriers, who benefit from the investment into these

subsea cables¹ with better global network connectivity and investment into their backhaul networks. That in turn benefits their customers.

10.3 They also design their services and invest in products that support operators' effective network management and reduce their costs.

10.4 Other online platforms invest in this sort of infrastructure as well. For instance, an October 2022 report by Analysys Mason on the [impact of tech companies' network investment on the economics of broadband ISPs](#) shows they spent US\$883 billion on internet infrastructure from 2011 to 2021, averaging \$125bn annually in recent years and saving ISPs \$5bn to \$6.4bn a year.

10.5 **Any calls for similar regulation of TSPs and internet companies may not have considered the following:**

10.5.1 The paper makes the assumption that because the offerings of the TSPs and the OTTs are interdependent and complementary, they should be similarly regulated and licensed. However, this view may ignore that the sectors are vastly different with different regulatory requirements (or lack thereof).

10.5.2 **Indian Telegraph Act does not apply to OTTs**

- a. OTT is essentially an internet-based app, not owning or working a telegraph.
- b. It should be appreciated here that central to the Telegraph Act is the concept of owning, establishing, operating maintaining a telegraph which, as defined in the Telegraph Act, is what attracts licensing. OTT's do not own, establish, operate or maintain a telegraph – so the question of attracting licensing does not arise.
- c. A plain reading of Section 3 (1)(aa) of the Indian Telegraph Act, 1885, (Telegraph Act) explains that a "telegraph" means to include any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, etc. The focus is on the presence of a hardware element tied to the services provided by the service provider.
- d. The Telecom Regulatory Authority of India (TRAI), in its consultation paper on Regulatory Framework for OTT Services, 2015, defined "OTT provider", as a service provider which offers Information and Communication Technology services, but neither operates a network nor leases network capacity from a network operator. Further, it also stated that based on the kind of service they provide, there are basically three types of OTT apps, namely, messaging and voice services (communication services); application ecosystems (mainly non-real time), linked to social networks, e-commerce; and, video/ audio content.
- e. In view of the above, OTT services are mere applications provided to end users over the internet using the network infrastructure of licensed Telecom Service Providers (TSP). They neither operate on a network nor lease network capacity from a network operator for the provision of their services. It is to be noted that the workings of OTT services can be distinguished from the definition of telegraph as provided in the Telegraph Act.
- f. Thus, the argument that the licensing under Indian Telegraph Act applies to OTTs is flawed. OTTs clearly fail this test and are anyway governed by the Information Technology Act, 2000.

¹ Examples include: Orange SA and Telefónica SA unit Telxius Telecom SA, which partnered to supply backhaul extensions, or data circuits, for Google LLC's Dunant submarine cable project, which will link France's Atlantic coast to the United States < <https://www.spglobal.com/marketintelligence/en/news-insights/blog/insight-weekly-february-7-2023>>

10.5.3 Substitutability Criterion

- g. Historically speaking, the government has always treated OTT services as applications, and has reiterated the same in several consultation papers² and reports³. Further, it is to be noted that while there have been several discussions around substitutability being criteria to understand the realm of a specific technology and its implications, it does not resonate well with the end users as well as the stakeholders in the prevalent scenario. Substitutability has to be complete and both ways.
- h. We acknowledge that substitutability stands as an essential criterion in considering comparable regulations. However, this factor must be treated at par with the level of competition, the level of innovation, consumer welfare, the ubiquity and adoption of such technology, amongst several other factors. We would like to stress on the fact that owing to the popularity of OTT services, higher investments were made by TSPs in the 4G networks.
- i. Moreover, in determining substitutability, several considerations including whether the technologies are operating in the same layer; whether the functional services are comparable; comparison in the nature of devices; and likewise, will have to be accounted for. In the absence of cogent functional similarity, it is misleading to compare OTT to traditional services provided by the TSPs.
- j. OTTs are not substitutes of TSPs; they depend on them. OTT applications cannot be offered without access to the physical networks that only TSPs deploy. TSPs control the underlying broadband access infrastructure, and are the gatekeepers to broadband internet access and therefore, OTTs themselves.
- Telecom networks and OTT applications operate in different layers (network layer and application layer respectively)
 - TSP licenses also confer several exclusive rights that OTT players do not enjoy. These include, for example: (i) the right to acquire spectrum, (ii) the right to obtain numbering resources, (iii) the right to interconnect with the PSTN, and (iv) the right of way to set up infrastructure.
 - Unlike TSP networks, OTT apps operate in a highly competitive market in which it is easy and often cost-free for consumers to switch between competing apps, and many consumers access multiple OTT communications apps from one device (thus, the rationale underpinning many legacy telecommunications regulations does not apply to OTT communications applications).
 - OTTs enjoy no exclusive right to deploy their applications. TSPs can and often do provide their own OTT applications. On the other hand, an OTT application provider would need a licence to deploy a TSP Network.
 - OTTs often offer diverse functionalities that do not easily fall into straitjacketed categories. They may use messaging or calling merely to augment unrelated services and improve the consumer experience. Conceiving "communication services" as a sub-category of OTT applications creates an impractical distinction between communication functionalities and non-communication functionalities among OTT applications. For example, gaming, document editing, photo sharing, social media and many other fundamentally dissimilar functionalities allow users to communicate with each other.

² TRAI Consultation Paper on Regulatory Framework for Over-The-Top (OTT) Communication Services, December, 2018.

³ Net Neutrality: DoT Committee Report, May, 2015.

- OTT services provide expansive experiences to customers that go beyond conventional messaging and communication options provided by TSPs. OTT communications applications such as Whatsapp, Hike Messenger, and Google Hangouts provide rich messaging features not available through SMS, and they also have broad economic impact. A recent study estimates that for the year 2017⁴, this consumer surplus⁵ for India provided by “Rich Interactive Applications” or “RIA” was a substantial Rs 6.3 lakh crore⁶. A 2017 report by WIK found that each 10% increase in usage of RIAs led to an average increase of US\$5.6 trillion in global GDP (0.33% of GDP) from 2000 to 2015⁷. And according to one study, a five percent increase in WhatsApp penetration in 2015 is associated with a US\$22.9 billion increase in global GDP⁸.
- Attention may be drawn in particular to the European Union’s acknowledgment in the revised European Electronic Communications Code of the fundamental differences between “number-based interpersonal communications services” (“NB-ICS”), such as those interconnected with the public telephone network⁹, and “number-independent interpersonal communications services” (“NI-ICS”), which includes non-interconnected OTT communications apps that ride over the network. The EU created separate regulatory regimes for NB-ICS and NI-ICS, subjecting NI-ICS to lighter touch regulation (e.g. transparency requirements).

10.5.4 OTTs governed by the Information Technology Act, 2000

a. OTT service providers fall under the ambit of Section 2(w) of the Information Technology Act, 2000, (IT Act) defining them as intermediaries. Consequently, they are subjected to the exemptions as envisaged under Section 79 thereof. The extant framework accounts for the content and the subject matter of the OTT services, in spite of the relaxed licensing regime.

b. Evidently, the courts have held that intermediaries are subjected to the provisions of IT Act. Also, in the matter of Justice for Rights Foundation v. Union of India, before the Hon’ble Delhi High Court, the Ministry of Information and Broadcasting has reaffirmed its stand attesting to the fact that the online platform are not required to obtain any license from the Ministry for displaying their contents, and further explained that the same is not regulated by the said Ministry. Further, the IT Act continues to be the applicable regulatory framework for this particular breed of technology and lends sufficient guidance to the players and the end users.

⁴ In its report “The Economic and Societal Value of Rich Interaction Applications (RIAs) in India”, WIK has stated that RIA usage saves on average 803.9 minutes per week. P. 13, available at https://www.wik.org/fileadmin/Studien/2017/WIK-BIF_Report_-_The_Economic_and_Societal_Impact_of_RIAs_in_India.pdf.

⁵ Consumer surplus indicates economic welfare that people gain from buying and consuming goods or services.

⁶ Available at <https://www.financialexpress.com/industry/telecom-ott-apps-create-rs-6-3-lakh-cr-consumer-surplus-study/935890/>.

⁷ WIK, The Economic and Societal Value of Rich Interaction Applications (RIAs), at 1 (2017).

⁸ Id. at 32.

⁹ European Parliament and the Council of the European Union, Directive establishing the European Electronic Communications Code, Article 2 ¶ 6 (July 11, 2018).

10.5.5 OTT and telcos are NOT in the same game or playing field – Level Playing Field Condition Does Not Apply

c. The argument that OTT services such as WhatsApp, Netflix, Saavn, and YouTube should be regulated under the same licensing regime that applies to TSPs is incorrect. The claim that since consumers tend to prefer the rich modern messaging over the obsolescent SMS, and Hotstar and YouTube over cable TV, they are comparable products/services is invalid. This is akin to demanding that a bullock cart be subject to the same taxes and regulations as a Mercedes car as both have the same functionality and are vehicles of travel, - oftentimes on the same road.

d. This erroneously overlooks the vast and critical differences between the two categories. The two types of entities are placed in very different circumstances. TSPs, eg, enjoy several exclusive rights that include (1) the right to interference-free spectrum, (2) the right to numbering resources, (3) the right to interconnect with PSTN, and (4) the right of way to set up infrastructure. However, OTT players neither have these privileges listed above, nor own the network or control the access to telecom infrastructure; therefore, question of level playing field simply does not arise.

10.5.6 Level Playing Field Condition Governed by Art.14 of The Constitution of India

It should be appreciated that Art.14 of our Constitution guarantees equal treatment only to persons who are equally situated. This is a well-established point and enough case law available on this point.

Moreover, unequals are not only permitted to be unequally but they also have to be so treated. St.Stephen's College vs Univ. of Delhi, (1992) 1 SCC 568; AIR 1992 SC 1630; 1992 AIR SCW 1792; JT 1991 (4) SC 548; 1992 (1) SCJ 624 para's 97 -100.

Importantly, equal treatment to unequals is nothing but inequality. To put both categories at par is wholly unjustified, arbitrary, unconstitutional, being violative of Art.14. (Onkar Lal Bajaj vs Uoi, AIR 2003 SC 2562: (2003) 2 SCC 673: 2003 AIR SCW 2757: 2003 (1) LRI 190: 2003 SRJ 200: (2002) 9 SCALE 501: 2003(1) Supreme 402.

Art.14 guarantees equal treatment to persons who are equally situated. Govt of AP vs Maharshi Publishers Pvt Ltd., AIR 2003 SC 296; (2003) 1 SCC 95; 2002 AIR SCW 4771; JT 2002 (9) SC 277; 2002 (10) SRJ 457; (2002) 8 SCALE 291; 2002 (7) Supreme 570.

11. Indeed, compared to the telecommunications space, the OTT sector has vastly different competition and consumer protection concerns, and is already regulated by laws in these areas and others (such as broadcasting rules).
12. With these apps, consumers can even 'multi-home' (i.e. use different platforms), meaning that not only can they switch apps in a couple of clicks, but that they can use these apps concurrently, and often for free. They also usually generate little consumer confusion or complaints.
13. The Competition Commission of India (CCI) in its Market Study on the Telecom Sector in India¹⁰ examined the telecom sector and also the establishment of the OTT service

¹⁰ Competition Commission of India, Market Study on the Telecom Sector in India, 22.01.2021
<<https://www.cci.gov.in/images/marketstudie/en/market-study-on-the-telecom-sector-in-india1652267616.pdf>>

providers in India. Tellingly, it stated: "On balance experts feel a separate regulatory framework is not necessary for OTTs and excessive regulation may stifle technological innovation, and therefore be counterproductive.

14. The International Telecommunications Union (ITU)'s [Recommendation ITU-T D.262](#) also mentions as below:

"Consideration of the economic impact of OTTs should be based upon recognition of the fundamental differences between traditional telecommunication operators and OTTs, including inter alia, control of broadband Internet access, level of regulatory exposure, barriers to entry, competitive environment, level of substitutability between OTTs and traditional telecom services and interconnection to public networks..."

8.2 In the spirit of service availability and affordability, Member States should foster enabling legal and regulatory environments, and develop policies that are fair, transparent, stable, predictable and non-discriminatory; and that promote competition, foster technological and service innovation and encourage private sector investment incentives, in order to ensure the continuing growth and adoption of OTTs.

(Emphasis added.)

As such, we emphasise that regulation for regulation's sake would not be the best way to encourage either the telecom or the online (OTT) industry.

15. The paper also makes a reference to the seeming lack of regulation of cloud services and cloud service providers.

15.1 In fact, cloud services are well covered under the existing legal framework. They are subject to the IT Act, 2000 and various rules under it, including the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011; the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021; and the Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009, as amended from time to time. They are also subject to all other laws including consumer protection and contract laws, as other service providers and companies operating in India are.

15.2 Further, MeitY governs empanelment of cloud service providers as government-approved service providers under its 'MeghRaj' cloud computing initiative. In order to be considered for empanelment, providers must adhere to several standards, including on information security and personal identifiable information.

15.3 India's data centre industry is estimated at USD 5.6 billion dollars in 2022, and set to grow as capacity is increasing, with over 45 data centres coming up. The industry received considerable tailwinds from the pandemic, and India is poised to become a data hub for the world. Any additional regulatory burden will have the unfortunate consequence of stymying innovation and investment into the sector.

15.4 Additionally, competition among service providers in creating value for consumers, the industry's existing best practices, and the overarching regulatory framework ensure that consumers are adequately protected. In fact, increased regulation would only lead to increased costs of access for Indian consumers, and create a chilling effect on investment in India. Therefore, no further regulation of cloud services or cloud services providers is necessary or desirable at this time.

16. We agree with the TRAI's view that convergence has been "defined and interpreted in many ways". For instance, a content creator or a Digital Service Provider (DSP) would have a different perspective on convergence, compared to a Telecom Service Provider (TSP) or a broadcast carriage service provider like Direct to Home (DTH), Headend-In-The-Sky (HITS) or Cable Operators.
17. To explain convergence, the CP states that "**various technological developments in digital markets have resulted in the convergence of devices, services, and networks**". The CP also delves into a broad range of issues from **convergence in telecom and broadcasting services, convergence between telecom and the IT sector due to convergence in IP based networks, and convergence between telecom and space sector**. The CP then highlights the challenges caused by such convergence at the statutory, licensing, regulatory (including content regulation), administrative and institutional levels. Consequently, it seeks stakeholder responses on how India should respond to these emerging trends.
18. Here are some of other principles which form the basis of our response to the questions in the Consultation Paper.
- 18.1 **Telecommunication and Broadcasting Services are distinct services, and they should remain so from a regulator's point of view.**
The CP states that "*various technological developments in digital markets have resulted in the convergence of devices, services, and networks*" and explains device convergence, service convergence and network convergence.
- 18.2 Some issues that arise out of the CP's explanation of "convergence".
- (i) **Device convergence:** To support its description of device convergence, the CP also refers to "smart devices" and describes smart TVs in detail. However, latest available data suggests that only around 22 million homes have internet-enabled smart TVs, making up around roughly 10% of all television households in the country. Is 10% penetration sufficient to conclude device convergence for a 1.4 billion people?
- (ii) **Service convergence:** The CP in para 1.3(ii) states that broadcasting services and telecommunication services have converged into one service.

"In the media and telecommunications business, it may mean the tendency for services to merge into one offering that combines the features of the original services. Convergence of services allows operators to offer bundles of services to the end-users. Converged services include at least two different types of services, for example, double-play, triple-play, quadruple play bundled services."
- (iii) The CP uses examples of double-play, triple-play, and quad-play to draw this conclusion. The CP mistakes the bundling of telecommunication services with broadcasting services by a single service provider as convergence of services. It is important to note that bundling of different services (like TV, broadband and voice) into one offering does not mean that these services have converged. Very existence of bundling of broadcasting and OTT services indicates that there is no convergence of services between the two sectors. It only enables a service provider to provide multiple services as a bundled offering and each service within the bundle remains distinct. The fact that they are offered as a

bundle or provided by one service provider does not mean that these distinct services have converged.

- (iv) As rightly pointed out in para 1.17 of the CP, telecommunication has a private nature of communication and its markets are ruled by economic and technical issues, including network access. As a result, regulators' role, inter-alia, included ensuring access. On the other hand, broadcasting is communication to the public and regulatory concerns in broadcasting are mainly to do with free of speech and expression. Therefore, we recommend TRAI to create a clear distinction in the regulation of Telecommunication services from that of Broadcasting Services.
- (v) **“Carriage convergence” (or “network convergence”):** The CP gives the example of *“integrated delivery, via a single delivery channel, of voice and other services, through a single network infrastructure that handles and distributes multiple types of media”* to explain network convergence. However, the networks for broadcasting and telecommunication services remain distinct, even if the services are available in a bundled offering for consumers. The CP itself notes that technologies “are being developed to enable convergence of broadcast and unicast infrastructure...” (emphasis added). It cites Direct-to-Mobile, 5G Broadcast, and satellite networks for broadcast and telecom services as examples of this, but what it describes are systems that could theoretically support convergence, rather than actual convergence taking place.

19. The CP appears to be basing the need for regulatory changes entirely on emerging trends, perhaps to ‘future proof’ the regulation. However, trends in certain urban pockets of the country like triple play and quad-play or anticipated developments like direct to mobile broadcasting, which have not been realised on any significant scale in India, cannot form the basis of policy changes that will impact 210 million TV home (or about 850 million TV viewers) and 1.2 billion mobile users in India.

20. The regulation of content should be kept separate from the regulation of carriage and should be outside the scope of the CP

The Department of Telecommunication's reference to TRAI dated August 12, 2021, is limited to "convergence of carriage of broadcasting and telecommunication services". However, the CP analyses the regulatory framework for content for OTT (news and non-news), Radio, TV (news and non-news), Films and Print and concludes that *“the existing regulatory oversight framework for content regulation, which is patchy and inadequate at its best, may need a complete overhaul in a converged era in line with many other nations, where a converged regulator regulates carriage and content”*.

21. We do not agree with such conclusive statements about the regulatory framework for content across different platforms. Such remarks completely disregard institutional learnings from the Ministry of Information and Broadcasting (MIB), the role of self-regulatory bodies like the News Broadcasting Standards Authority (NBSA) and the Broadcasting Content Complaints Council (BCCC) in television and the Digital Publisher Content Grievances Council (DPCGC) and the Digital Media Content Regulatory Council (DMCRC) for OTT, as well as the 2021 amendment to the IT Rules to address the issues and challenges posed by digital platforms.

22. We would also like to take this opportunity to highlight that content regulation is very different from carriage regulation. Content regulation deals with freedom of speech and expression as guaranteed by Article 19(1)(a) of the Indian Constitution, subject to

restrictions under Article 19(2). As illustrated in pages 28-29 of the CP, the regulatory framework for content has evolved from judicial interpretation of Article 19(1)(a) of the Indian Constitution for different media platforms.

23. We therefore recommend that the regulatory framework for content should be distinct and separate from the regulatory framework for carriage. In fact, TRAI in its 2006 Recommendations on "Issues Relating to Convergence and Competition in Broadcasting and Telecommunications" acknowledges this distinction and recommended that the "Regulation of carriage and content should be separated, as the skill sets required for the two are significantly different. Regulation of carriage is more or less concerned with technical and economic aspects/ repercussions of policies. Content regulation has to take into account the impact of content on sensibilities, morals and value system of the society. Artistic and creative persons from the fields of fine arts, drama, films etc. may be more suited for content regulation than technocrats or economists." The MIB adopts a similar view in its response to the DoT and TRAI on the issue; its letter dated 4th October 2022 echoes the TRAI's 2006 recommendations¹¹. The Ministry also says that existing mechanisms for content regulation are effective, and there is no need to disturb established practices or re-engineer business processes.

The premise for such distinction and separation of the regulatory frameworks for content and carriage still holds in today's digitalised carriage eco-system.

24. Moreover, the principles for regulating content across different platforms are different for theatres, TV, and OTT because of fundamental differences in how content is consumed via these platforms. For example, content shown in theatres is being publicly exhibited, viewed by a wide range of viewers at the same time, and hence is governed by the Cinematograph Act & Rules and a Self-Regulatory Framework. Television, by comparison, is relatively private and characterised co-viewing with schedule programs (push content) and hence governed by the Cable Television Networks Regulation Act and Rules. OTT on the other hand, is a characterised with private viewing in India with consumers making informed choice (pull content) about every content that they watch, and hence content OTT on governed by Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 and the Self-Regulatory Framework including the certification process for identification of content and calibration of access.

The viewer's ability to exercise choice in how they view the content, or indeed whether they view it at all, factors into the potential risks of providing content via a particular platform.

Therefore, a converged or "one size fits all" framework for content regulation cannot be applied for all platforms.

25. Internet-based Services or Digital Services are different from Telecommunication Services and should be regulated by specialised legislation like the Information Technology Act, 2000

- 25.1 **Telecommunication services** are services provided by Telecommunication Service Providers (TSPs) and include fixed and mobile telephone services (including internet connectivity), carrier services, call management services, private network services and data transmission services.

¹¹ https://www.trai.gov.in/sites/default/files/CP_30012023_0.pdf#page=146

TSPs provide these services through a license granted by the Government which confers to them an exclusive right to acquire and exploit scarce natural resources like telecommunication spectrum, the right to obtain telecom numbering resources, and the right of way to set up infrastructure. TSPs also have access to a Public Switched Telephone Network (PSTN) (*or switched or non-switched networks in the case of mobile services*) for the transmission of voice, data and video to and from national and international destinations, and hence their service is primarily concerned with the transmission of voice and data. They are also often provided with crucial infrastructural assets, essential facilities, subsidies, concessions and territories necessary for their operations.

These exclusive privileges give TSPs economic advantages like high entry barriers, reduced competition and exclusivity in business operations, and are the premise for regulations in the form of net neutrality, revenue share, contributions to universal service obligations, investment mandates, tariff regulation and must carry obligations.

- 25.2 ***Internet-based services or digital services***, as the name suggests, are services that are provided over the internet. The EU defines these as services sent and received by electronic equipment for data processing.¹²

Digital services include buying and selling, OTT communication and messaging services, OTT video streaming services, digital news, search services, navigation services, ride hailing services, dating services, delivery and logistics services delivered over the internet. On the supply side, new data networks, digital computing tools, and internet platforms enable service providers to digitalise their services and transform their modes of delivery. On the demand side, internet platforms and digital technology reduce transaction costs and allow access to a variety of goods and services. They also provide convenience and the ability to customise services. Such “digital markets” are built on top of telecommunication services and characterised by hyper competition and low entry barriers.

Therefore, it is important to note that these digital services are different from the telecom services mentioned above.

26. Of late, there have been several attempts to equate voice and messaging services of TSPs with services of DSPs. They allege that voice and messaging services provided by TSPs are substitutable with *internet-based communication services and OTT communication services* of DSPs and that these services be brought under the same rules that regulate TSPs’ voice and messaging services.

27. It is crucial to understand that *internet-based communication services* and OTT *communication services* are not a substitute for TSPs’ voice and messaging services. Terming the services as substitutable ignores the differences in the features offered by the two services.¹³

¹² See Article 1(1)(b) of Directive (EU) 2015/1535, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L1535>

¹³ Noyanika Batta. *Regulation of OTT Communications Services: Justified Concern or Exaggerated Fear?* January 2023, Esya Centre, available at https://static1.squarespace.com/static/5bcef7b429f2cc38df3862f5/t/63d8b49179bdf80b02924cc6/1675146395190/Esya_Centre_Report_Communications_OTT_Services.pdf

- i.) TSPs provide internet connectivity and facilitate the provision of services through the internet. As all internet access is controlled by TSPs, which DSPs need to build and provide their services, they are a dependent industry and not equal.
 - ii.) The Australian Competition and Consumer Commission (ACCC) found that a technical shortfall of OTT communication is that it only facilitates communication within a particular app's ecosystem (e.g., *call only possible from WhatsApp to WhatsApp*), whereas a TSP enables communication between different operators (e.g., *call from Airtel to Singtel*). This limitation of OTT communication limits the substitutability of traditional communications and OTT communications.¹⁴ The ACCC report also concluded that there is "no basis for requiring equivalent regulatory treatment".
 - iii.) Digital, or internet-based services cannot be treated on par with telecom services as their dependence is not equivalently mutual, i.e., while DSPs require the services provided by TSPs, the reverse is not true.
 - iv.) TSPs are gatekeepers of internet access, and hence gatekeepers to all digital services. To be considered as equal, the first requirement is for the services to be independent or mutually dependent. Neither is true and hence TSPs' voice and messaging services are not the same service as that of DSPs' *internet-based communication services or OTT communication services*.
28. In view of the above distinction and has been pointed out earlier, OTTs (or CAPs) and TSPs are unequal's and cannot be treated as equals as per Article 14 of the Constitution. There is not case of a 'Level playing field 'between them and 'same service same rules' cannot apply. While TSPs enjoy different unique rights (right to obtain interference free spectrum, right of interconnection, right to unique numbering resources and right of way) and resources, CAPs do not have any. Vide Article 14 of the Constitution, it is mandatory to treat them differently as they are neither similar nor substitutable.
29. Given this distinction, digital services require specialised legislation like the Information Technology Act, 2000 (*which, according to Minister of State for MEITY, is currently being revamped to a Digital India Act*) and a separate regulatory framework distinct from the regulatory principles that govern and regulate telecommunication services. The CP's claim in paragraph 1.33 that "The objective of promoting innovation, competition and growth of India's Digital Economy may not be fully achieved by just amending the India's Information Technology Act, 2000" overlooks the clear intent of the government to refine and further develop specialized legislation for digital services.
30. India has a unique institutional setup that favours specialisation to better manage administrative affairs. The intent to maintain distinctions between different areas of expertise is apparent in the fact that there are separate ministries for Communication, Information & Broadcasting, and Electronics & Information Technology and in the different responsibilities they have been allocated/entrusted with. Accordingly, separate but coordinated licensing and regulatory frameworks are most appropriate for the Indian context. The CP has not shown that there is any need for additional regulations, or that there is something to be "fixed" in the current regulatory

¹⁴ Australian Competition and Consumer Commission, *Communications Sector Market Study (April 2018)*, available at: https://apo.org.au/sites/default/files/resource-files/2018-04/apo-nid139446_1.pdf

frameworks: it does not highlight competitive outcomes that are not being achieved by the market, it does not indicate that there are unified technical standards that need to be enforced, nor does it suggest social benefits which could be realised.

Question 1. Whether the present laws are adequate to deal with convergence of carriage of broadcasting services and telecommunication services? If yes, please explain how? OR Whether the existing laws need to be amended to bring in synergies amongst different acts to deal with convergence of carriage of broadcasting services and telecommunication services? If yes, please explain with reasons and what amendments are required? OR Whether there is a need for having a comprehensive/converged legal framework (separate Comprehensive Code) to deal with convergence of carriage of broadcasting services and telecommunication services? If yes, provide details of the suggested comprehensive code.

BIF RESPONSE

1. Yes - the present legal and regulatory frameworks that exist adequately covers the field to ensure that all stakeholders are suitably regulated, and therefore, all consumers of telecom and digital services are suitably protected. To the extent that there are gaps or deficiencies in the existing laws, we note that sectoral reforms (including amendments to new legislations, etc.) are being considered and deliberated amongst all the stakeholders. Accordingly, we do not believe that any significant amendments, or a consolidated legal code to deal with convergence between telecommunications and broadcasting services is necessary. However, we agree that convergence of carriage of broadcasting and telecom services are regulated under the TRAI Act with TRAI being the convergent regulator dealing with the same.
2. BIF believes that clause 2.1 of the UASL license, enables the telecom operators to provide all kind of data services as data service. Since some types of broadcasting services riding on the telecom network is also a data service, it is believed that the present license conditions are sufficient for handling such special kinds of services which can be construed as data services. This is restricted to the carriage aspect only.
3. Some other points in justification of our stand are given below –
 - 3.1 The present legal and regulatory frameworks that exist adequately covers the field to ensure that all stakeholders are suitably regulated, and therefore, that all consumers of telecom and digital services are suitably protected.
 - 3.2 As mentioned in the paper¹⁵, at the statutory level, there are already the Indian Telegraph Act 1885, the Indian Wireless Telegraphy Act (**IWT Act**) Information Technology Act (**IT Act 2000**), the Cable Television Networks (Regulation) Act, 1995 (**CTNR Act**), the Prasar Bharati (Broadcasting Corporation of India) Act, 1990, and on the regulation side, Telecom Regulatory Authority of India Act), 1997 (as amended) (**TRAI Act**) that govern converged ICT services. There are other rules that govern content. The paper acknowledges⁵ that TRAI is already a unified regulator for regulating carriage of both telecom and broadcasting services (though its powers may not be structured in the same way as the regulators in other countries).
 - 3.3 The broadcasting and telecommunication sectors have the same regulator, i.e. TRAI, and their disputes are settled by the same body i.e. the Telecom Disputes Settlement

¹⁵ Page 21, para 1.39 of the paper.

and Appellate Tribunal (TDSAT). The TRAI and TDSAT are created by the TRAI Act. It is also important to note that SACFA clearance, wireless operating license, allotment of spectrum to both telecom and broadcasting operators are given by the same government body, namely, the Wireless Planning & Coordination wing ("WPC ") of the Department of Telecommunications (DoT). Further, there is already a convergence of some statutes and institutional frameworks relating to carriage of broadcasting and telecom services, like the same regulator, adjudicator and spectrum administrator. The IT Act and the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ("Intermediary Guidelines 2021") are applicable to the carriage of broadcasting and Telecommunication services.

3.4 Even the Ministry of Information & Broadcasting (MIB) in its reply⁶ to the DoT's reference, cited TRAI's role as the common regulator for carriage of telecom and broadcasting services. TRAI was giving recommendations suo moto or on the MIB's reference (on aspects such as carriage platforms, foreign investment provisions, license fees, digital terrestrial transmission, etc). MIB flagged that convergence of technology had already happened to a great extent in the last decade, and TRAI along with MIB have successfully handled all the legal, policy, and regulatory requirements arising out of such changes. Further, the MIB mentioned that broadcasting is an important sector, which, owing to its sensitivity and impact, is a strategic sector that needs to be regulated. As such, multiple agencies, including the Ministry of Home Affairs, and the Department for the Promotion of Industry and Internal Trade, are involved in regulation. Shifting of licensing functions to another department, "will not serve any good but will only disturb the established practices". The MIB also mentioned that the regulatory convergence happening in the broadcasting sector was being achieved by creating a single platform in the form of 'Broadcast Seva Portal' on which all the stakeholders / ministries / departments are integrated as a single window for all licensing / permissions / reporting requirements etc.

3.5 As such, there does not appear to be a need to modify, at this time, the legal, regulatory, or licensing framework.

3.6 **Convergence is not an end in itself**: The convergence of regulations or regulators should not be seen as an "end" in itself. A unified regulatory structure does not, by itself, guarantee optimal regulation, and in any structure, co-ordination amongst all wings/departments involved (much like all ministries or regulators) is critical. Any significant change to the regulatory framework should be only made if the long-term benefits of the change outweigh the immediate uncertainty and disruption that may be caused as a result of such a change. In our view, the driving force behind a successful regulatory regime is not convergence/unification of regulations, but should be as follows: (a) the simplicity and clarity with which the objectives of the regulations are laid out; (b) the clarity and precision with which the rules are written and consistency with the overall objective; (c) skill development of the stakeholders enforcing the rules through constant engagement with the industry and international regulators/governments; (d) aimed at de-regulation, such that minimal necessary regulations are prescribed to meet the objectives; (e) through the introduction of mechanisms to further reduce regulation to encourage the entry of new market-players and foster competition towards meeting policy objectives (such as, providing greater choices to consumers etc.); and (f) robust co-ordination amongst all ministries and regulators involved in the enforcement of the rules.

3.7 **Consultations in advanced stages for sectoral statutory reforms**: We note that the TRAI in the CP has observed that the silo-ed and disjointed approach to regulation of broadcasting and telecommunication services is inadequate to address technology-

driven convergence-related challenges. However, as noted in the CP itself, the Central Government is in advanced stages of formulating principle-based sectoral reforms for different aspects of our digital economy. This process is unfolding in two ways:

- (i) First, there is a consolidation of different legislations within a sector which were enacted to regulate the same technologies. For instance, the Indian Telecommunications Bill, 2022 ("**Telecom Bill**"), seeks to replace legislations governing the telecommunication sector, such as the Indian Telegraph Act, 1885 along with the Indian Wireless Telegraphy Act, 1933. Additionally, as mentioned in the letter sent by the Ministry of Information and Broadcasting ("**MIB**") to the Department of Telecommunications ("**DoT**") (Annexure II of the CP) and from information available in the public domain, it appears that the MIB is seeking to usher in reforms in the broadcasting sector by bringing in: (i) amendments to the Cable Television Networks (Regulation) Act, 1995; and (ii) a National Broadcasting Policy. These reforms as mentioned by the MIB are likely to "*cover all broadcasting carriage platforms within its ambit and address all institutional, legal and regulatory aspects of broadcasting services under a unified Act*".
- (ii) Second, there is an overhauling of existing legislations by replacing them with new legislative frameworks for new services or technologies. For instance, we note that the TRAI in paragraph 2.43 of the CP, has mooted the idea of a converged statute/framework that could cover within its ambit, new age technologies like OTT communication services. In this regard, we understand that the Telecom Bill is already working towards regulating new communication technologies that have developed due to convergence, such as those which are provided over the top of the network layer (i.e., in the application layer).

3.8 Further, we understand that the Central Government is in the process of replacing the Information Technology Act, 2000 (which was enacted two decades ago to primarily address concerns arising out of the advent of electronic commerce, etc.) with a new Digital India Act ("**DIA**"). We understand from information available in the public domain, that the DIA will primarily be based on the principles of ensuring openness, user safety, consumer trust and accountability for the online ecosystem. Further, the DIA will likely include provisions to regulate stakeholders in the IT and ITeS sector (such as, cloud service providers ("**CSPs**")), as well as new and emerging technologies and specifically regulate certain aspects of our digital economy that are presently unregulated (such as blockchain, metaverse, artificial intelligence, augmented reality/virtual reality, etc.).

3.9 While the sectoral reforms are not in the nature of a converged law across sectors, they are likely to solve for the absence of regulation over emerging technologies which, we note, is the primary concern apparent in the CP. These sectoral reforms are important steps for promoting innovation, fostering the growth of the start-up ecosystem, and attracting investment opportunities as they avoid a one-size-fits-all approach. Instead, and importantly, they provide updated toolkits to regulators having the relevant sectoral expertise to enable them to effectively regulate their respective industries. Furthermore, draft frameworks like the Telecom Bill, are undergoing extensive stakeholder consultations to take into account industry concerns and balance them against user interests. Significant work has been undertaken by the stakeholders in connection with some of the changes suggested above, and therefore it would not be prudent to undertake a material alteration in the regulatory framework as it would cause significant disruption, uncertainty and loss of valuable public time

and resources spent by relevant stakeholders in the engagement and consultations process for these draft frameworks

- (i) **CP does not cover the details of the convergence:** While the CP raises certain “in principle” questions i.e. whether there should be a single comprehensive code, it does not share the regulatory thinking around the enforcement of the code, whether there will be a ‘super’ regulator, composition of the regulator, domain experts required for supervising each vertical, whether the licensing and supervisory roles will be segregated within the regulator, co-ordination between various departments, the role of the Government, interaction/co-ordination between the Government and regulator. The CP only makes peripheral observations around these points, if any. In the absence of policy details around the nature of the comprehensive code or a draft code itself it is difficult to comment and compare whether the new proposed regulatory structure will significantly benefit all the stakeholders.
- (ii) **Global best practices are not uniform:** We note that the CP has mentioned that there is an international trend towards the convergence of regulatory frameworks for broadcasting and telecommunication services. Accordingly, India should consider emulating the global best practices referred to in the CP and consider convergence as well. Here, it is important to point out two additional points. Firstly, there are nuances to the regulatory frameworks in the different jurisdictions cited by TRAI as examples of convergence, and some of these frameworks follow an approach with regulatory oversight and allied roles are divided internally. For example, while it is true that the Federal Communications Commission (“**FCC**”), inter alia, regulates providers of telecommunication and broadcasting services – in terms of its structural organization and regulatory operations, the FCC is divided into bureaus (i.e., ‘Media’, ‘Wireless Telecommunication’ and ‘Wireline Competition’) depending on the technology being regulated. Therefore, it appears that even converged regulators are internally, in effect, segregated into departments based on the technology(ies) under the domain of regulation of the respective departments. Moreover, we understand from academic writings on the functioning of the FCC that even the FCC’s “silo” model has been critiqued for *“viewing each industry sector as a distinct set of entities that do not interact with each other and which should be regulated under different principles”*¹⁶. We also note that the FCC’s regulatory authority over OTT services is, as such, limited. Secondly, as you may be aware most of the countries cited by the TRAI in the CP as having converged regulatory frameworks are advanced economies with very different per capita incomes compared to India, and to that extent, the concerned stakeholders (industry and consumers alike) may generally find it difficult to seamlessly adapt to new regulations. Moreover, the adoption/penetration of new and emerging technologies is more widespread in such countries. Be that as it may, it may be noted that there is generally also no consensus on convergence being the most appropriate regulatory approach and how convergence should be achieved. For example, we understand that in Brazil (which is part of the BRICS multi-lateral forum alongside India, and as such is similarly situated to India in terms of economy etc.), the Ministry of Communications (‘MCOM’) and the National Telecommunications Agency (‘ANATEL’) regulate broadcasting and telecommunication services respectively under separate legislative frameworks. In addition, it is pertinent to note that countries that have extended telecom or

¹⁶ H. Russell Frisby, Jr. & David A. Irwin, The First Great Telecom Debate of the 21st Century, 15 COMMLAW CONSPECTUS 373, 379 n. 26 (2007), <http://scholarship.law.edu/commlaw/vol15/iss2/4/>.

broadcasting regulations to OTT services have done so through the adoption of light-touch regulations (such as the European Electronic Communications Code and the Audiovisual and Media Services Directive, 2010 in Europe and the Telecommunications Business Act, 1984 in Japan. In this context, we believe that there are nuances and peculiarities of each country, which inform the mode and manner of regulation that it chooses to adopt. In our view, the one stop solution to pre-existing sectoral regulatory challenges cannot be to bring in a converged code administered by a single converged regulatory authority. Instead, the focus should be solely on facilitating the healthy and orderly growth of the telecommunications and broadcasting sector through responsive and effective regulatory frameworks.

- (iii) **Differential approach based on the needs of India**: India has leapfrogged into the digital age much faster than other countries with similar per capita incomes. In fact, we note that India has a unique socio-economic situation, promising size of the economy and unique historical governance structure. However, like any other country in a similar stage of its development, there are domestic limitations/scarcity on human resources, institutional capacities, and budgetary resources. Addressing the needs of convergence will stretch scarce human resources and institutional capacities even further, and will result in significant disruption. Further, over-regulation of some technologies in a converged environment may impede rapid innovation that the tech and digital industry has seen in the last decade.
- (iv) **Solutions exist outside of a comprehensive code to address convergence issues**: There are simpler regulatory solutions that exist which may address some of the convergence related issues highlighted in the CP. These include, but are not limited to: (a) encouraging regulatory associations to deepen understanding of convergence issues; (b) establishing channels of communication between telecommunications and broadcasting regulators/ministries to address convergence issues; and (c) putting convergence on the agenda of meetings and workshops between the regulators.
- (v) **Certain aspects cannot be subject to regulatory convergence**: We believe that there are certain regulators and regulatory frameworks which operate across sectors, and as such, their specialized functions cannot be converged. One such example is the Competition Commission of India ("**CCI**"), which has been tasked with ensuring fair and healthy competition in economic activities in India, and without any restrictions on which sectors it can investigate. However, the CCI's functioning has not been without jurisdictional conflicts with other sectoral regulators. In particular, we note, the case of *Competition Commission of India v. Bharti Airtel Limited and Ors*¹⁷, before the Supreme Court ("**SC**") which *inter alia* was related to the jurisdictional conflict between the CCI and the TRAI. In its judgment, the SC was of the considered view that there is a need to allow sectoral regulators to undertake their specialized regulatory functions in their respective domains (specifically, the TRAI and the CCI) Therefore, in our view, introducing a converged regulatory framework and / or a converged regulator for telecom and

¹⁷ Competition Commission of India v. Bharti Airtel Limited and Ors., Civil Appeal No(s). 11843 of 2018 & Ors. (Arising Out of SLP (C) No. 35574 of 2017 & Ors.), Supreme Court of India, December 05, 2018 available at <https://indiankanoon.org/doc/130504148/>. ¶190 "The conclusion of the aforesaid discussion is to give primacy to the respective objections of the two regulators under the two Acts. At the same time, since the matter pertains to the telecom sector which is specifically regulated by the TRAI Act, balance is maintained by permitting TRAI in the first instance to deal with and decide the jurisdictional aspects which can be more competently handled by it."

broadcasting may cause significant overlaps with the ambit of specialized regulators - leading to redundancy and causing further jurisdictional conflicts). Such overlaps may give rise to business uncertainty as they will likely have to be settled in constitutional courts, and the ensuing regulatory uncertainty may be detrimental for the growth of market players. Given the potential danger of jurisdictional conflict due to the convergence in the regulatory ecosystem, convergence should be avoided in the interest of protecting the interest of stakeholders in each specific sector.

- (vi) It should also be noted that even if a converged regulator is created - it is likely that such regulator will have sub-divisions with the objectives and functions to regulate niche and specialized areas of law - such as those relating to competition law, intellectual property law, etc. In such a scenario, it remains untested whether a nodal regulator and its sub-regulators will operate in harmony with one another, or whether the existence of multiple such regulators will lead to a newer kind of jurisdictional conflict, albeit within the same organization. We believe that having separate, though complementary, legislations could potentially focus more clearly on specific aspects of each issue which a converged legislation may not achieve.
- (vii) **Fast paced evolvement of new technology and long policy cycle:** With modern advancements in technology, digital products, services, and industries can attain significant importance in a very short period of time due to their ability to evolve rapidly. New legislation is required to go through a policy cycle that can take several years to enforce, while a startup can rapidly expand into a global enterprise in just a few months. In order to achieve a streamlined and efficient implementation process, it may be advisable to preserve the existing legislative framework and enact targeted modifications, when necessary, rather than undertaking a comprehensive revision of the system. This approach can help minimize the potential legal uncertainties and disruptions that can arise from a complete overhaul of the legislative regime.
- (viii) **Unique characteristics of convergence technology and competition in the market:** In our opinion, the regulation of convergence technologies must not depend on the service or use-case being offered by a service provider. Instead, it should be solely determined by the technology being employed/implemented. Neglecting to consider technological distinctions in regulatory efforts and attempting to find a 'one shoe fits all' approach towards convergence technology, can ultimately hinder the public's access to services across diverse and competitive platforms. Furthermore, excessive regulation may have the unintended consequence of stifling innovation and impeding commercial growth, ultimately leading to a reduction in competition within the market. The emergence of novel technologies will inevitably present regulators with the challenge of determining how these new technologies can be integrated into the current regulatory framework, and whether modifications to the framework are necessary. In answering these questions, in our view, it is the regulator's primary duty to ensure that consumers receive the benefit of these new technologies, and their use-cases/services and features on a case-by-case basis and not by way of an overarching converged legislation. To summarize, we believe that the sector specific reforms initiated by and being undertaken by the Central Government in consultation with stakeholders (which are currently at advanced levels) are sufficient to align the present laws with the rapid technological advancements. Accordingly, the convergence of regulatory frameworks concerning the carriage of telecommunication and broadcasting services should be avoided.

- (ix) **Content regulations outside the scope of review:** Lastly, we note that the terms of reference ("ToR") stated in the letter dated August 08, 2022, sent by the DoT for TRAI's consideration and recommendations were limited in scope to only carriage of broadcasting services and telecommunication services. To elaborate, the DoT has sought TRAI's views on, inter alia, the convergence of carriage of broadcasting and telecommunication services, and associated steps to be taken in relation to licensing, spectrum management, etc. However, we note, the TRAI in the CP, has opted to consider matters beyond the scope of the ToR, including issues pertaining to the IT sector, as well as issues that are unrelated to carriage (such as the co-regulation of carriage and content in broadcasting)¹⁸. Be that as it may, we believe that the regulation of carriage together with content by a unified regulator is likely to bring with it significant challenges, which includes but are not limited to the fact that content regulation requires distinct domain expertise as compared to regulation for carriage of such content/services. Content regulation, as such, needs a regulatory approach that is nuanced and sensitive to multi-layered perspectives. That is, and to elaborate, the regulation of content requires sectoral expertise and skillsets that take into account creativity and expression, which, inter alia, existing sectoral regulators housed under MIB have developed over the years. Additionally, there are aspects of content regulation that would still need to be governed under dedicated frameworks and cannot be subsumed within a converged law or regulation, or as such administered by a single converged regulator. For example, issues related to intellectual property rights have a separate legislative and regulatory framework and there is also a body of jurisprudence that has developed in common law for disputes related to copyright, etc. Broadly speaking, the regulation around content is adequate at this stage and does not require any significant re-examination. In light of the above, we request the TRAI to reconsider including content regulation within the ambit of the current consultation and instead, limiting the scope of the CP to issues pertaining to carriage.
4. The Indian Telegraph Act 1885, the Indian Wireless Telegraphy Act (IWT Act) Information Technology Act (IT Act 2000), the Cable Television Networks (Regulation) Act, 1995 (CTNR Act), the Prasar Bharati (Broadcasting Corporation of India) Act, 1990, and on the regulatory side, Telecom Regulatory Authority of India Act 1997 (amended) (TRAI Act) that govern converged ICT services. There are other rules that govern content. The CP itself acknowledges that TRAI is already a unified regulator for regulating carriage of both telecom and broadcasting services, though it may not be structured in the same way as the converged regulators in other countries.
- 4.1 The broadcasting and telecommunication sectors have the same regulator, i.e. TRAI, and their disputes are settled by the same body i.e. the Telecom Disputes Settlement and Appellate Tribunal (TDSAT). The TRAI and TDSAT were both created through the TRAI Act. It is also important to note that SACFA clearance, wireless operating license, allotment of spectrum to both telecom and broadcasting operators are given by the same government body, namely, the Wireless Planning & Coordination wing ("WPC ") of the Department of Telecommunications (DoT). Further, there is already a convergence of some statutes and institutional frameworks relating to carriage of broadcasting and telecom services, like the same regulator, adjudicator and spectrum administrator. The IT Act and the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ("Intermediary Guidelines 2021") are applicable to the carriage of broadcasting and Telecommunication services.

¹⁸ By way of example, the TRAI appears to suggest that a 'fully converged Information and Communications Technology (ICT) regulator' performing 'data privacy and cyber-security functions' would be beneficial for a digitalized economy

4.2 Even the Ministry of Information & Broadcasting (MIB) in its reply to the DoT's reference, cited TRAI's role as the common regulator for carriage of telecom and broadcasting services. TRAI has been giving recommendations suo moto or on the MIB's reference on aspects such as carriage platforms, foreign investment provisions, license fees, digital terrestrial transmission, etc.

4.3 Convergence of technology had already happened to a great extent, and TRAI along with MIB have successfully handled all the legal, policy, and regulatory requirements arising out of such changes within the ambit of the present laws. Further, the MIB has mentioned that broadcasting is an important sector, which, owing to its sensitivity and impact, is a strategic sector that needs to be regulated. As such, multiple agencies, including the Ministry of Home Affairs, and the Department for the Promotion of Industry and Internal Trade, are involved in regulation. Shifting of licensing functions to another department, "will not serve any good but will only disturb the established practices". MIB has also mentioned that the regulatory convergence happening in the broadcasting sector was being achieved by creating a single platform in the form of 'Broadcast Seva Portal' on which all the stakeholders / ministries / departments are integrated as a single window for all licensing / permissions / reporting requirements etc.

4.4 As such, there does not appear to be a need to modify, at this time, the legal, regulatory, or licensing framework that exists for carriage of telecommunication & broadcasting services.

4.5 Additional Comments:

4.5.1 **Convergence in the manner as proposed in the TRAI paper is linked merely to the medium of distribution and the infrastructure that such entails. The services / content transmitted through the infrastructure continue to be different and divergent, there is no convergence of services or of content.**

(1) At the outset, it is submitted that the idea of establishing a 'super-regulator' due to the purported convergence of *technology, services and network* expounded in the Consultation Paper adds unnecessary layers to the existing framework in place and on an overall basis is against anti-consumer and at the core extremely regressive. The Consultation Paper is not accurate in noting that convergence of *technology, services and network*.

(2) As the TRAI's Consultation Paper notes, this convergence of the transmission infrastructure for telecommunications and broadcasting services is not a recent phenomenon, and has been driven entirely by the adoption of Internet protocol (IP) based packet switching within those transmission networks and systems, which has enabled digital media to be accessed and consumed on any electronic device. As such, it is extremely important to note and accept that content services or the media services being offered through the purportedly converged pipeline / infrastructure / means of dissemination does not change the essential nature of the underlying product which is the content, and as such the content made available via this medium is already regulated under existing laws. To elucidate further, while ecommerce services and video streaming services could be accessed and viewed from the same mobile handset, ecommerce cannot surely be treated at par or even akin to media services. Similarly, e-payment services cannot surely be treated akin to video streaming services, as a consequence there is an inherent fallacy in using such examples of purportedly converged pipeline / infrastructure / means

of dissemination as grounds for considering a purportedly blended law whose net impact is likely to be regressive as it ignore the uniqueness of the underlying item it is attempting to regulate all under the garb of an attempt to address convergence by the creation of a super regulator.

(3) It is respectfully submitted that convergence at the infrastructure / carriage end has led to unlocking of the immense potential of the creative economy. With more than 700 million Indians being connected through the Internet, a wider network of small local businesses are now able to tap the business potential to access consumers pan-India and concomitantly all different types of content creators both large and small are able to leverage the internet to reach a wider audience than ever before. We respectfully submit that for this creative ecosystem to thrive, any regulation based on convergence must be restricted to its application over infrastructure / carriage providers and cannot encroach upon content creators / service providers.

(4) History is replete with examples of new technology making the old obsolete. Imposing licensing conditions on content service providers will not only be regressive but will be anti-consumer. It will amount to penalising the creative economy and content service providers for unlocking the significant consumer benefits of convergence at infrastructure level. It will effectively halt the march of technology which has been hugely beneficial for consumers.

(5) We respectfully submit that *infrastructure service providers / carriage service providers (viz. entities that are engaged in the business of setting up the infrastructure / pipeline as the means of dissemination of information) are intermediaries. Their role is to limited to providing a network / infrastructure to connect businesses at one end with consumers at the other end. By their very nature, intermediaries cannot and should not have any say in the content / services being transmitted through their pipelines. Otherwise, they will lose their intermediary status.* In today's interconnected and globalised world, where every device and every person in every corner of the world is connected, suggesting a potential regime which strengthens intermediaries' role of gatekeeping by imposition of licensing requirements on businesses / users of the services of such intermediaries is regressive and anti-consumer.

4.6. The licensing framework that exists presently are onerous for all sectors – both from the point of view of the players who are establishing the infrastructure, as well as the ones who are providing user-interfacing services to the last mile customer.

- (1) In terms of convergence – with respect to the discussion merely from the POV of services, there are several laws which apply to the sectors and the domains – IT laws have a major role to play in terms of the devices, and user facing applications.
- (2) Telecom laws are primarily focusing on the hardware/ infrastructure side of things. However, the proposed Telecom Bill which is set to come to the fore – intends to control the overlaps between the carriage services as well as the applications. The intent of the central government does not seem to merely control the telecom regime which is directly impacted or forms the underlying use-case for all new age technologies – but it seems that the intent is to club together the converging technology with the telecommunication services.
- (3) Ideally, considering the way new applications are germinating on a daily basis, it is imperative that a new code be created with a complete overhaul of the

existing laws – *if convergence is the key driving factor*. However, this will lead to the issue of having to seek renewed licenses, determining scope of how existing frameworks which authorize service providers and consumers to avail a particular telecom service to also be changed – which would invariably lead to a chaotic environment. This might interfere with the overall objective of the central government to achieve ease of doing business.

- (i) In terms of creation of a comprehensive code – the first major consideration will have to be with respect to what shall be contained and clubbed with a capital intensive segment of carriage services – which require not just licenses but also adherence to technical specifications and standards and also have a higher gestation period.
- (ii). This shall then have to be carefully segmented from the application services/ application layer of things prior to considering creation of regulatory framework.
- (iii) Since telecom services have an overlap with the realm of what is being controlled under the IT laws framework, it will be better to either hive off such considerations from either of the legislative framework – or to make a distinction between how content shall be subject to the realm of IT laws, and the underlying technical considerations be continued to be governed by the telecom considerations. This will be over and above the distinction that is being sought to achieve under the convergence of services in general.
For instance, while OSP as a service/ authorization should continue to be bound by the framework that is prescribed under the telecom laws, instances which concern themselves exclusively with electronic communications services (ECS) should be subject to IT laws, only.
- (iv) Since the definition telecommunication services under the proposed bill are scoping in not just core telecom services – but also intend to scope in aspects related to content – broadcasting which is also a highly regulated sector, there is little legroom left for what is already governing the aspects of M2M, interpersonal communication services and ECS providers too.
- (v) With separate laws also being built around OTT services, and new age technology applications – not building in this distinction will also mean applicability of similar license/ authorization based regime for all and sundry.
- (vi) With uptake of new technologies – there will also be a need to create separate frameworks for laws which will be bound to strike a chord similar to both telecom and IT laws, much like what we are seeing under the blockchain enabled ecosystem. Much like how the TCCCPR took cognizance of DLT and bring out an enabling regime – to fit in and accommodate new solutions related to AI/ ML, Metaverse, GPT-kinds, it will be good to consider a new code which brings them all under one fold – yet distinguishing them on the basis of their (i) interactions with end users; (ii) accessibility; (iii) dependence on underlying technology / infrastructure.
- (vii) For instance, for a user to be availing any form of OTT/ cloud services, they need to rely on UL licensees for connectivity and accessibility – however, the purposes that each type of service provider is serving for the end user is entirely different in nature. This debate which has been long-hailing and either seeks revenue share/ or a stringent framework for the application-based services – will not be addressed or be resolved till such time that the distinction between the value derived from each offering is achieved.

- (viii) The western world has hived off aspects which were creating interlinkages between telecom infra and telecom services, and have sought to govern them through different means, and treat them differently. This position has further soldered the difference between how a service provider who is making investments on conventional telecom systems, is able to function in a converged "network" ecosystem. As the paper also speaks of how convergence has different meanings for network, devices and services – this will become the foundation on the basis of which regulation can be created.
- (ix) It is only when this distinction is made that the code will be able to decide which one deserves a light-touch regulation, as opposed to the ones which need to tow a stringent approach.
- (x) In addition to this, several TRAI papers have spoken at length about how when certain services are provided with internet as a medium, do not fall under the purview of regulation as per the standard TRAI/ DoT norms – but this position has not been clarified either by DOT or in any other law which enable a service provider to use underlying services to offer solutions related to cloud services and allied hosting services.

Question 2. Whether the present regime of separate licenses and distinct administrative establishments under different ministries for processing and taking decisions on licensing issues, are able to adequately handle convergence of carriage of broadcasting services and telecommunication services? If yes, please explain how? If no, what should be the suggested alternative licensing and administrative framework/architecture/establishment that facilitates the orderly growth of telecom and broadcasting sectors while handling challenges being posed by convergence? Please provide details.

BIF RESPONSE

1. Yes. As explained in our response to Q1 earlier, the licensing regime which is currently handling different services viz. broadcasting & telecommunications, falls under the ambit of MIB & DoT respectively. There are several laws governing regulation of specific parts of the ecosystem, which then feed into different licensing & regulatory authorities viz. DoT, MIB & TRAI. DoT deals with issues relating to telecommunications which include voice, video, and data communication, while MIB deals with information and broadcasting technologies; MeitY considers issues related to electronics and information technology. Together, they form a comprehensive regulatory ecosystem for the carriage of telecom and broadcasting services in India.
2. Some other points in justification of our response is given below-
 - (i) Each administrative establishment, under each Ministry, has a unique mandate and purpose. As mentioned above, there are several laws governing specific parts of the ecosystem, which then feed into different regulators (including the DoT, TRAI, and MIB). For content, the Cinematograph Act of 1952 and the Press and Registration of Books Act 1867, as well as the IT Act, 2000 and the rules framed thereunder, among others, cover the field. DoT deals with issues relating to communications which include voice, video, and data communication, while MIB deals with information and broadcasting technologies; MeitY considers issues related to electronics and information technology. Together, they form a comprehensive regulatory ecosystem for the carriage of telecom and broadcasting services in India. Creating a new regulatory dispensation would create a situation of confusion for operators and the

internet ecosystem in India, an uncertain operating environment, and reduce ease of doing business in India.

(ii) The requirement of a license, approval or authorization for provision of internet-based communication services runs contrary to TRAI's own observations in its recommendations on "Regulatory Framework for Over-The-Top (OTT) Communication Services". TRAI observed that a comprehensive regulatory framework for OTT services is not recommended beyond the existing laws and regulations. It was of the opinion that such regulation could be looked into afresh when more clarity emerges in international jurisdictions, particularly the study undertaken by the International Telecommunication Union (ITU). Between 2020 and 2023, there has been no change in this situation, international practices; and no change in ITU's approach. Infact, ITU has not specified any regulatory mechanism for OTT based services, and has only encouraged voluntary commercial agreements between TSPs and OTT service providers. Additionally, TRAI also recommended that no regulatory interventions are required in respect of issues related with privacy and security of OTT services.

(iii) We emphasise that bringing internet communication services within the regulatory ambit of DoT or another regulator would not only subject such services to onerous license terms and conditions, but would also include a levy of entry fees, license fees and registration fees. *This will have a chilling effect on innovations and investments in the internet ecosystem.*

(iv) As such, the permission-based regime should only extend to those services which traditionally qualify as 'material resources' and are under the ownership of the government – such as spectrum assignment. In addition, the government's exclusive privilege to license certain resources must also differentiate between app-based services and network services. *No further changes in the regulatory ecosystem are necessary at this time.*

(v) Licensing is usually required where resources are scarce and operators obtain something of value in turn for a license, such as spectrum (for mobile, television, or radio channels). When it comes to online services, there is a virtually infinite number of services that can be offered which do not require the allocation of such finite resources. As such, we do not believe that a licensing regime is appropriate for online applications and services. For services referred to as 'Video OTT platforms', such Internet applications and services have been essential for economic growth and other societal benefits, including choice, innovation and new uses for consumers and businesses. Apart from the fact that it would be impractical and beyond the capacity of any one regulator to license all OTT services, it is important to note that these services which are different from traditional, legacy broadcasting also elicit different user needs and different expectations. For example, for online video services with user generated content, consumers can choose proactively and precisely what they want, from multiple choices and sources, and to protect themselves through tools such as parental controls; this is a marked departure from traditional linear broadcast which gives limited choices to viewers and controls the content shown to consumers.

3. We note that the TRAI in the CP has presented two options for the consideration of stakeholders in respect of the licensing regime for the carriage of telecommunication and broadcasting. In our view, the first option adequately facilitates orderly growth of telecom and broadcasting sectors while handling the challenges posed by convergence i.e., the present regime of separate licenses and distinct administrative establishments under different ministries for processing and taking decision on licensing issues is adequate. To the extent that there is a need to further simplify business processes for the same, those can be undertaken without overhauling and

restructuring the regime. Accordingly, we do not think that any alternative licensing and administrative framework/architecture/establishment is necessary.

4. **Retaining established practices and procedures:** We believe that the issues highlighted by the TRAI in the CP, including those arising due to convergence of carriage of broadcasting services and telecommunications, are on account of inefficiencies in existing processes to issue licenses / permissions and registrations by various ministries. In our view, the inefficiency of existing processes alone does not warrant the need to completely overhaul the existing regime of separate licenses issued by administrative structures housed within the different ministries i.e., the DoT and the MIB. This is because each administrative authority tasked with issuing and administering licenses under the DoT and MIB for carriage of telecom and broadcasting respectively are uniquely positioned due to inter alia (i) having developed domain expertise over many decades of having operated as the licensing authority in their respective sectors and; (ii) having put in place standard practices and procedures for navigating the complex task of issuing coveted licenses to carriage operators, such as assessing applicants that will have rights over valuable spectrum bands and operate critical telecom infrastructure. In addition, we understand that once the proposed sectoral reforms are finalized, there may be a further streamlining of administrative functions. For example, the process of auctions and assignment of spectrum bands and those related to right of way are proposed to be codified under the Telecom Bill. Be that as it may, a converged licensing regime does not guarantee that the current inefficiencies would not continue. Ultimately in order to create efficiencies, a single unified regulator is not necessarily required – what is required is adequate co-ordination in the decision-making process, clear rules of business and freedom to operate.
5. **Creation of a single window clearance system:** Based on information available in the public domain, we understand that there is a proposal to inter alia include all Central Government departments in the National Single Window System (“NSWS”), which is an integrated digital platform serving as a “single window” approvals/licenses clearance system. We further understand that certain telecommunication and broadcasting related approvals are already on-boarded onto the NSWS. Accordingly, instead of overhauling and restructuring the existing process of issuance of licenses that is already in place - TRAI may consider the benefits that would arise from: (i) a full integration of all licenses on the NSWS (including those routed through the “Broadcast Seva” portal of the MIB and “the Gatishakti Sanchar” portal for centralized right of way approvals); and (ii) bringing in strict timeframes for each ministry/department to process the applications for such licenses. To the extent that there any pending licensing and related issues that require a more detailed discussion - we propose an institutional mechanism in the form of an independent nodal body or office, with relevant subject matter expertise, and focusing on serving as a steering mechanism for national and inter-ministerial coordination be created. Further, we recommend that a forum should be created for government departments to engage with stakeholders on a continuing basis. Reserving existing sectoral regulatory jurisdiction while implementing a harmonizing and integrated system for approvals will require minimal restructuring and enable relatively short timelines for implementation as opposed to overhauling the existing licensing framework. These, in our view, would be important steps for a ‘whole of government and industry approach’ given the criticality of the telecommunication and broadcasting sector.
6. Creating a new regulatory dispensation would create a situation of confusion for operators and the internet ecosystem in India, an uncertain operating environment, and reduce ease of doing business in India. All aspects of consumer facing services

including security, data protection, user safety and protection, etc are adequately handled by the extant laws. If some tweaking is required to cater to new services or new user requirements, it would be easier and more effective to do so under the existing laws, instead of creating a new one.

7. It is also pertinent to point out here that *OTT media service providers are in the business of creation and dissemination of copyright works and are thus governed by the Copyright Act, 1957. An owner of copyright in a work (which includes a programme, film, TV Show etc.) is entitled to use different means of dissemination and any technology so available to make available the copyright work. Further, such a copyright owner is also entitled to have complete control over the manner of exploitation of their copyright work. Further, OTT media services are also mandated to comply with various content regulation statutes by virtue of the Digital Media Ethics Code. Thus, there is a robust mechanism in place to ensure adequate checks and balances over OTT media service providers. Any attempt to create a converged legislation or a super-regulator which ignores the already existing robust mechanism and statutes will directly conflict with such well-established and well- functioning statutory regimes.*
8. The Copyright Act provides for a well-accepted approach that balances rights of creators vis-à-vis the rights of the public. As you would be aware, Article 19(1)(a) of the Constitution of India protects freedom of speech and expression. Further, the right guaranteed under Article 19(1)(a) extends not only to the matter or form of speech but also to the medium of speech. The freedom of speech includes within its scope the freedom to choose the means and instruments to exercise the right and to achieve the maximum possible circulation (without undermining the independence of the media by narrowing the scope of dissemination of information (Anuradha Bhasin v. Union of India, (2020) 3 SCC 637). Further, freedom of speech very much includes the protection of freedom of speech and expression through all the modes of distribution including the internet (Anuradha Bhasin v. Union of India, (2020) 3 SCC 637). Thus, any curtailment of any content being disseminated through the medium of internet or any service provider engaged in content services through the means of Internet by way of additional legislation will be an overreach, particularly when existing systems and process including legislation, executive oversight, evolution of judicial precedent and industry self-regulation adequately addresses the functioning of OTT services operating in India.
9. **Consultation Paper incorrectly treats video streaming services / OTT Media services the same as OTT communication services.**

9.1 As evident from para 2.18 of the Consultation Paper, one of the reasons for this consultation exercise is that TSPs have argued that "*OTT communication services are grabbing their SMS and voice call businesses and, therefore, should be licensed just as they are*". This reference is evidently to OTT Communication services viz. services that use the Internet to offer voice calling and text messaging services. However, the Consultation Paper has incorrectly included within its sweep, services that are completely different from such OTT Communication services such as video streaming services or any other service making available media content (viz. images, videos, blogs, etc.) through the Internet. Such lack of clarity identifying the specific type of OTT service that is sought to be regulated by TRAI ignores the inherent distinction between OTT communications services and OTT Media services.

9.2 OTT Communication services like Whatsapp are inherently different than OTT Media services like Prime Video. Some key differences are highlighted below:

- a. OTT Communication services relate to text / voice calls whereas OTT media services make available copyright works i.e. audio, audio-visual content such as films, series and songs.
- b. OTT Communication services offer services akin to telecom companies whereas OTT media services offer media content that is unrelated to telecom companies' offerings.
- c. OTT Communication services function in a closed system where subscribers transmit information only if the other subscriber also has access through the same service. Whereas OTT media services are available over the open Internet.
- d. There is a "push versus pull" distinction – a text / voice transmission in OTT Communication services is "pushed" to a subscriber by another subscriber. A subscriber of OTT Communication services cannot decide the time of their choosing for receiving any text / voice call. Whereas in OTT media services, a subscriber "pulls" whatever content he/she seeks to watch at a time of their choosing.
- e. There are inherent geographical limitations in OTT Media services as the underlying statutory right viz. copyright is inherently territorial in nature. However, OTT Communication services have no such inherent geographical / territorial limitations and can push same content to any subscriber in any territory globally.
10. Thus, we respectfully submit that TRAI must clearly define the service and activity which is sought to be regulated. TRAI must not treat OTT communication service providers the same as OTT media services which simply make available copyright works through the Internet. TRAI must restrict its scope and ambit to "carriage service providers" viz. the entities engaged in the business of setting up physical infrastructure for providing telecom, broadcast, or internet access.
11. **Any suggestion requiring OTT service providers to pay "carriage fee" to infrastructure providers will lead to gatekeeping / access restrictions hampering innovation, also increasing burden of new entrants.**
12. *The Consultation Paper hints at the possibility of OTT communication service providers being required to pay a fee to carriage / infrastructure service providers for use of their infrastructure for carriage / making available of OTT communication service providers. This amounts to strengthening intermediaries as gatekeepers and imposing a penalty on any service provider who wishes to unlock the potential benefit of convergence of infrastructure. The cost of setting up infrastructure is fixed, and intermediaries recover such cost from the various consumers of their services. Intermediaries have all kinds of subscription plans available to any and all consumers of their services who wish to access and use telecom or internet or any other carriage services. However, intermediaries cannot be allowed to double-dip by demanding additional gatekeeping fee from any service provider who uses the intermediaries' infrastructure.*
13. Considering the sweeping inclusion of OTT media services within the scope of the consultation, we are concerned that any such carriage fee requirements will be imposed (due to sheer lack of clarity and similar treatment of dissimilar services) on OTT media services as well. This would effectively mean that every social media influencer, vlogger, or any content creator provider on the Internet (who are also engaging in OTT media services either directly or through third party service providers) will also be required to pay such carriage fee. This will be akin to mandating that if person A engages an artist say for sake of example Ms. Asha Bhosle to sing a song over a telephone call and pays her Rs. 1 lakh for 1 minute, the telephone company should be entitled to a carriage fee for carrying Asha Bhosle's voice to person A. This will not only amount to gatekeeping of the means of dissemination but will effectively kill the growth of the creative economy of the country.

14. In this regard, we respectfully submit that the right to propagate one's ideas/views is inherent in the conception of freedom of speech and expression and concomitantly, every citizen has a right to publish, disseminate and circulate such ideas and views. The right guaranteed under Article 19(1)(a) of the Constitution of India extends not only to the matter or form of speech but also to the medium of speech. It is settled law that the freedom of speech includes within its scope, the freedom to choose the means and instruments to exercise the right and to achieve the maximum possible circulation, without undermining the independence of the media by narrowing the scope of dissemination of information and driving it to seek government aid. *Sakal (Newspapers v. Union of India, (1962) 3 SCR 842; Indian Express Newspapers (Bombay) P. Ltd. v. Union of India, AIR 1986 SC 515)*. Any law which lays excessive and prohibitive burdens on the medium of dissemination which would restrict the circulation of speech and expression would not be saved by Article 19(2) of the Constitution.
15. We respectfully submit that any imposition of carriage fee to be paid by OTT Media services to infrastructure providers will not only be a direct encroachment on the freedom of speech but will also impose excessive and prohibitive burdens on propagation of speech by controlling the entry-way to the mode of dissemination of the speech.
16. The requirement of a license, approval or authorization for provision of internet-based communication services runs contrary to TRAI's own observations in its recommendations on "Regulatory Framework for Over-The-Top (OTT) Communication Services". TRAI observed that a comprehensive regulatory framework for OTT services is not recommended beyond the existing laws and regulations. It was of the opinion that such regulation could be reviewed afresh when more clarity emerges in international jurisdictions, particularly the study undertaken by the International Telecommunication Union (ITU). Between 2020 and 2023, there has been no change in this situation, international practices; and no change in ITU's approach. In fact, ITU has not specified any regulatory mechanism for OTT based services, and has only encouraged voluntary commercial agreements between TSPs and OTT service providers. Additionally, TRAI also recommended that no regulatory interventions are required in respect of issues related with privacy and security of OTT services.
17. Any move to bring internet communication services within the regulatory ambit of the Telecom Bill as proposed by DoT (Draft Telecom Bill 2022) or another regulator would not only subject such services to onerous license terms and conditions, but would also include a levy of entry fees, license fees and registration fees. This will have a negative effect on innovations and investments in the internet ecosystem.
18. **Indian Telegraph Act does not apply to OTTs**
 - (i) OTT is essentially an internet-based app, not owning or working a telegraph.
 - (ii) It should be appreciated here that central to the Telegraph Act is the concept of owning, establishing, operating maintaining a telegraph which, as defined in the Telegraph Act, is what attracts licensing. OTT's do not own, establish, operate or maintain a telegraph – so the question of attracting licensing does not arise.
 - (iii) A plain reading of Section 3 (1)(aa) of the Indian Telegraph Act, 1885, (Telegraph Act) explains that a "telegraph" means to include any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, etc. The focus is on the presence of a hardware element tied to the services provided by the service provider.

- (iv) The Telecom Regulatory Authority of India (TRAI), in its consultation paper on Regulatory Framework for OTT Services, 2015, defined “OTT provider”, as a service provider which offers Information and Communication Technology services, but neither operates a network nor leases network capacity from a network operator. Further, it also stated that based on the kind of service they provide, there are basically three types of OTT apps, namely, messaging and voice services (communication services); application ecosystems (mainly non-real time), linked to social networks, e-commerce; and, video/ audio content.
- (v) In view of the above, OTT services are mere applications provided to end users over the internet using the network infrastructure of licensed Telecom Service Providers (TSP). They neither operate on a network nor lease network capacity from a network operator for the provision of their services. It is to be noted that the workings of OTT services can be distinguished from the definition of telegraph as provided in the Telegraph Act.
- (vi) Thus, the argument that the licensing under Indian Telegraph Act applies to OTTs is flawed. OTTs clearly fail this test and are anyway governed by the Information Technology Act, 2000.

19. **Substitutability Criterion**

- (i) Historically speaking, the government has always treated OTT services as applications, and has reiterated the same in several consultation papers¹⁹ and reports²⁰. Further, it is to be noted that while there have been several discussions around substitutability being criteria to understand the realm of a specific technology and its implications, it does not resonate well with the end users as well as the stakeholders in the prevalent scenario. Substitutability has to be complete and both ways.
- (ii) We acknowledge that substitutability stands as an essential criterion in considering comparable regulations. However, this factor must be treated at par with the level of competition, the level of innovation, consumer welfare, the ubiquity and adoption of such technology, amongst several other factors. We would like to stress on the fact that owing to the popularity of OTT services, higher investments were made by TSPs in the 4G networks.
- (iii) Moreover, in determining substitutability, several considerations including whether the technologies are operating in the same layer; whether the functional services are comparable; comparison in the nature of devices; and likewise, will have to be accounted for. In the absence of cogent functional similarity, it is misleading to compare OTT to traditional services provided by the TSPs.
- (iv) OTTs are not substitutes of TSPs; they depend on them. OTT applications cannot be offered without access to the physical networks that only TSPs deploy. TSPs control the underlying broadband access infrastructure, and are the gatekeepers to broadband internet access and therefore, OTTs themselves.
- (v) Telecom networks and OTT applications operate in different layers (network layer and application layer respectively)

¹⁹ TRAI Consultation Paper on Regulatory Framework for Over-The-Top (OTT) Communication Services, December, 2018.

²⁰ Net Neutrality: DoT Committee Report, May, 2015.

- (vi) TSP licenses also confer several exclusive rights that OTT players do not enjoy. These include, for example: (i) the right to acquire spectrum, (ii) the right to obtain numbering resources, (iii) the right to interconnect with the PSTN, and (iv) the right of way to set up infrastructure.
- (vii) Unlike TSP networks, OTT apps operate in a highly competitive market in which it is easy and often cost-free for consumers to switch between competing apps, and many consumers access multiple OTT communications apps from one device (thus, the rationale underpinning many legacy telecommunications regulations does not apply to OTT communications applications).
- (viii) OTTs enjoy no exclusive right to deploy their applications. TSPs can and often do provide their own OTT applications. On the other hand, an OTT application provider would need a licence to deploy a TSP Network.
- (ix) OTTs often offer diverse functionalities that do not easily fall into straitjacketed categories. They may use messaging or calling merely to augment unrelated services and improve the consumer experience. Conceiving “communication services” as a sub-category of OTT applications creates an impractical distinction between communication functionalities and non-communication functionalities among OTT applications. For example, gaming, document editing, photo sharing, social media and many other fundamentally dissimilar functionalities allow users to communicate with each other.
- (x) OTT services provide expansive experiences to customers that go beyond conventional messaging and communication options provided by TSPs. OTT communications applications such as Whatsapp, Hike Messenger, and Google Hangouts provide rich messaging features not available through SMS, and they also have broad economic impact. A recent study estimates that for the year 2017²¹, this consumer surplus²² for India provided by “Rich Interactive Applications” or “RIA” was a substantial Rs 6.3 lakh crore²³. A 2017 report by WIK found that each 10% increase in usage of RIAs led to an average increase of US\$5.6 trillion in global GDP (0.33% of GDP) from 2000 to 2015²⁴. And according to one study, a five percent increase in WhatsApp penetration in 2015 is associated with a US\$22.9 billion increase in global GDP²⁵.

20. OTTs governed by the Information Technology Act, 2000

(a) OTT service providers fall under the ambit of Section 2(w) of the Information Technology Act, 2000, (IT Act) defining them as intermediaries. Consequently, they are subjected to the exemptions as envisaged under Section 79 thereof. The extant framework accounts for the content and the subject matter of the OTT services, in spite of the relaxed licensing regime.

(b) Evidently, the courts have held that intermediaries are subjected to the provisions of IT Act. Also, in the matter of Justice for Rights Foundation v. Union of

²¹ In its report “The Economic and Societal Value of Rich Interaction Applications (RIAs) in India”, WIK has stated that RIA usage saves on average 803.9 minutes per week. P. 13, available at https://www.wik.org/fileadmin/Studien/2017/WIK-BIF_Report_-_The_Economic_and_Societal_Impact_of_RIAs_in_India.pdf.

²² Consumer surplus indicates economic welfare that people gain from buying and consuming goods or services.

²³ Available at <https://www.financialexpress.com/industry/telecom-ott-apps-create-rs-6-3-lakh-cr-consumer-surplus-study/935890/>.

²⁴ WIK, The Economic and Societal Value of Rich Interaction Applications (RIAs), at I (2017).

²⁵ Id. at 32.

India, before the Hon'ble Delhi High Court, the Ministry of Information and Broadcasting has reaffirmed its stand attesting to the fact that the online platform are not required to obtain any license from the Ministry for displaying their contents, and further explained that the same is not regulated by the said Ministry. Further, the IT Act continues to be the applicable regulatory framework for this particular breed of technology and lends sufficient guidance to the players and the end users.

21. OTT and telcos are NOT in the same game or playing field – Level Playing Field Condition Does Not Apply

- (a) The argument that OTT services such as WhatsApp, Netflix, Saavn, and YouTube should be regulated under the same licensing regime that applies to TSPs is incorrect. The claim that since consumers tend to prefer the rich modern messaging over the obsolescent SMS, and Hotstar and YouTube over cable TV, they are comparable products/services is invalid. This is akin to demanding that a bullock cart be subject to the same taxes and regulations as a Mercedes car as both have the same functionality and are vehicles of travel, - oftentimes on the same road.
- (b) This erroneously overlooks the vast and critical differences between the two categories. The two types of entities are placed in very different circumstances. TSPs, eg, enjoy several exclusive rights that include (1) the right to interference-free spectrum, (2) the right to numbering resources, (3) the right to interconnect with PSTN, and (4) the right of way to set up infrastructure. However, OTT players neither have these privileges listed above, nor own the network or control the access to telecom infrastructure; therefore, question of level playing field simply does not arise.

22. Level Playing Field Condition Governed by Art.14 of The Constitution of India

It should be appreciated that Art.14 of our Constitution guarantees equal treatment only to persons who are equally situated. This is a well-established point and enough case law available on this point.

Moreover, unequals are not only permitted to be unequally but they also have to be so treated. St.Stephen's College vs Univ. of Delhi, (1992) 1 SCC 568; AIR 1992 SC 1630; 1992 AIR SCW 1792; JT 1991 (4) SC 548; 1992 (1) SCJ 624 para's 97 -100.

Importantly, equal treatment to unequals is nothing but inequality.To put both categories at par is wholly unjustified, arbitrary, unconstitutional, being violative of Art.14. (Onkar Lal Bajaj vs Uoi, AIR 2003 SC 2562: (2003) 2 SCC 673: 2003 AIR SCW 2757: 2003 (1) LRI 190: 2003 SRJ 200: (2002) 9 SCALE 501: 2003(1) Supreme 402.

Art.14 guarantees equal treatment to persons who are equally situated. Govt of AP vs Maharshi Publishers Pvt Ltd., AIR 2003 SC 296; (2003) 1 SCC 95; 2002 AIR SCW 4771; JT 2002 (9) SC 277; 2002 (10) SRJ 457; (2002) 8 SCALE 291; 2002 (7) Supreme 570.

23. Right to Equal Opportunity fully available to the TSPs

It should be noted that TSPs have ready opportunity to operate as OTTs without any additional regulatory levy or cost. . OTTs cannot act as TSPs. In fact, many TSPs have started forging partnerships with OTTs since they realise how important they are for increasing telco revenues.

24. **Light touch regulation is needed for OTTs**

a. It is noteworthy that low barriers to entry²⁶, open nature of the internet and the interactions that the OTT services make available, will result in a stronger digital economy.

b. Raising regulatory barriers for the OTT service providers will possibly result in obstructing innovation in the realm of digital growth and may also raise costs for the end users as it trickles down. A rise in costs will result in impeding investments, instead of encouraging the same.

c. Further, the vision of Make in India and the conducive environment for young entrepreneurs and innovative start-ups will be impacted for heavy-handed regulations may also create entry-level barriers. This will especially impact the start-ups that lack the resources to compete.

d. The scenarios described hereinabove will result in denying the end users access to the plethora of services that come along with the OTT services, and deprive them of the innovative and useful technology.

e. If the Telecom Regulatory Authority of India (TRAI) and the government continue to extend a light-touch regulatory approach to OTTs, they will encourage a win-win situation for all that will lead to all round cooperation between the partners.

25. Hence we are of the firm opinion that a licensing regime (as envisaged) is not appropriate for online applications and services. Apart from the fact that it would be impractical and beyond the capacity of any one regulator to license all OTT services, it is important to note that these services which are different from traditional legacy broadcasting, also elicit different user needs and different expectations. For example, for online video services with user generated content, consumers can choose proactively and precisely what they want, from multiple choices and sources, and to protect themselves through tools such as parental controls; this is a marked departure from traditional linear broadcast which gives limited choices to viewers and controls the content shown to consumers.

26. As such, the permission-based regime should only extend to those services which traditionally qualify as 'material resources' and are under the ownership of the government – such as spectrum assignment. In addition, the government's exclusive privilege to license certain resources must also differentiate between app-based services and network services. No further changes in the regulatory ecosystem are necessary at this time.

27. We respectfully submit that *any attempt to bring about a converged legislation or a super- regulator that treats carriage intermediaries akin to content service providers who are engaged in dissimilar services is bound to treat un-equals equally, thereby violating Article*

Such a converged legislation is also bound to suffer from manifest arbitrariness. It is settled law that any legislation which is enacted by the legislature capriciously, irrationally and/or without adequate determining principle will suffer from manifest arbitrariness. When something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary (Shayara Bano v. Union of India, (2017) 9 SCC 1) Further, the expression 'reasonable' employed in Article 19 connotes that the

²⁶ David S. Evans, Attention to Rivalry among Online Platforms and Its Implications for Antitrust Analysis, 9 J. Competition L. & Econ. 313, 318-21 (2013).

limitation imposed on a person in the enjoyment of the fundamental right should not be arbitrary or of an excessive nature beyond what is required in the interests of public. For any legislation to be reasonable, the restriction must have a reasonable relation to the object which the legislation seeks to achieve and must not be in excess of that object. (Modern Dental College & Research Centre v. State of M.P., (2016) 7 SCC 353)

28. **No need for TRAI or any other body as a “Super-Regulator”. There is complete clarity between roles of different ministries / departments like MIB, MEITY and TRAI**

29. It appears from paragraph 1.48 (extracted below) that TRAI is seeking to establish itself as a “Super-Regulator”:

1.48 Globally, the governments around the world have moved towards convergence as many countries have put in place a regulatory mechanism in which the providers of transmission infrastructures of broadcasting services and telecom services are governed by a single entity of the government under a single Act of legislature. FCC in USA, OFCOM in UK and ACMA in Australia are few examples of converged international bodies for telecom and Broadcasting sector. The chapter on international experience in this CP looks into details about the regime that some of the nations have in this area. Though TRAI is already a unified regulator for regulating carriage of Telecom as well as Broadcasting sectors, its regulatory powers, however, are limited in comparison to the other regulators in many major countries. Broadly speaking, TRAI regulation powers are limited to prescribing and monitoring of quality benchmarks, Interconnect rules and pricing of services only. In other critical areas like licensing administration, spectrum management etc., TRAI has only got recommendatory powers. Many areas like content regulation have been kept out of TRAI’s preview. So, it needs to be critically examined how the role of TRAI as a unified regulator can be redefined to meet the objectives of regulatory convergence of Telecom and Broadcasting in line with the of role of regulators of other developed countries. Due to the increasing popularity of OTT streaming platforms, content has become more important today. Therefore, content regulation is one of the areas which needs detailed examination and consultation.

30. We respectfully submit that TRAI’s basis for such an attempt is not accurate. TRAI has referred to other regulators in many major countries. However, it is evident from Chapter 4 of the Consultation Paper itself that none of the global jurisdictions require any licensing by any OTT Media service providers. Chapter 4 clearly notes that all jurisdictions have content regulation regimes which regulate the kind / nature of content being disseminated over the Internet.

31. In this regard, it is submitted that the Ministry of Information & Broadcasting has provided sufficient guidelines and rules to regulate content of online publishers. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (“Digital Media Ethics Code”) was brought into force on 25th February 2021. Since then, in compliance of the rules enforced therein, OTT Media services have set up grievance redressal mechanisms and also self-regulatory bodies at the industry level. In fact, the Nariman Committee has also observed and advised that content regulation of media should occur through such self-regulatory bodies and not through statutory mandates. In **Destruction of Public & Private Properties v. State of A.P., (2009) 5 SCC 212**, on considering the role of media, the following suggestions of the Committee led by Mr F.S. Nariman were observed:
So far as the role of media is concerned Mr F.S. Nariman Committee has suggested certain modalities which are essentially as follows:

(a) *The Trusteeship Principle*—Professional journalists operate as trustees of public and their mission should be to seek the truth and to report it with integrity and independence.

(b) *The Self-Regulation Principles.* —A model of self-regulation should be based upon the principles of impartiality and objectivity in reporting; ensuring neutrality; responsible reporting of sensitive issues, especially crime, violence, agitations and protests; sensitivity in reporting women and children and matters relating to national security; and respect for privacy.

(c) *Content regulations.* —In principle, content regulation except under very exceptional circumstances, is not to be encouraged beyond vetting of cinema and advertising through the existing statutes. It should be incumbent on the media to classify its work through warning systems as in cinema so that children and those who are challenged adhere to time, place and manner restraints. The media must also evolve codes and complaint systems. **But prior content control (while accepting the importance of codes for self-restraint) goes to the root of censorship and is unsuited to the role of media in democracy.**

(d) *Complaints Principle.* —There should be an effective mechanism to address complaints in a fair and just manner.

(e) *Balance Principle.* —A balance has to be maintained which is censorial on the basis of the principles of proportionality and least invasiveness, but which effectively ensures democratic governance and self-restraint from news publications that the other point of view is properly accepted and accommodated.

32. **It is felt that the appropriate methods have to be devised (sic for) norms of self-regulation rather than external regulation in a respectable and effective way both for the broadcasters as well as the industry.** It has been stated that the steps constitute a welcome move and should be explored further. The proposed norms read as follows:

“NBA believes that media that is meant to expose the lapses in Government and in public life cannot obviously be regulated by the Government, else it would lack credibility. It is a fundamental paradigm of freedom of speech that media must be free from governmental control in the matter of ‘content’ and that censorship and free speech are sworn enemies. It therefore falls upon the journalistic profession to evolve institutional checks and safeguards, specific to the electronic media, that can define the path that would conform to the highest standards of rectitude and journalistic ethics and guide the media in the discharge of its solemn constitutional duty. There are models of governance evolved in other countries which have seen evolution of the electronic media, including the news media, much before it developed in India. The remarkable feature of all these models is ‘self-governance’, and a monitoring by a ‘jury of peers’.”

33. *The Nariman Committee has recommended the following suggestions:*

(i) *India has a strong, competitive print and electronic media.*

(ii) *Given the exigencies of competition, there is a degree of sensationalism, which is itself not harmful so long as it preserves the essential role of the media viz. to report news as it occurs and eschew comment or criticism. There are differing views as to whether the media (particularly the electronic media) has exercised its right and privilege responsibly. But generalisations should be avoided. The important thing is that the electronic (and print) media has expressed (unanimously) its wish to act*

responsibly. The media has largely been responsible and more importantly, it wishes to act responsibly.

(iii) Regulation of the media is not an end in itself; and allocative regulation is necessary because the 'air waves' are public property and cannot technically be free for all but have to be distributed in a fair manner. However, allocative regulation is different from regulation per se. All regulation has to be within the framework of the constitutional provision.

However, a fair interpretation of the constitutional dispensation is to recognise that the principle of proportionality is built into the concept of reasonableness whereby any restrictions on the media follow the least invasive approach. While emphasising the need for media responsibility, such an approach would strike the correct balance between free speech and the independence of the media.

(iv) Although the print media has been placed under the supervision of the Press Council, there is need for choosing effective measures of supervision— supervision not control.

(v) As far as amendments mooted or proposed to the Press Council Act, 1978 are concerned this Committee would support such amendments as they do not violate Article 19(1)(a), which is a preferred freedom.

(vi) Apart from the Press Council Act, 1978, there is a need for newspapers and journals to set up their own independent mechanism.

(vii) The pre-censorship model used for cinema under the Cinematograph Act, 1952 or the supervisory model for advertisements is **not at all appropriate, and should not be extended to live print or broadcasting media.**

(viii) This Committee wholly endorses the need for the formation of:

- (a) principles of responsible broadcasting, and
- (b) institutional arrangements of self-regulation.

But the Committee emphasised the need not to drift from self-regulation to some statutory structure which may prove to be oppressive and full of litigative potential.

(ix) The Committee approved of NBA model as a process that can be built upon both at the broadcasting service provider level as well as the industry level and recommend that the same be incorporated as guidelines issued by this Court under Article 142 of the Constitution of India, as was done in Vishaka case [(1997) 6 SCC 241: 1997 SCC (Cri) 932]

34. It is pertinent to mention that the Digital Media Ethics Code is completely in line with the Nariman Committee's recommendations as it has set up grievance redressal mechanisms at the service provider level and at industry level.

35. Importantly, the Digital Media Ethics Code also clearly brings out the role of TRAI, MIB and MEITY in their respective jurisdictions. TRAI's jurisdiction is over the pipelines or the infrastructure over which the content is made available. Whereas content is the video streaming / OTT media service itself, which is beyond the jurisdiction of TRAI. TRAI is empowered to look at the carriage aspects i.e. the means of dissemination of information, whereas the MIB and MEITY are empowered to look at the content aspects i.e. the information / media / video / film etc being transmitted through the various means of dissemination. Between the MIB and MEITY, there is no confusion

regarding the scope of their jurisdictions – MIB oversees the publishers of content whereas MEITY oversees the intermediaries involved in the creative ecosystem.

36. Pertinently, it is the view of Ministry of Information and Broadcasting (“MIB”) that regulation of content *“requires separate skill sets of creative and artistic persons than that of technocrats or economists who can factor the impact of content on sensibilities, morals, and the value system of the society”*. In this regard, the following is clearly stated by the MIB in its letter dated 04th October 2022 addressed to TRAI:

3. Further, Telecom Regulatory Authority of India (TRAI) is a common regulator for the carriage segment of Telecommunication and Broadcasting Sector. It has been giving recommendations suo-moto or on reference from the M/o I&B, on various aspects of broadcasting like carriage platforms, foreign investment provisions, license fee, digital terrestrial transmission etc. Convergence of technologies has already happened to a great extent in last decade; and TRAI along with the Ministry have very successfully handled so far all the legal, policy and regulatory requirements arising out of such changes. Hence carriage policy and regulations for broadcasting should continue with MIB. Also, regulation of content requires separate skill sets of creative and artistic persons than that of technocrats or economists who can factor the impact of content on sensibilities, morals and value system of the society. Hence, content policy and regulation should also continue with the MIB.

6. The need of the hour is not to bring in further disturbances but to re-engineer business processes such that there is ease and convenience of doing business for these entities. The regulatory convergence in the broadcasting sector is being achieved through the **‘Ease of Doing Business Model’** by creating a single platform in the form of **‘Broadcast Seva Portal’** on which all the stakeholders/ministries/Departments are integrated as a single window for all licensing, permissions and reporting requirements etc. As of now this portal is integrated with DoT’s ‘Saras Charch Portal’ and portals of other Ministries/Departments are also planned to be integrated under single window system that will enable ease of obtaining license/permissions etc. This will serve the purpose of holistically addressing all aspects related to DTH, HITS and Cable TV services. Any change in the legal, regulatory framework should entail bare minimum changes of essential nature and aim to provide smooth transition. Further, there is no guarantee of the advantages that will be achieved which cannot be achieved through the single window clearance system as being implemented by this Ministry. TRAI is already doing consultation on ‘Ease of Doing Business’ and it may consider the aspect of single window clearance system in this effort.

37. Thus, not only is the creative ecosystem functioning well under the aegis of the MIB, any objective of removing alleged confusions between multiple Ministries and enabling ease of doing business is being achieved by single window portal and doesn’t require convergence at legislative level. In line with the above view of the MIB, TRAI has also repeatedly stated in various Consultation Papers, and before various courts, that it does not regulate content and that it is not possible for TRAI to fix price of content due to the very nature of content being dynamic. TRAI has categorically admitted before the Hon’ble Supreme Court that it does not regulate content i.e. the films and TV shows shown on TV Channels (Star India Pvt. Ltd. vs. Department of Industrial Policy & Promotion & Ors., (2019) 2 SCC 104 @ para 36). TRAI has also categorically stated at multiple places / for a that it cannot price content due to its dynamic nature. In this regard, TRAI’s most recent Consultation Paper on Issues related to New Regulatory Framework for Broadcasting and Cable services dated 07th May 2022 is relevant:

2.4. While framing the new regulatory framework 2017, the Authority noted that it is impractical to determine the price of a television channel. In this regard the Authority observed that generally a channel consists of number of the programs. The cost of the production of different programs varies based on the

actors, setup cost, script, copy rights, and other miscellaneous factors. Various programs on a given channel also get changed frequently based on their Television Rating Points (TRP) and advertisement potential. Hence, determining the cost of production of a program on a television channel at all times is an extremely difficult process, perhaps almost impossible to derive through a fixed mathematical/statistical model. Moreover, such determination of price would be dynamic in nature and may vary with change in programs in a channel and programs on television channels change dynamically. Accordingly, the Authority in the Tariff Order 2017 did not prescribe any ceiling on the prices of channels and left it to the broadcasters to decide the prices of their channels.

38. Accordingly, it is submitted that what holds true for pricing of programmes on TV Channels is ever more dynamic and variable when it comes to content created and made available through other means of dissemination, particularly the Internet. Importantly, the intention of the Legislature to establish TRAI was to regulate the carriage service providers and not the content service providers. Furthermore, Thus, TRAI's attempt to impose regulation / licensing requirement on content service providers would be ultra vires the legislative intent and contrary to TRAI's previous stated position that it does not deal with content.
39. We thus respectfully submit that any exercise by TRAI to regulate intermediaries engaged in the business of setting up means of carriage / dissemination of information, must not include within its scope content service providers like video streaming services which are engaged in different and dissimilar services. There is already adequate regulations and protections (viz. appointment of grievance officer in India, grievance redressal mechanisms at service provider end, self-regulatory bodies at industry level, reporting to the MIB and public disclosure, various legislations that regulate the kind of content to be disseminated, to name a few) which are not only in line with internationally accepted practices but are also compliant with judicial precedents of the Hon'ble Supreme Court. Thus, there is no need for any converged legislator or super-regulator for content related services which are adequately regulated and protected. In fact, such a suggestion is regressive, anti-consumer and anti-competition.
40. India's digital ecosystem/internet economy has been fuelled by innovations in technology and has positively contributed to creation of jobs, contribution to the GDP, creation of start-up ecosystem and inviting investments which have enabled new entrepreneurs freely innovate and experiment. It requires economic freedom that is in line with the National goals of ease of doing business and a supportive architecture for the digital ecosystem.
41. An effective regulatory mechanism should act as a catalyst and enable a complete solution for a vibrant digital ecosystem in comparison to an excessive regulatory regime which will stifle innovation and investment into the sector, which will be an unintended consequence of this exercise.

Question 3. How various institutional establishment dealing with – (a) Standardization, testing and certification. (b) Training and Skilling. (c) Research & Development; and (d) Promotion of industries under different ministries can be synergized effectively to serve in the converged era. Please provide institution wise details along with justification.

BIF RESPONSE

1. As mentioned above, every institutional establishment within the larger ICT ecosystem has a specific and unique role. Together, they form a cohesive and successful regulatory mechanism. It would be useful for different regulators to collaborate in the form of project teams, working groups, or task forces on areas of common interest, so as to bring together their respective expertise and perspectives to solve particular situations, while not having to merge the entities themselves. Examples of this approach include the UK's Digital Regulation Cooperation Forum, which brings together the data protection authority, the telecom regulator and others, and engages on an ongoing basis with stakeholders across society.
2. At present, there are multiple agencies providing for standardisation, testing and certifications in telecom, broadcasting and IT sector (for instance, the Telecommunications Engineering Centre under the DoT being responsible for standardization, testing, certification in telecom and related IT equipment; MeitY's Standardisation Testing and Quality Certification (STQC) Directorate which provides quality assurance services such as Testing, Calibration, IT & e-Governance, Training and Certification in the area of Electronics and IT ; and the Bureau of Indian Standards under the Ministry of Consumer Affairs, which notifies standards). In a converged environment, we may consider recommending that the same agency specify standards, conduct testing, and issues certifications, otherwise multiple agencies may specify different standards and requirements for the same technology. Alternatively, the multiple institutions under different ministries relating to standardization, testing and certification should have some institutional mechanism (as suggested above) to follow a collaborative approach.
3. We believe that there is significant scope to create synergies and a coordinated mechanism between institutional establishments dealing with the above-mentioned sub-headings. Please find below a detailed sub-heading wise response.

(a) Standardization, testing and certification.

We note from the CP that the challenge of convergence inter alia includes one converged technology having to adhere to multiple standards issued by overlapping agencies. Presently, we understand that the standardization, testing and certification for telecom and related IT equipment is broadly under the purview of several agencies across different ministries. These include the Bureau of Indian Standards and the Telecommunication Engineering Centre, which administers the Mandatory Testing and Certificate of Telecom Equipment requirements. Due to this complex administrative structure, it is likely that a converged technology would have to adhere to multiple standards, testing and certification requirements. Accordingly, we recommend that the focus should be solely on enabling each agency to utilize and develop their core competencies in the process of standardization, testing and certification. This is important in order to ensure that the overlaps between different administrative agencies is limited, and the harmonization of their functions is happening in an orderly manner. Further, for all new standards that are being considered, in our view, the relevant agency should undertake consultation with relevant stakeholders on whether there are industry practices that can be adopted and formalized. This, in particular, is significant as industry practices are developed after giving due consideration to t: (i) the technical nuances of the technology; (ii) the best interest of users and; (iii) the most effective method for the delivery of the service.

(b) Training and Skilling

We note from the CP that it mentions that there is a need to create synergies between the different training and skilling institutions operating under the DoT and MIB respectively. In this respect, we note the reports titled 'Human Resources and Skill Requirements in the Telecommunications Sector' and 'Human Resources and Skill Requirements in the Media and Entertainment Sector' published by the Union Ministry of Skill-Development and Entrepreneurship. These reports inter alia suggest that there is an urgent need to upskill the workforce to align with the changing technical requirements in the industry. This can be achieved in a number of ways, which include developing public-private partnership models in training for infrastructure sharing and usage of modern technology in training methods and curriculum.

(c) Research & Development

With regard to giving impetus to synergies in research and development activities, we recommend public-private partnership models initiated by the coordinating departments/ministries. This will enable research institutions to have adequate funding and readily available resources to undertake research, testing, certification and marketing of their converged technologies. Additionally, it will also facilitate the growth of digital services as India steps into the next 'techade' of being a major digital economy.

(d) Promotion of industries

We note from the CP that it refers to different schemes and initiatives already undertaken for the promotion of industries in different ways and there is a need to create synergies between them. These include, for example, (i) the Software Technology Parks of India, towards the promotion of the start-up ecosystem, (ii) the Telecom Equipment and Services Export Promotion Council, towards the promotion and export of telecom equipment and services. These are indeed laudable schemes, initiatives and institutions which have contributed significantly for the development of digital technologies. However, in line with the regulatory sandbox launched by the Reserve Bank of India/Securities and Exchange Board of India for inter alia the financial technology sector, we recommend the creation of a cohort, opt-in based regulatory sandbox(es) coordinated jointly by the MIB and the DoT and other relevant ministries to support innovation in the emerging technologies (such as, for artificial intelligence, virtual reality/augmented reality). Amongst other benefits, these regulatory sandboxes(es) would facilitate: (i) regulators to obtain first-hand empirical evidence on the benefits and risks of emerging technologies and their implications and thereby enabling them to take a considered view on the regulatory changes that may be needed to support useful innovation, while containing the attendant risks and; (ii) the participant telecom and broadcasting start-ups and to improve their understanding of how new technologies may operate, which helps them to appropriately integrate such new technologies with their business plans; and (iii) improve the pace of innovation and technology absorption.

4. As mentioned above, every institutional establishment within the larger ICT ecosystem has a specific and unique role. Together, they form a cohesive and successful regulatory mechanism. It would be useful for different regulators to collaborate in the form of project teams, working groups, or task forces on areas of common interest, so as to bring together their respective expertise and perspectives to solve particular situations, while not having to merge the entities themselves. Examples of this

approach include the UK's Digital Regulation Cooperation Forum²⁷, which brings together the data protection authority, the telecom regulator and others, and engages on an ongoing basis with stakeholders across society.

5. At present, there are multiple agencies providing for standardisation, testing and certifications in telecom, broadcasting and IT sector (for instance, the Telecommunications Engineering Centre under the DoT being responsible for standardization, testing, certification in telecom and related IT equipment; MeitY's Standardisation Testing and Quality Certification (STQC) Directorate which provides quality assurance services such as Testing, Calibration, IT & e-Governance, Training and Certification in the area of Electronics and IT ; and the Bureau of Indian Standards under the Ministry of Consumer Affairs, which notifies standards). In a converged environment, we may consider recommending that the same agency specify standards, conduct testing, and issues certifications, otherwise multiple agencies may specify different standards and requirements for the same technology. Alternatively, the multiple institutions under different ministries relating to standardization, testing and certification should have some institutional mechanism (as suggested above) to follow a collaborative approach.

Question 4. What steps are required to be taken for establishing a unified policy framework and spectrum management regime for the carriage of broadcasting services and telecommunication services? Kindly provide details with justification.

BIF RESPONSE

1. In view of the rapid development in broadcasting and telecommunications, and the resulting spectrum requirements, a unified policy that applies across the board may not be the best approach. Rather all allied issues should be examined on a case-by-case basis weighing relevant costs and benefits to stakeholders. This will enable a deeper analysis of the developments and more precise regulatory response for new technological developments.
2. We note that the Telecom Bill states that the Central Government may assign spectrum for telecommunication through, inter alia, any other manner as prescribed. Further, the Telecom Bill also empowers the Central Government, to also – by notification – exempt specific usages within specified frequencies and parameters from requirements mentioned therein, if it determines that it is necessary in the public interest. While we understand that there may be reluctance in allocating or administratively assigning natural resources like spectrum bands due to legacy issues, we believe that the imposition of a light-touch framework (including delicensing) of those spectrum bands that are not as valuable as access spectrum bands to telecom service providers is crucial – as not only will it enable entities without the financial resources to compete in an open market auction – but also contribute to reducing the digital divide, increasing competition, improve broadband penetration and implementation of innovative technologies across sectors.

Q5. Beyond restructuring of legal, licensing, and regulatory frameworks of carriage of broadcasting services and telecommunication services, whether other issues also need to

²⁷ The Digital Regulation Cooperation Forum, <https://www.gov.uk/government/collections/the-digital-regulation-cooperation-forum>

be addressed for reaping the benefits of convergence holistically? What other issues would need addressing? Please provide full details with suggested changes, if any.

BIF RESPONSE

1. A balanced, market-led approach to spectrum allocation is critical to achieving efficiency. The paper acknowledges²⁸ that the WPC of the DoT exercises the statutory functions of the central government, and issues licenses to establish, maintain, and operate wireless stations under the provisions of the Indian Telegraph Act, 1885. For the delivery of services for broadcasters, suitable approvals / licenses are issued by the MIB, and telecom service licenses are issued by the DoT. The expanded reference from DoT²⁹ also refers only to the following:
 - (a) Amending the license regime to enable the convergence of carriage of broadcasting services and telecommunications services;
 - (b) Establishing a unified policy framework and spectrum management regime for the carriage of broadcasting services and telecommunications services;
 - (c) Restructuring of legal, licensing, and regulatory frameworks for reaping the benefits of convergence of carriage of broadcasting services and telecommunications services;
 - (d) Revising regulatory regime in respect of DTH and cable TV services holistically addressing all institutional, regulatory and legal aspects.
2. As delineated in the sections above, we believe that the comprehensive policy framework in place now is the best and most effective way to regulate the ICT ecosystem. This framework ensures that licenses are suitably issued, content is moderated, and the remit of each individual agency is suitably protected. That said, we do believe that regulators should prioritise the co-existence of lightly licensed and unlicensed models, with a sharing framework that is light on bureaucratic overheads and makes significant unlicensed spectrum available for WiFi³⁰
3. We note the CP has referred to the Information Technology enabled Services providers ("ITeS") sector, which include CSPs, as a sector having significant convergence (and increasing at rapid pace). As also referred to in our response to Q1., we understand that the IT and ITeS sector will be likely be regulated under the upcoming DIA, and which will also likely take into account issues like cybersecurity, intermediary liability etc. Further, the DIA is also likely to (i) include provisions for category-wise classification of intermediaries based on the functions/services that they deliver and (ii) introduce a new regulator with penal consequences specified for entities that flouting the norms laid down in the DIA. Since, there is already a reform process underway for the IT and ITeS sector through the DIA, we believe that the need to consider issues related to the IT and ITeS sector does not arise. To elaborate, the DIA, we note, proposes to introduce a new digital regulatory architecture for all issues concerning the internet ecosystem as a whole. Further, as a part of the process of

²⁸ Page 107, para 3.61 of the paper

²⁹ Annexure I, page 130 of the paper.

³⁰ PTI, "Wifi in unlicensed frequency bands can generate Rs. 12.7 lakh crore economic value: BIF", The Economic Times < <https://telecom.economictimes.indiatimes.com/news/wifi-in-unlicensed-frequency-bands-can-generate-rs-12-7-lah-crore-economic-value-bif/82728076>>

introducing a draft legislation, the Central Government will likely undertake extensive stakeholder consultations that will allow: (i) industry players to highlight the issues that they facing to the Central Government; and (ii) the Central Government to consider solutions to those issues that can be added to the DIA.

Question 6: Beyond restructuring of legal, licensing, and regulatory frameworks of carriage of broadcasting services and telecommunication services, whether other issues also need to be addressed for reaping the benefits of convergence holistically? What other issues would need addressing? Please provide full details with suggested changes, if any.

BIF RESPONSE

1. In the draft Indian Telecommunications Bill, 2022 as well (Telecom Bill), the proposed definition of “telecommunication services” includes OTT communication services, among other, extremely varied services. Further, the bill places exclusive privilege on the central government to issue a license to provide telecommunication services. In this proposed design, all OTT communications would require a license by the DoT!
2. However, there are fundamental reasons why OTT communications should remain outside of the licensing regime. OTT services are essentially different from traditional telecommunications services: OTT services do not have their own network and spectrum, and is merely an application delivered through the internet. Even the TRAI, in its Recommendations on Regulatory Framework for Over-the-Top (OTT) Communication Services³¹ had stated that it was “not an opportune moment to recommend a comprehensive regulatory framework for various aspects of services referred to as OTT services, beyond the extant laws and regulations prescribed presently.” TRAI stated that the matter may be looked into afresh when more clarity emerged in international jurisdictions particularly the study undertaken by ITU.¹² Further, as mentioned above, there is sufficient regulatory coverage OTT services under existing laws, including the IT Act and the rules thereunder (including the Intermediary Guidelines).
3. Further, there is no price arbitrage: TSPs earn revenue for the OTT services provided on their network in the form of data and internet charges. In the IP based network, the cost of voice calls is negligible. TSPs charge for broadband access, and voice calls are free, and therefore, there is no pricing arbitrage between voice calls via TSPs and internet-based calls.
4. In addition, there is a direct and detrimental impact on user privacy by placing OTTs in the same regulatory ambit as TSPs. OTTs may be required to weaken encryption to comply with requests, directly impacting user privacy.
5. In the draft Indian Telecommunications Bill, 2022, the proposed definition of “telecommunication services” includes OTT communication services, among other, extremely varied services. Further, the bill places exclusive privilege on the central government to issue a license to provide telecommunication services. In this proposed design, all OTT communications would require a license by the DoT.
6. However, there are fundamental reasons why OTT communications should remain outside of the licensing regime, as explained in detail in response to Q2. OTT services

³¹ TRAI, Recommendations on Regulatory Framework for Over-the-Top (OTT) Communication Services <https://www.trai.gov.in/sites/default/files/Recommendation_14092020.pdf>

are essentially different from traditional telecommunications services: OTT services do not have their own network and spectrum, and is merely an application delivered through the internet. Even TRAI, in its Recommendations on Regulatory Framework for Over-the-Top (OTT) Communication Services, had stated that it was “not an opportune moment to recommend a comprehensive regulatory framework for various aspects of services referred to as OTT services, beyond the extant laws and regulations prescribed presently.” TRAI stated that the matter may be looked into afresh when more clarity emerged in international jurisdictions particularly the study undertaken by ITU. Further, as mentioned above, there is sufficient regulatory coverage for OTT services under existing laws, including the IT Act and the rules thereunder (including the Intermediary Guidelines). Further, there is no price arbitrage: TSPs earn revenue for the OTT services provided on their network in the form of data and internet charges. In the IP based network, the cost of voice calls is negligible. TSPs charge for broadband access, and voice calls are free, and therefore, there is no pricing arbitrage between voice calls via TSPs and internet-based calls. In addition, there is a direct and detrimental impact on user privacy by placing OTTs in the same regulatory ambit as TSPs. OTTs may be required to weaken encryption to comply with requests, directly impacting user privacy.

Question7: AoB

1. Convergence in the carriage of broadcasting and telecommunication services has increased sharply over the last decade and has made access to technology increasingly seamless for consumers, including businesses. We are seeing enhanced access (and usage) of technology and tech products by Indians. This ecosystem has allowed innovation in both carriage and content, bringing the idea of Digital India to life.
2. Before responding to the specific questions in the Consultation Paper on Regulating Converged Digital Technologies and Services – Enabling Convergence of Carriage of Broadcasting and Telecommunication services (the paper) we feel that it is important to set out certain broad points which offer alternate views to some of the fundamental assumptions made in the paper.
3. The offerings of OTT services are in addition to, and not in derogation of, traditional telecommunications (or broadcasting) services.
- 3.1 The paper operates on the assumption that all digital services are largely similar, and indistinct from telecom services (and therefore should be regulated similarly with telecom services). In actuality, the vast majority of online services, sometimes referred to as ‘OTTs’, are in addition to, and not in derogation or substitution of, traditional telecommunications (or broadcasting) services. In fact, it is suggested that they should be referred to as CAPs (Content & Application Providers) as termed appropriately by BEREC (EU Regulator for ICT). While adoption of online communications by users is already considerable, that does not imply product market substitution, and certainly not complete substitution for traditional telephony, or for mobile networks.
- 3.2 Over-the-top (OTT) services refer to applications and services which run ‘over the top’ of the telecommunication networks, through the public Internet. While the term can describe any Internet application or service, it is most often understood and used to refer to apps that enable either online communications or video viewing, which some contend are ‘similar’ or ‘replacements’ and ‘substitutes’ for telecommunications / telephony and broadcasting services, respectively.

- 3.3 Users of these products also typically subscribe to traditional fixed and mobile services, and use each of them as the circumstances and call types vary, depending on the use case (e.g. at home, on the road, personal use, professional use, intended call duration, combination with text, video and file transfer, unified communications, conference calls, business solutions, etc.).
- 3.4 Usage is therefore more complementary and accretive than substitutive. Essentially, everyone has a mobile phone and uses it for calling and SMS, even when they are also users of OTTs, 'unmanaged VoIP' and messaging solutions.
4. The symbiotic relationship between TSPs and technology companies –
 - 4.1 As use and reach of online ('OTT') services grows, more and more consumers are purchasing more and more of TSPs' products to access the internet. Therefore, a virtuous cycle exists in the online content space, which ultimately depends on consumers who buy high-speed internet access from TSPs (as Internet Service Providers - ISPs) in order to reach content and applications. Similarly, content providers are themselves reliant on a connected population for their business to work.
 - 4.2 This has delivered huge advantages to consumers and users who benefit from unfettered access to a rich ecosystem of online content, applications, and services, bringing socio-economic benefits and access to entertainment and information that enriches consumers' lives as well as economic opportunities. The government should continue to encourage this kind of symbiotic relationship for the benefit of all actors in the ecosystem, beginning with end-users.
 - 4.2.1 OTT companies contribute significantly to investment in networks and to supporting TSPs and the telecom value chain. Their services and infrastructure are a major benefit for TSPs, other online companies, and consumers.
 - 4.2.2. Google, for instance, has invested extensively in network infrastructure: both its own, and the TSP partners'. It carries Google traffic much of the way to users, by building its own network - often in partnership with TSP providers - interconnecting with their networks, and also providing Google Global Cache 1 servers to ISPs. This reduces costs for TSPs to whom they deliver traffic, and improves the service performance they offer.
 - 4.2.3. Related Investments include large data centers for storing content; purchased capacity from Internet backbone providers to transport the data over long distances, in peering and content delivery infrastructure at the edges of the network where the data packet gets to the local internet service provider.
 - 4.2.4. They invest in subsea cables that connect global internet traffic and provide networks with high speed content delivery, resilience, and capacity. They often directly partner with local carriers, who benefit from the investment into these subsea cables 2 with better global network connectivity and Google's investment into their backhaul networks. That in turn benefits their customers.
 - 4.2.5. They also design their services and invest in products that support operators' effective network management and reduce their costs.
 - 4.2.6. Other online platforms invest in this sort of infrastructure as well. For instance, an October 2022 report by Analysys Mason on the impact of tech companies' network investment on the economics of broadband ISPs shows they spent US\$883 billion on internet infrastructure from 2011 to 2021, Examples include: 1)Orange SA and

Telefónica SA unit Telxius Telecom SA, which partnered to supply backhaul extensions, or data circuits, for Google LLC's Dunant submarine cable project, which will link France's Atlantic coast to the United States 2)The Blue and Raman cable systems are also Google's investments in subsea cables. The Blue Cable System connects Italy, Greece and Israel, and the Raman Cable System connects Jordan, Saudi Arabia, Oman and India. Google will collaborate with Telecom Italia Sparkle on the Blue part of the system, and with Omantel on the Raman part 1 Google Edge Network averaging \$125bn annually in recent years and saving ISPs \$5bn to \$6.4bn a year.

5. Any calls for similar regulation of TSPs and internet companies may not have considered the following:
 - 5.1. The paper makes the assumption that because the offerings of the TSPs and the OTTs are interdependent and complementary, they should be similarly regulated and licensed. However, this view may ignore that the sectors are vastly different with different regulatory requirements (or lack thereof).
 - 5.2. Indeed, compared to the telecommunications space, the OTT sector has vastly different competition and consumer protection concerns, and is already regulated by laws in these areas and others (such as broadcasting rules).
 - 5.3. With these apps, consumers can even 'multi-home' (i.e. use different platforms), meaning that not only can they switch apps in a couple of clicks, but that they can use these apps concurrently, and often for free. They also usually generate little consumer confusion or complaints.
 - 5.4. The Competition Commission of India (CCI) in its Market Study on the Telecom Sector in India 3 examined the telecom sector and also the establishment of the OTT service providers in India. Tellingly, it stated: "On balance experts feel a separate regulatory framework is not necessary for OTTs and excessive regulation may stifle technological innovation, and therefore be counterproductive.
 - 5.5. The International Telecommunications Union (ITU)'s Recommendation ITU-T D.262 also mentions as below: "Consideration of the economic impact of OTTs should be based upon recognition of the fundamental differences between traditional telecommunication operators and OTTs, including inter alia, control of broadband Internet access, level of regulatory exposure, barriers to entry, competitive environment, level of substitutability between OTTs and traditional telecom services and interconnection to public networks. ..." 8.2 In the spirit of service availability and affordability, Member States should foster enabling legal and regulatory environments, and develop policies that are fair, transparent, stable, predictable and non-discriminatory; and that promote competition, foster technological and service innovation and encourage private sector investment incentives, in order to ensure the continuing growth and adoption of OTTs. (Emphasis added.) As such, we emphasise that regulation for regulation's sake would not be the best way to encourage either the telecom or the online (OTT) industry.
6. The paper also makes a reference to the seeming lack of regulation of cloud services and cloud service providers.
 - 6.1. In fact, cloud services are well covered under the existing legal framework. They are subject to the IT Act, 2000 and various rules under it, including the Information Technology (Reasonable security practices and procedures and sensitive personal

data Competition Commission of India, Market Study on the Telecom Sector in India, 22.01.2021 or information) Rules, 2011; the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021; and the Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009, as amended from time to time. They are also subject to all other laws including consumer protection and contract laws, as other service providers and companies operating in India are.

- 6.2. Further, MeitY governs empanelment of cloud service providers as government-approved service providers under its 'MeghRaj' cloud computing initiative. In order to be considered for empanelment, providers must adhere to several standards, including on information security and personal identifiable information.
- 6.3. India's data centre industry is estimated at USD 5.6 billion dollars in 2022, and set to grow as capacity is increasing, with over 45 data centres coming up. The industry received considerable tailwinds from the pandemic, and India is poised to become a data hub for the world. Any additional regulatory burden will have the unfortunate consequence of stymying innovation and investment into the sector
- 6.4. Additionally, competition among service providers in creating value for consumers, the industry's existing best practices, and the overarching regulatory framework ensure that consumers are adequately protected. In fact, increased regulation would only lead to increased costs of access for Indian consumers, and create a chilling effect on investment in India. Therefore, no further regulation of cloud services or cloud services providers is necessary or desirable at this time.

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