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Dear Sir,

**Re: NBDA Comments on TRAI Consultation Paper dated 07.07.2023 on Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services.**

Attached please find comments of NBDA on the TRAI Consultation Paper dated 07.07.2023 on Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services.

Thanking you,

Yours Faithfully,



**Annie Joseph**  
Secretary General

CC: Mr. Avinash Pandey, President, NBDA

Encl: As above

**NBDA Comments on TRAI Consultation Paper dated 07.07.2023 on “Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services”**

The News Broadcasters & Digital Association (NBDA) (formerly known as News Broadcasters Association, NBA) is an association of 24x7 television broadcasters and digital media entities/platforms that broadcast and/or publish news and current affairs programmes and content. NBDA represents several important and leading national and regional private news and current affairs broadcasters who run news channels and digital platforms in Hindi, English and Regional languages.

On 07.07.2023, the Telecom Regulatory Authority of India (“TRAI”) issued a Consultation Paper titled “Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services” (“Consultation Paper”). The Consultation Paper arises from a Department of Telecommunications (DoT) back reference dated 07.09.2022, wherein TRAI was requested to reconsider its recommendations on the Regulatory Framework for OTT Communication Services dated 14.09.2020 and suggest a suitable regulatory mechanism for OTTs, including on issues relating to 'selective banning of OTT Services' in the light of Recommendation No. 14 of the 26th Report of the Standing Committee on Communications and Information Technology (2021-2022) dated 01.12.2021.

NBDA believes that the Consultation is premature and should be withdrawn by TRAI for the reasons given below:

1. That at the outset, NBDA would like to state that the Consultation Paper on the issue of regulation of OTT Communication Services appears to be premature in view of TRAI’s Recommendations dated 14.09.2020 on ‘Regulatory Framework for Over–The–Top (OTT) Communication Services’, wherein it had recommended that:
  - i. *Market forces may be allowed to respond to the situation without prescribing any regulatory intervention. However, developments shall be monitored and intervention as felt necessary shall be done at appropriate time.*
  - ii. *No regulatory interventions are required in respect of issues related with Privacy and security of OTT services at the moment.*
  - iii. *It is 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. The matter may be looked into afresh when more clarity emerges in international jurisdictions particularly the study undertaken by ITU.”<sup>1</sup>*

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<sup>1</sup> Para 3.1 of TRAI’s Recommendations dated 14.09.2020 on ‘Regulatory Framework for Over–The–Top (OTT) Communication Services’

2. That the cause, reason, and rationale for seeking a policy turnaround in less than two years since the recommendations made by TRAI in 2020 is not only inexplicable and incomprehensible but is also contradictory to TRAI's stand of it not being an "*opportune moment*" particularly given that the market forces are functioning smoothly and there is also no pressing need for regulatory intervention.
3. That in any event, with so many developments, including legislations like the Telecommunication Bill, the Digital India Bill being underway and consultations like the TRAI Consultation on Regulating Converged Digital Technologies and Services - Enabling Convergence of Carriage of Broadcasting and Telecommunication Services under deliberations, conducting a consultation on the subject would be untimely, as responses are being sought at a stage when there is no clarity on the emerging legislative and regulatory scenario.

Any responses/comments given at this point may be half-baked, as they would not benefit from the substantive legislation and policies put in place thereafter. Such an exercise would not only fail to address the problems, if any but it may also be required to be revisited in future if it becomes contrary to the legislations and regulations subsequently enacted.

Therefore, it is suggested that TRAI should await the outcome of these Bills and its consultation process on various related subjects before undertaking this consultation.

4. That the basis for the current Consultation Paper is questionable, as the mandate for regulating OTT Services pertaining to Digital / Online Media, including News and Current Affairs content on online platforms, lies with the Ministry of Information & Broadcasting (MoI&B)<sup>2</sup>. Thus, TRAI cannot recommend any further regulation. Moreover, TRAI cannot regulate OTT Communication Services as they do not fall within the definition of "licensees" under Section 4 of the Indian Telegraph Act 1885. Consequently, TRAI does not have the authority to regulate OTT Services under its constituting Act, the Telecom Regulatory Authority Act, 1997.
5. That without prejudice to the above, any policy framework must serve as a foundation for a rapidly evolving digital economy, online environment, digital communication infrastructure and services ecosystem. It must be in tune with the impact of digitization across various sectors and in line with the present market reality.

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<sup>2</sup> Government of India (Allocation of Business) Rules, 1961

6. That introducing a licensing framework in the OTT space would result in a steep decline in innovation and dissuade investments in developing newer platforms and applications, thereby halting India's digital success story before it could fructify or reach its pinnacle. The exit of most VPN service providers from the Indian market, which left Indians with almost no choice, is a good case in point. The exit was a result of the Government's insistence on having servers of VPN service providers in India. The requirement stemmed purely from the Government's intent to access data flowing through these servers, giving the Government unfettered access to individual data flows.
7. That 'OTT Services' and 'OTT communication services' face stiff competition in the market and must constantly innovate to keep pace with future technological developments. Therefore, subjecting 'OTT Services' and 'OTT communication' service providers to the same terms and conditions as telecom service providers and consequently to licensing obligations would be detrimental to their business, as it would slow their growth and result in increased operational costs, which would ultimately be borne by the consumers. Imposing identical/similar licensing obligations on 'OTT Services' and 'OTT communication' services would be counterproductive given their contribution to the socio-economic growth, which is enormous, particularly when it relates to the digital economy of the country.
8. That there is a substantial difference between OTT and telecommunication services in terms of network architecture, business model, and nature of services. It may be relevant to note herein that, in its response to the draft Telecommunication Bill, NBDA had already made detailed submissions as to why "broadcast services" and "OTT" should not be brought under the definition of "telecommunication services". The present definition of OTT Services should not lead to the inclusion of OTT Services under the purview of "telecommunication services". There is no commonality between the services offered by telcos and OTT, as OTT Services go beyond conventional messaging and communication provided by telcos. OTTs should be seen through a different lens and must not be brought within the ambit and scope of being regulated or regarded as being substitutable with telecom services and thus get subjected to similar rules, licensing and regulatory framework.
9. That further, OTTs operate on a pull basis, meaning the demand for data-intensive activities stems from consumers who choose, download, and consume content based on their preferences. When users choose to watch content through a device, they send a playback request to the streaming OTT, which in turn delivers the OTT the requested content over an internet connection that the consumer has already paid for. Attempting to burden OTTs to cover network costs or regulate or control them would be ignoring the fact that the consumers pay for internet connectivity and determine traffic volumes. Therefore, it is the

consumers and not the OTT providers, who drive the data traffic. Regarding the issue of load on the telecom network, it must be appreciated that the content is being sought/demanded by a telecom consumer only. The said consumer also has a contractual agreement with telcos and pays the telcos for using broadband. The telcos should, therefore, not be given the advantage of benefitting from both the consumers and the OTTs. It must be appreciated that OTT players also make considerable investments to ensure that content gets consumed and delivered to the end consumer with minimal load on the telecom infrastructure. Even the consumers, apart from paying for data, make substantial investments towards hand-held devices/smartphones.

10. That the shutdown of internet and telecom services has been a cause of concern since it impacts and affects people in many ways. It is vital that essential sectors, such as content, news, finance, health, and education, should remain in operation to minimize inconvenience as well as to curb misinformation during unrest. However, the discussion on questions posed for consultation relating to the selective banning of OTT Services in the context of technical challenges faced and also the need to put in place a regulatory framework should be put on hold since these issues are under deliberation under the proposed Telecommunications Bill and the Digital India Bill which could replace the Indian Telegraph Act and Information Technology Act 2000 (IT Act) respectively. Similarly, the provisions of the Digital Personal Data Protection Act, 2023, which was recently passed, would also have a bearing on many aspects raised in this consultation, especially aspects of Government blocking entities collecting data, which may even include OTTs. It would be advisable to tread with caution on recommending or coming up with regulations on the subject matter of “selective banning of OTT Services”. The consultation on this subject would be a parallel exercise, being agnostic of the issues raised in the paragraphs above and thus would be premature. TRAI must, therefore, wait and watch for these developments to fructify before undertaking any consultation on the subject.
11. That in any event, ‘OTT Services’ and ‘OTT Communication’ service providers are already adequately regulated by the Ministry of Electronics & Information Technology (MeitY) as well as by the MoI&B under the IT Act and the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (IT Rules). Further, ‘OTT Services’ and ‘OTT communication’ are also regulated by robust self-regulatory mechanisms, like NBDSA, BCCC, ASCI Guidelines, etc., which address any complaint with respect to content. Therefore, any further attempt to selectively ban the “content OTT applications” would constitute an unreasonable restriction on the fundamental right of speech and expression and is likely to hinder start-ups and new entrants from entering the OTT sector. This also goes against the principle of the internet being free and open for all and may impact the ability of the sector to create jobs. It may also result in a scenario where, to offset their financial

burdens, OTT service providers may start charging users for their services, which, so far, have been free or minimally priced. It may also force users, unable to afford paid services to drop out of using such services, thus widening the digital divide in India.

12. That even globally, it is accepted that internet-based services should not be statutorily regulated, but the content thereof should be subject to self-regulation. Making OTT subject to stringent regulation will only lead to the growth story of the OTT Services being brought to a grinding halt, reducing the number of players offering digital services and negatively impacting service quality.
13. That the Consultation Paper is also beyond its stated scope, which is focused on *“(a) Identification of a suitable regulatory mechanism for OTT communication services, and (b) Examination of the issues related to selective banning of OTT communication services”*.<sup>3</sup> However, the manner in which the Consultation Paper has been drafted and the questions formulated appear to have expanded the scope of the consultation from OTT communication services to OTT Services in general. If the intent and objective of TRAI was to regulate “OTT communication services” alone, the decision to expand the scope of the Consultation Paper by including questions relating to OTT Services and ‘selective banning of OTT Services’ is a matter of concern and beyond the jurisdiction of TRAI.
14. That any expansion of the scope of consultation, which would enable the telcos to act as gatekeepers and that too on services that are not part of the same ‘relevant market’, and have different functionalities, must be avoided. The existing laws, like the IT Act and the Rules framed thereunder, are already taking adequate care of the concerns relating to lawful interception, privacy, security, user safety and preventing user harm. The inherent underlying technological differences and interdependencies mandates to have separate treatment and separate regulation. There is no market failure, and any attempt to regulate in the manner proposed should be treated with scepticism. The same would be against the Government’s vision of ‘Ease of Doing Business’ (EoDB), ‘Digital India’ and ‘Maximum Governance Minimum Government’. Further, it would also be against the National Digital Communications Policy, wherein DoT has committed to remove regulatory barriers and reduce regulatory burdens that hamper investment, innovation and consumer interest.
15. That it must be appreciated that if the TRAI goes ahead with the present Consultation Paper, there would be a disruption of MeitY’s target of unlocking one trillion-dollar value from India’s digital economy by 2025 and the governance framework for internet services, thereby adversely impacting the digital economy.

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<sup>3</sup> Para 2.38 of the TRAI Consultation Paper dated 07.07.2023 on “Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services

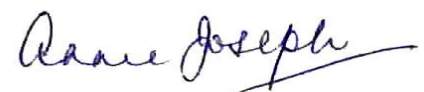
It may be noted that, ultimately, the telecom industry would also be hit since it is OTTs that drive data consumption and subscription.

16. That in any event, TRAI itself, has recently taken up consultations on convergence-related issues as well as on the allocation of C-Band spectrum/satellite spectrum by way of auction. As stated in the paragraphs herein above, there are several other consultations, like the draft Telecommunications Bill, the Digital India Bill etc., which are currently being discussed, which would have a substantial bearing on the questions raised in the Consultation Paper.

NBDA reiterates that adverse effects can arise in the event of over-regulation as is being considered, convergence of ministries' services or as a result of licensing or adopting auction methodologies like telcos. These issues were highlighted by NBDA and its members, who had made detailed submissions and had also participated in the recent Open House Discussions conducted by TRAI on "Regulating Converged Digital Technologies and Services - Enabling Convergence of Carriage of Broadcasting and Telecommunication Services".

In view of the above, NBDA believes that the Consultation Paper should be withdrawn, and TRAI should wait for all issues pertaining to the 'Digital Framework' to be settled before undertaking any consultation regarding OTT Services.

The above submissions have been made on behalf of the Members of NBDA.



**Annie Joseph**  
**Secretary General**

**September 1, 2023**