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USISPF Comments on the TRAI Consultation Paper on Regulating Converged Digital Technologies and Services – Enabling Convergence of Carriage of Broadcasting and Telecommunication Services

The U.S. India Strategic Partnership Forum **(USISPF**) welcomes the opportunity to provide feedback on the Telecom Regulatory Authority of India's **(TRAI)** Consultation Paper on Regulating Converged Digital Technologies and Services – Enabling Convergence of Carriage of Broadcasting and Telecommunication Services **(Consultation Paper).** Please see our comments below.

Q1. 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.

USISPF Response: We do not endorse the proposal to establish a converged legal framework. We believe there is no requirement for a separate legal framework to deal with convergence of carriage of broadcasting and telecommunication services for the following reasons:

- **India has a Common Regulator for Carriage of Telecom Services and Broadcasting Services:** As identified in this Consultation Paper, TRAI functions as the common regulator for the carriage of telecom services and broadcasting services. TRAI was established with effect from 1997 to regulate telecom services, including fixation and revision of tariffs for telecom services, which were earlier vested in the Central Government. TRAI was subsequently entrusted with the regulation of the broadcasting sector in 2004. In its reply to the Department of Telecommunications' **(DoT)** reference, the Ministry of Information & Broadcasting **(MIB)** has also referred to TRAI's role as the common regulator for carriage of telecom and broadcasting services.

  All disputes in relation to the broadcasting and telecommunication sectors are settled by the same body i.e., the Telecom Disputes Settlement and Appellate Tribunal **(TDSAT).** Moreover, SACFA clearances, wireless operating licenses and allotment of spectrum to both telecom and broadcasting operators are handled by the same government body, namely, the Wireless Planning & Coordination **(WPC)** wing under DoT. Accordingly, there are sufficient systems in place that adequately deal with convergence of carriage of broadcasting services and telecommunication services.

  Regulatory convergence, in the form suggested in the Consultation paper, requires overhauling the legal, regulatory, licensing, administrative and institutional setup for both telecommunication and broadcasting services. However, this is a disproportionate response to address issues such as a lack of interdepartmental coordination. A converged regulatory framework does not guarantee optimal

regulation and improved coordination. Instead, in the absence of any evidence of market failure, such a step is likely to disrupt the equilibrium of the telecommunication and broadcasting sectors and adversely impact their growth.

Moreover, while the Consultation Paper presents examples of converged regulations globally, a converged regulation for carriage of broadcasting and telecommunication services may not be appropriate for the Indian context. While the Consultation Paper cites the Federal Communications Commission **(FCC)** as an example of a converged regulator for providers of telecommunication and broadcasting services, countries such as Brazil regulate telecommunication and broadcasting services separately. Moreover, the FCC is internally organized into departments based on the technology being regulated (such as the media, wireless telecommunication, and wireline competition bureaus). Accordingly, there is no global consensus with respect to convergence. Under Indian law, each administrative establishment, under each Ministry, has a unique mandate, purpose and domain expertise, which should be maintained. Therefore, creating a converged regulation by emulating certain jurisdictions may not be the best way forward for India.

- **Ongoing Regulatory Reforms to Bridge Gaps in Existing Laws**: India has a unique institutional setup that favours specialization to better manage administrative affairs. The intent to maintain distinctions between different areas of expertise is apparent as there are separate ministries for Communication, Information & Broadcasting, and Electronics & Information Technology allocated/entrusted with different responsibilities. Accordingly, separate but coordinated regulatory frameworks are most appropriate for the Indian context.

  At the statutory level, several distinct laws governing specific parts of the ecosystem feed into different regulators (including DoT, TRAI, and MIB). The Cinematograph Act of 1952, the Press and Registration of Books Act 1867 and the Information Technology Act, 2000 (and the rules thereunder) are examples of existing legislation dealing with different aspects of content regulation. While DoT deals with issues relating to communications (including, voice, video, and data communication), MIB deals with content as well as information and broadcasting technologies. Additionally, the Ministry of Electronics and Information Technology **(MeitY**) addresses issues related to electronics and information technology. ICT services are also governed by legislation such as the Indian Telegraph Act 1885, the Indian Wireless Telegraphy Act, the Cable Television Networks (Regulation) Act, 1995 and Prasar Bharati (Broadcasting Corporation of India) Act, 1990. Together, these laws form a comprehensive regulatory ecosystem for the carriage of telecom and broadcasting services in India.

  While some of these laws may be dated, we believe that ongoing regulatory reforms will be sufficient to bridge any gaps in existing laws. Relying on ongoing regulatory reforms is preferrable to creating a converged regulator, which may lead to overregulation and stifling innovation and growth of the digital economy.

  The Government is currently in the process of overhauling several IT and telecom regulations in consultation with industry. The objective of these reforms is twofold. On one hand, the Government is aiming to modernize and harmonize the laws to create an open, safe and trusted online ecosystem and ensure robust enforcement. On the other hand, the reforms are aimed at making the regulatory framework "future ready" to facilitate innovation, incentivize investment and promote the growth of the domestic start-up ecosystem. For instance, MeitY is preparing the Digital India Act, 2023 to replace the dated Information Technology Act, 2000 and the Digital Personal Data Protection Bill to address governance of digital personal data and cross border data flows. Additionally, MIB is seeking to reform the broadcasting sector by amending the Cable Television Networks (Regulation) Act, 1995 and the National Broadcasting Policy. As the Government works on a principle-based approach to reform existing laws, the evolving regulations are likely to address emerging technologies as well. Accordingly, no requirement to replace separate but coordinated regulatory frameworks with a converged law arises.

  Further, certain regulators with specialized functions such as the Competition Commission of India **(CCI)** operate across sectors and cannot be subjected to regulatory convergence. In cases of jurisdictional conflict between regulators, specialized regulators are best placed to function

independently. For instance, in the case of jurisdictional conflicts between CCI and TRAI, the Supreme Court has held that the CCI should be allowed to undertake its regulatory functions separately.[1]

- **Distinct Regulatory Frameworks for Carriage and Content:** DoT's reference to TRAI dated 12 August 2021 is limited to "convergence of carriage of broadcasting and telecommunication services". However, the Consultation Paper goes beyond that to analyze the regulatory framework for content for OTT (news and non-news), radio, television (news and non-news), films and print. In the Consultation Paper, TRAI suggests 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". However, we believe that content regulation should be distinct from carriage regulation.

  The technical proficiency and knowledge required to regulate carriage and content are different. Unlike carriage regulations, content regulation deals with issues related to freedom of speech and expression as guaranteed by Article 19(1)(a) of the Indian Constitution. Within content regulation, different principles will be applicable for regulating content on different platforms. Additionally, establishing one regulator for both carriage and content regulation will pose certain challenges as certain issues such as those relating to intellectual property rights will always have to be addressed by specialized legislation.

  Content regulation requires a certain domain expertise, which regulators formed under MIB have developed over the years. Therefore, content regulation is best addressed in specialized regulation such as the IT Rules, 2021 to address the issues and challenges posed by digital platforms. Moreover, the institutional learnings of MIB and self-regulatory bodies such as the News Broadcasting Standards Authority **(NBSA)**, the Broadcasting Content Complaints Council **(BCCC)** in television, the Digital Publisher Content Grievances Council **(DPCGC)**, and the Digital Media Content Regulatory Council **(DMCRC)** for OTT should be relied on.

  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 economical 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." MIB adopts a similar view in its response to the DoT and TRAI on the issue. Its letter dated 4 October 2022 echoes TRAI's 2006 recommendations.[2] Accordingly, the distinction in regulation of carriage and content must be maintained and no changes to existing laws are warranted. Further, the remit of this Consultation Paper should not extend to content regulation.

Q2. 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.

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[1] *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/. ¶90 "*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.*"

[2] *https://www.trai.gov.in/sites/default/files/CP_30012023_0.pdf#page=146*

USISPF Response: Telecom services are distinct from broadcasting services. It is important to note that the networks for broadcasting and telecommunication services remain distinct even if different services (such as TV, broadband and voice) are available in a bundled offering for consumers. Accordingly, there is no requirement for a converged regulation and licensing regime. As mentioned above, streamlining processes under existing regulatory and licensing frameworks can be achieved by harmonizing the existing system for approvals, curing administrative inefficiencies, and enhancing inter-ministerial coordination. Therefore, the current system of separate licenses and distinct administrative establishments under different ministries should continue.

With respect to licensing, we also request TRAI to treat internet-based services / digital services differently from traditional telecommunication services. Internet-based services / digital services are not substitutive of traditional telecommunication services as they are heavily dependent on data and voice services that are offered by telecom service providers **(TSPs).** While TSPs can exist without OTTs, it is not possible for OTT services to be provided in absence of TSPs. Internet-based services / digital services run 'over the top' of the telecommunication networks through the public internet. Accordingly, TSPs earn revenue for all OTT services provided on their networks in the form of data and internet charges. Moreover, given that TSPs charge for broadband access, there is no pricing arbitrage between voice calls via TSPs and internet-based calls. Therefore, as the use and reach of OTT services grows, there is an increased consumption of TSPs' products by consumers by way of accessing and using the internet.

The growth of internet-based services / digital services contributes to the increased demand and growth in the telecom sector. Several internet-based services contribute significantly to investment in networks and support telecom service providers and the telecom value chain. Accordingly, given that internet-based services / digital services are complimentary rather than substitutive of traditional telecommunication services, they should be regulated differently from traditional telecommunication services.

In the context of telecommunications, telecommunications network operators have the right to acquire spectrum, obtain numbering resources and interconnect with the Public Switched Telephone Network. They are also entitled to use the public right of way to set up telecom infrastructure. It is on account of these rights of exclusivity over the use of public infrastructure that telecom operators have been traditionally subject to rigorous regulatory frameworks in India, including licensing regimes. In contrast to traditional telecommunication services, internet-based services / digital services run on the application layer over these distribution services and do not use natural resources. Therefore, as highlighted above, the permission-based licensing regime should only extend to those traditional telecommunication services which traditionally qualify as 'material resources' and are under the ownership of the government. The Government's exclusive privilege to license certain resources must also differentiate between app-based services and network services. Such a distinction should be reflected in the evolving telecommunications regulations.

The requirement of a license, approval or authorization for provision of internet-based communication services runs contrary to TRAI's observations in its recommendations on "Regulatory Framework for OTT Communication Services".[3] TRAI observed that a comprehensive regulatory framework for OTT services is not recommended beyond the existing laws and regulations. It believed such regulation could be explored afresh when more clarity emerges in international jurisdictions. TRAI also recommended that no regulatory interventions are required in respect to issues related with privacy and security of OTT services. There has been no change in international practices between 2020 and 2023. Moreover, after examining the telecom sector and the establishment of the OTT service providers in India in its *Market Study on the Telecom Sector in India*[4], the CCI concluded that "on balance experts feel a separate regulatory framework is not necessary for OTTs and excessive regulation may stifle technological innovation, and therefore be counterproductive."

Therefore, given that OTT services are already regulated under existing laws (including the IT Act, 2000 and rules), no regulatory interventions or licensing is required with respect to such internet-based services

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

[4] 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

/ digital services. Subjecting such services to a similar licensing regime as traditional telecommunication services or imposing a carriage fee on OTT service providers will have a chilling effect on innovation, create entry barriers for new players, increase costs for customers and disincentivize investments in the internet ecosystem.

Q3. How various institutional establishments deal 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.

USISPF Response: With respect to standardization, testing and certification, we understand that multiple agencies prescribe standardisation, testing and certification requirements in the telecom, broadcasting and IT sector, including the Telecommunications Engineering Centre under DoT, MeitY and the Bureau of Indian Standards under the Ministry of Consumer Affairs. Every institutional establishment within the larger ICT ecosystem has a specific and unique role. Together, they form a cohesive and successful regulatory mechanism. To increase synergies and enhance the ease of doing business, we recommend that the focus should be on: (i) harmonising standards with international standards to ensure compliance with WTO TBT commitments; (ii) deconflicting existing standards; and (iii) preventing overlapping and duplicative requirements through better coordination and increased collaboration. For instance, it would be useful for different regulators to collaborate in the form of project teams, working groups, or task forces to bring together their respective expertise and perspectives to collectively solve particular situations. We also recommend that all new standards should be formulated in consultation with the industry and align with the six principles of standards setting as found in the TBT Principles of Development of International Standards[5]. This will lead to improved consistency, efficiency, certainty, and quality offered across the sectors and industries.

Additionally, as the Government strives to transform India into a global hub for technology, manufacturing and innovation, we recommend exploring the public-private partnership model to achieve greater scale and success in R&D and skilling initiatives.

Q4. 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.

USISPF Response: The current spectrum management regime deals with carriage services offered in both the broadcasting and telecom industry. The Consultation Paper acknowledges that WPC under 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 current policy framework ensures that licenses are suitably issued, content is moderated, and the remit of each individual agency is suitably protected within the ICT ecosystem. Additionally, portals such as the "Saral Sarchar Portal" under DoT and the Broadcast Seva Portal" under MIB have been established to simplify process for frequency allocation through WPC and administrative allocation of spectrum, respectively. Improving these platforms and increasing coordination between Government departments

[5] https://www.wto.org/english/tratop_e/tbt_e/principles_standards_tbt_e.htm

for all the processes/approvals pertaining to allocation of spectrum may be better than creating a new unified policy framework.

Additionally, we recognise the importance of a spectrum management regime that offers stability and recognises licensed and unlicensed uses of spectrum. In light of the rapid developments in broadcasting and telecommunications, we support the co-existence of lightly licensed and unlicensed models, with a sharing framework that is light on bureaucratic overheads and makes unlicensed spectrum available for WiFi and other uses.

Q5. 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.

USISPF Response: Other issues that need to be addressed include:

- The Government is currently in the process of formulating an omnibus legislation that will introduce a new regulatory architecture for all issues concerning the digital and internet ecosystem. While the exact scope of the legislation is yet to be clarified, the proposed Digital India Act, 2023 is likely to cover cybersecurity, regulate emerging technologies, address intermediary liability and create regulations for different intermediaries based on the functions/services provided by them. As an extensive stakeholder consultation is envisaged, further regulatory interventions in the IT and ITeS sector should be avoided.

- The Consultation Paper assumes similarities between TSPs and cloud service providers **(CSPs).** This assumption is misplaced. Cloud services are information services for businesses and individuals that build on a cloud platform, and include servers, storage, software, platforms etc. While TSPs provide the infrastructure for connectivity and the connectivity itself, cloud service providers rely on the networks of TSPs to provide services to users. The provision of cloud services does not involve the allocation of any scarce resources such as spectrum or numbering resources. Cloud service providers do not control access to the internet or the network layer. Accordingly, CSPs should not be treated at par with TSPs.

  The National Digital Communications Policy, 2018 **(NDCP)** recognised the significance of this distinction and explicitly rejected the idea that entities operating at these different layers should be treated the same or regulated as equivalents. This clear distinction between telecommunications services and cloud computing is recognised by other telecommunications regulators around the world as well. The fact that telecommunications regulations are unsuitable for cloud computing has also been recognized through country case studies in the Consultation Paper. Therefore, imposing telecommunication regulation on the cloud services sector would be antithetical to the NDCP's goal of establishing India as a global hub for cloud computing and would be misaligned with global best practices.

  Based on the inherent differences between cloud services and other telecom services, we request TRAI to recognize that cloud services must be treated differently to TSPs. Regulating CSPs in the same manner as TSPs will adversely impact the provision of cloud services in India. Cloud computing is enabling internet-based innovation for all types of businesses and industries across the economy. As discussed above, imposing telecommunications regulation or licensing requirements on cloud technology or a wider range of digital services risks jeopardizing the potential benefits of innovation and increases the compliance and cost burdens on service providers. Therefore, we request that the cloud computing and other information technology enabled services should be excluded from potential regulations under 'convergence of carriage'.

  Moreover, DoT sought TRAI's advice on the regulatory frameworks to accommodate the 'convergence of carriage of broadcasting services and telecommunication services. Given that cloud computing is neither a form of carriage or transmission nor drives the convergence of transmission media, it should be excluded from the scope of this Consultation Paper.

Additionally, cloud computing does not need to be brought under TRAI's domain as CSPs are already regulated under existing laws, including the Information Technology Act, 2000 and various rules thereunder ranging from 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, 2021to the Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009, as amended from time to time. Cloud services providers are also impacted by the Consumer Protection Act, 2019 and the Computer Emergency Response Team's (CERT-In) guidelines. Further, in order to be considered for empanelment, CSPs are required to adhere to several standards, including on information security and personal identifiable information.