

Counter-Comments on TRAI's Consultation Paper on "Regulating Converged Digital Technologies and Services – Enabling Convergence of Carriage of Broadcasting and Telecommunication Services"

- At the outset, we wish to thank the Telecom Regulatory Authority of India ("TRAI") for providing us the opportunity to submit our counter-comments on the consultation paper ("CP") on "*Regulating Converged Digital Technologies and Services – Enabling Convergence of Carriage of Broadcasting and Telecommunication Services*".
- We wish to highlight that while the focus of this ongoing consultation process (as per the Department of Telecommunication's 'terms of reference' to the TRAI issued *vide* letter dated 12 August 2022) was envisaged to primarily focus on 'convergence' of 'carriage' of broadcasting and telecommunication services and related issues, the CP to some extent, as well as comments submitted by various stakeholders have steered away from this central theme and delved into other issues as well, such as those relating to convergence of content. To assist with the consultation process, in addition to our submitted comments, we wish to provide some additional comments in the form of counter-comments to several of these issues and topics raised by some stakeholders after having examined their comments available in the public domain. However, we sincerely urge the Authority to kindly consider the submissions and comments that directly relate only to 'convergence' of 'carriage' of broadcasting and telecommunication services and allied/related issues.
- For ease of convenience, we have provided our counter-comments below in a question-wise format. Before we proceed with our counter comments, at the outset, we would like to point out the fact that the basis of the CP formulated by the TRAI is that there needs to be an all-encompassing framework to ensure that future and upcoming challenges (such as, double-play, triple-play, quadruple-play bundled services) related to convergence of services and technology(s) are dealt with effectively through updated laws/regulations. However, we wish to submit that such an approach incorrectly equates 'bundling' of telecommunication and broadcasting services by a single service provider as 'convergence' – and the very existence of bundling indicates that there are two (or more) separate services that are merely being clubbed or provided together by a single entity. In fact, convergence of services – whether it terms of carriage and content – is still at an emerging and fledgling stage in the country and is yet to reach sufficient scale to influence policy decisions that will impact all mobile and internet users in India and industry stakeholders.

Counter-Comments

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.

- a. **Present laws are adequate to deal with convergence of carriage of broadcasting and telecommunication services:** A few stakeholders and industry bodies have submitted in their comments that a comprehensive/converged legal framework is necessary to address, *inter alia*, "the full spectrum of legal and regulatory" challenges arising from convergence. Further, we understand that some comments have suggested that all communication services that operate over-the-top of "fixed and wireless networks" (including broadcasting services) should be converged and defined under a revised proposal of the draft Indian Telecommunication Bill, 2022. ("**Telecom Bill**"). However, these comments do not: (a) comprehensively state or clarify why a converged legal framework is an overall superior policy option for addressing convergence related issues; or (b) address or acknowledge the potential practical/implementation challenges related to a converged legal framework either housed under a new comprehensive code or under the Telecom Bill.
- b. **Carriage of broadcasting and telecommunication services already regulated by the TRAI:** As mentioned in the CP and, in our comments to the CP as well, we understand and agree that there is already a converged regulatory structure for "carriage of broadcasting and telecommunication services" through, *inter alia*, the TRAI, which is a common, unified regulator in respect of the carriage of both services. In fact, this dual operational role of the TRAI has been recognised by the Ministry of Information and Broadcasting ("**MIB**") in its letter to the TRAI dated 04 October, 2022. Specifically, the MIB in its letter had *inter alia* stated that the TRAI "*is a common regulator for the carriage segment of the telecommunications and broadcasting sector*". In addition, there is a function-specific and sector-specific convergence in the regulatory framework that is already in place under existing laws. For instance, the Wireless Planning and Coordination ("**WPC**") wing of the Department of Telecommunications ("**DoT**") is the single agency that is responsible for/performs an important function, i.e., the allotment of spectrum to the broadcasting and telecommunications operators. The 'Broadcast Seva Portal' (launched by the MIB) also serves as an example of regulatory convergence since it is a single window to process all licenses/permissions/reporting requirements related to the broadcasting sector.
- c. **Content regulation outside the scope of the CP:** We also note that the submissions provided by some of the stakeholders have suggested that the envisaged comprehensive converged legal framework should address issues such as, 'content regulation'. However, as mentioned in our comments, the DoT had requested the TRAI to limit its recommendations to the 'carriage' of broadcasting and telecommunication services. Hence, we would like to reiterate that 'content' regulation is, as such, outside the scope of review of this consultation process. Further, we wish to submit that content regulation brings with it a set of unique challenges which, *inter alia*, include the need for specialised knowledge and skills and sectoral expertise – and an understanding/recognition that certain aspects of content (such as, intellectual property rights) cannot be subsumed under a converged legal framework and need to be regulated under a distinct and specialised statutory regime.

- d. **Sector-specific reforms already at various stages of consultations:** We also want to highlight that certain stakeholders have provided comments wherein they have noted that the issues a converged legal framework would address include: (i) new technologies that are presently unregulated; and (ii) ensuring privacy and security in converged networks, etc. In our view, these comments ignore the fact that the Central Government has already proposed certain significant sectoral reforms for the digital ecosystem – and which are also undergoing consultative processes with stakeholders. These include, the draft Digital Personal Data Protection Bill, 2022 ("**DPDP Bill**") to regulate personal data in the digital domain and the Digital India Act ("**DIA**") which is likely to include provisions for regulating various new and emerging technologies. In addition to this, there are already consumer-centric laws, such as the Consumer Protection Act, 2019, that apply to a whole host of consumer-facing services – including online and digital services.
- e. **Simpler policy tools available:** The comments provided by a few stakeholders echo the observations in the CP that a comprehensive/converged legal framework (if and when brought in) should be defined in such a way that it "*...provides sufficient flexibility and opportunities to connectivity, media and technology providers to adopt new business models*". It is also suggested that such a framework can address issues such as content regulation, net neutrality, licensing, spectrum allocation and consumer protection with a focus on ease of doing business. However, it is unclear in what way is a converged/comprehensive legal framework going to enable service providers in achieving the above-mentioned goals and objectives. On the contrary, in our view, there are far simpler policy tools that can be easily implemented that exist outside of convergence and satisfy the same goals and objectives. These include but are not limited to establishing channels for communication and constructive dialogue between the DoT, TRAI and the MIB on issues relating to convergence of carriage, relying on existing (and also upcoming) laws that – as noted above – already deal with issues relating to content regulation, consumer protection, etc. – and the domain expertise and deep-rooted knowledge of regulators to exercise regulatory oversight over such issues, as well as revisiting the legacy licensing conditions and fees (including spectrum fees) in order to keep pace with new-age industry demands and policy developments, and alleviate financial considerations (as opposed to imposing the same or similar conditions on broadcasting or digital services). Moreover, we believe that a comprehensive/converged legal framework may instead lead to excessive regulation, potentially deter the thriving creative ecosystem of especially application service providers etc., and consequently hamper innovation and commercial growth.
- f. **Convergence is not a one-size-fits-all solution for pre-existing sectoral issues:** Additionally, several stakeholders in their comments appear to suggest that a converged legal framework administered by a unified regulator will be the one-size-fits-all solution for pre-existing issues in the broadcasting and telecommunications sector. However, we wish to submit that we beg to disagree with these submissions for the following reasons. First, there are certain regulators and their corresponding specialized legal frameworks that cannot be converged – and any attempt to bring in convergence here will likely create significant jurisdictional overlaps. Second, a converged regulator may also, in any case, have internal departments/divisions (such as, department/divisions for competition law, intellectual property issues, etc.,) and it is unclear how such a converged regulator may operate in harmony with the internal-sub regulators. Third, 'a super-regulator' in the form of a converged regulator adds an

unnecessary regulatory layer which, when combined with potentially onerous licensing conditions) may affect the ease of doing business in India. Fourth, a converged legal framework alone may not, in and of itself, be sufficient for optimal regulation, and instead, what may be more feasible is to, *inter alia*, ensure effective and robust coordination between the existing relevant regulators/ministries - including by way of working groups and task forces – for which lessons may be learnt from the Digital Regulation Cooperation Forum of the United Kingdom.

- g. **No global consensus on convergence:** We also note that several stakeholders have stated in their comments that global practices should be studied on how regulators are handling convergence of technology(s) in the broadcasting and telecommunication sector. It is pertinent to highlight here that in our initial comments we had already examined such international practices, and our understanding is that there is no global consensus as such on convergence as the preferred regulatory approach.
- h. **OTT platforms and telecom service providers operate in different layers and cannot be equated:** Lastly, and most importantly, we note that certain stakeholders in their submissions have, *inter alia*, argued that OTT communication platforms should be regulated in the same manner as telecom service providers and such telecom service providers should be allowed to recover “network access charges” from the OTT communication platforms having users above a certain threshold. In our view, these submissions do not appreciate how exactly OTT platforms operate. OTT platforms (including, communication applications) operate at the application layer and not at the network layer, and as such, are completely dependent on the network layer to function. In other words, while OTT platforms exercise control over only the application via which users communicate, the telecom service providers effectively control the network itself through which users communicate. In addition, the services they offer are also not substitutes of one another. In fact, OTT applications cannot be offered without access to the networks that only TSPs deploy. TSPs control the underlying broadband access infrastructure and are the gatekeepers to broadband internet access. Therefore, OTT communication platforms cannot, at a fundamental level, be equated to telecom service providers in the first place. Drawing from this, we also note that certain submissions have urged that video-based OTT platforms should be regulated in a manner akin to traditional linear broadcasting. However, this approach, again, fails to appreciate the fundamental differences between video streaming services and television broadcasting – both in terms of content and carriage. For example, for online video services, consumers can choose proactively and precisely what they want, from multiple choices and sources, and can also 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 at source, the content shown to consumers.

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.

Several stakeholders in their comments have, *inter alia*, submitted that a unified regulatory body could also potentially aid in streamlining the existing processes related to the issuances of licenses for telecommunication and broadcasting services. Such a regulatory body (such as, for example, the TRAI itself), they argue, would not only regulate but also grant licenses to different types of service providers that could take the form of a converged license that is akin to the Unified License. However, we beg to disagree with such views for the following reasons:

- a. **New licensing framework will create market instability and regulatory uncertainty:** Instituting a new overhauled all-encompassing licensing framework is likely to destabilise the existing business operations of operators in the internet ecosystem, throw in regulatory uncertainty, impinge the ease of doing business and create entry barriers in the telecom, broadcasting, and digital services markets. In this respect, we also note that certain stakeholders in their comments have submitted that *all* communication services (including broadcasting and OTT communication services) that utilise the telecommunications network should, in the interests of creating a "level playing field", be brought within the ambit of the draft Telecom Bill. However, in our view, such an approach would prove to be inimical to the growth of the telecom, broadcasting, and digital services markets as they deliver unique services to users (that are not substitutes for or comparable to traditional telecom services) and as such, do not warrant being subject to the same or similar set of regulations.
- b. **Onerous license conditions can impede innovation and growth:** Moreover, we take this opportunity to reiterate that placing onerous license conditions such as, entry fees, carriage fee, license fees, etc., on OTT platforms (as urged by certain stakeholders) would hamper digital innovation and growth, which has been the backbone of India's goal to becoming a world-leading digital economy. Further, it is also contrary to TRAI's own previously stated position in its recommendations on a 'Regulatory Framework for OTT Communication Services' dated 14 September 2020, wherein the TRAI observed that the existing laws adequately regulate OTT communication platforms. The underlying idea behind issuance of license by a governmental authority, in our view, is that there must be a 'scarce natural resource' that is owned or controlled by the licensor (for instance, limited natural resources such as spectrum, right of unique numbering resources, etc). However, in the case of OTT applications, it is unclear what the license will be for and how it satisfies the above test mentioned (i.e., if a license-based mechanism were to be introduced).
- c. **A converged legal framework may be constitutionally suspect:** In addition, in our view, any converged framework/regulator that treats OTT communication platforms in a similar manner to telecom service providers and, as a corollary, seeks to impose licensing or other allied conditions is likely to be subject to a constitutional infirmity under Article 14 and Article 19 of the Indian Constitution. This is because a converged framework/regulator as suggested by the TRAI in the CP and as mentioned in the comments made by a number of stakeholders, *inter alia*, intends to treat unequally positioned service providers equally. Telecom service providers as opposed to OTT communication platforms enjoy exclusive rights and privileges, such as the right to spectrum, right of way to set up network infrastructure, the ability to connect

to the PSTN, and also the ability to operate as OTT services in addition to traditional telecom services. Moreover, any such converged framework that imposes license conditions (such as, network or carriage fees) on OTT communication platforms may also be considered to be manifestly arbitrary and an unreasonable restriction (beyond what is required in public interest) in the enjoyment of the fundamental right to carry on any trade, business etc.

Q3. How various institutional establishments 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.

In respect of Q3., we do not have any counter-comments given our views largely align with the submissions provided by other stakeholders in their comments.

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.

Certain stakeholders, particularly telecom service providers have submitted in their comments that the unified policy framework and spectrum management regime should only permit the auctioning of spectrum bands. However, we beg to disagree with this view for the following reasons:

- a. **Allow the administrative assignment of certain spectrum bands:** The imposition of a light-touch regulatory model (including through administrative assignment/allocation) for spectrum bands will foster technological innovation and growth in a significant way as it will make available use of spectrum for innovation.
- b. In any event, we note that the Telecom Bill already seeks to allow for the Central Government to assign spectrum through any manner that it may prescribe. Further, the Telecom Bill also seeks to permit the Central Government to (by notification) exempt certain use-cases in specified spectrum frequency bands from legal/regulatory requirements subject to it determining that there is a public interest served.

We also take this opportunity to urge that rather than have a unified policy framework and spectrum management regime for the carriage of broadcasting services and telecommunication services, the focus should be on improving existing administrative mechanisms for obtaining approvals, etc. pertaining to allocation of spectrum in a time bound manner, including via better coordination amongst the relevant Government departments and ministries.

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.

We note that a number of stakeholders have reiterated their arguments (made in response to Q1 to Q4 of the CP) as responses to Q5. In the paragraphs below, we have highlighted certain additional facts that are crucial to delink OTT communication platforms as being similarly situated as telecom service providers and regulated by a common framework.

- a. Telecom service providers are able to recover capital expenditure incurred, earn revenue (are also able to make profits) for the OTT services provided on top of their networks through data and internet charges generated on account of increased user demand to access OTT platforms. They are free to charge any data rate as tariffs are under forbearance.
- b. If subject to the same licensing regime (and consequent requirements) as telecom service providers, OTT platforms could potentially be required to compromise on user trust and safety through the weakening of encryption for users to comply with government requests for access to user data etc., which would directly have significant implications for privacy of users.
- c. Further, and to reiterate, we believe that there is a symbiotic and inter-connected relationship between OTT platforms and the services that they provide and the telecom service providers. In other words, OTT platforms incur large capital and operational costs to deliver their services on top of the network provided by telecom service providers – and as noted above, the higher the number of users of OTT platforms, the larger revenue that telecom service providers would be able to make through data and internet charges (especially, with increased penetration of the internet). OTT platforms also have made frequent investments in improving network connectivity in the country and globally.
- d. Moreover, given the differences between OTT communication services and telecommunication services as elaborated in our comments to this CP, it may be noted that OTT and other digital services are regulated under specialised laws such as the Information Technology Act, 2000 ("**IT Act**") (which is currently being revamped to the proposed Digital India Act) and are under the purview of Meity. Thus, a separate regulatory framework distinct from the regulatory principles that govern and regulate telecommunication services is the best way forward and will help avoid any form of unnecessary regulatory uncertainty and compliance hurdles.
- e. **Cloud service providers are already regulated:** Lastly, we note that an additional focus of the TRAI in the CP is towards 'Information Technology enabled Service providers' ("**ITeS**") including cloud service providers ("**CSPs**") and the need for a regulatory framework(s) for the same. Here, we would like to highlight the following. First, the proposed Digital India Act will likely include provisions for, *inter alia*, the ITeS sector including CSPs. Second, even at present, CSPs are subject to regulatory oversight of the Ministry of Electronics and Information Technology (according to the Allocation of Business Rules, 1961) under the IT Act as well as by sectoral regulatory authorities such as, the Securities and Exchange Board of India and the Reserve Bank of India. Fourth, it would be incorrect to treat the ITeS sector including CSPs as being similarly placed to the telecom service providers since CSPs, like OTT platforms,

operate in the application layer as well. Accordingly, in our view, the ITeS sector including CSPs should not be brought within the ambit of a converged law/unified regulator.
