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Consultation Paper on Regulating Converged Digital Technologies and Services - Enabling Convergence of Carriage of Broadcasting and Telecommunication services

We would like to thank the Telecom Regulatory Authority of India (TRAI) for giving stakeholders the opportunity to comment on its Consultation Paper. AVIA is the trade association for the video industry and ecosystem in Asia Pacific. It serves to make the video industry stronger and healthier through promoting the common interests of its members.

Our membership consists of a combination of local, regional and multi-national companies, many of which are substantial cross-border investors; creating and purchasing video content to meet rapidly expanding consumer demands and investing in India's communications and creative industries.

We agree with the TRAI's view that convergence has been "defined and interpreted in many ways". As such, 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. From a user perspective, convergence is the ability to obtain multiple services on a single platform or device and obtain any given service on multiple platforms or devices.

India's current regime has several regulators assigned to handle different types of services. Currently, service providers within the broadcasting sector have to get permission from MIB and, with regard to the carriage portion of broadcast, they are regulated by TRAI. TRAI is now conducting a consultation exercise at the Department of Telecommunications' reference *inter-alia* as to whether it needs to recommend adoption of a holistic regulatory and policy framework for the telecommunication, broadcast and broadband sectors due to technological changes/developments in the said sectors. This concept of a single 'converged' framework to handle all types of communications, regardless of the medium, has found favour in few markets. Malaysia's 1998 Communications and Multimedia Act groups telecommunications, broadcasting and the computing industries into one industry with one regulator. OFCOM similarly regulates, radio, telecommunications, video on demand and wireless communication. And in Singapore the Information and Media Development Authority (IMDA) regulates communications and media. India is no stranger to this initiative. In 2001, [the Communications](#)

[Convergence Bill](#) came close to fulfilling this vision of technology-agnostic regulation but was never adopted. It is now being revisited through the present consultation exercise.

The three key areas within the Consultation Paper which we wish to address in our submission are:

1. Has there in fact been a convergence of services?
2. Are telecommunications and digital internet services the same?
3. Should both telecommunications and digital internet services be regulated by a single, converged regulator?

Convergence of services

TRAI's Consultation Paper seems to suggest that the bundling of telecommunication services with broadcasting services by a single service provider equates to a 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. 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. In fact, by forming such partnerships, companies not only benefit from the established brand name of their partners and achieve efficiencies like the reduction of operational costs but ultimately, the end consumer also benefits with the introduction of a more cost-effective product or bundle of products. The Consultation Paper also 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.

Are telecommunications and digital Internet services the same?

In this Consultation Paper, it appears that TRAI has adopted the view that all services made available through the internet should be governed in the same way as a telecommunications service provider. The suggestion is that these are all internet services and that the "same" services should be regulated in the same way. We would respectfully suggest that this argument is not correct. It fails to take into account the fact that the fundamental nature of the service does not change merely because the means of distribution does. A subscription video on demand service will still be a video content service whether it is delivered via the internet or via some other means and accordingly, the MIB, which is tasked with content oversight, should still be the primary regulator of that service. Telecommunication service providers provide their services through a license granted by the Indian government which confers on 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. These exclusive privileges give telecommunication service providers economic

advantages like high entry barriers, reduced competition and exclusivity in business operations, and are the premise for regulations in areas such as net neutrality, revenue share, contributions to universal service obligations, investment mandates, tariff regulation and must carry obligations. Internet-based services or digital services, as the name suggests, are services that are provided over the internet, are built on top of telecommunication services and are characterised by hyper competition and low entry barriers. Digital, or internet-based services cannot be treated on par with telecom services, as their dependence is not equivalently mutual, i.e., while digital service providers require the services provided by telecommunication service providers, the reverse is not true. The two types of services are simply not the same.

The introduction of a single converged regulation and a single converged regulator

Digital services require specialised legislation like the Information Technology Act, 2000 (*which, according to the 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 Consultation Paper'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 India's Information Technology Act, 2000" overlooks the clear intent of the government to refine and further develop specialized legislation for digital services.

It has been contended that the establishment of a single media and telecommunications regulation, administered by a single, converged regulator, might confer the benefits of ease of doing business, an initiative which has been driven by the India government to encourage investment. However, in India establishing this single, converged regulator may be far harder to achieve than some assume. Currently, there is not even a single media regulator in place. Broadcast, while no formal legal definition exists, is not viewed in the same way as Unicast. Viewing content online occurs within a private medium and is based on a 1:1 consumer-pull rather than a 1:many broadcaster-push action. The business models are entirely different and require different governing frameworks administered by regulators who are expert in that particular sector. TRAI does suggest in its Consultation Paper that there seems to be a "convergence" of these networks. It states 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.

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 Consultation Paper, the regulatory framework for content has evolved from judicial interpretation of Article 19(1)(a) of the Indian Constitution for different media platforms. Of late, we have witnessed a worrying trend where the independence of the self-regulatory framework is under threat. "Fake news" regulations or

regulations which prohibit content that “offends” local mores, have been interpreted at some times to suppress freedom of expression and/or criticism of government with its censorship-like tools.

The Consultation Paper 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”. We do not believe that these conclusive statements about the regulatory framework for content across different platforms reflect the evolving reality of the content regulation frameworks in India. 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 some of the issues and challenges posed by digital platforms. A broad-brush approach to content regulation ignores the fact that the principles for regulating content across different platforms are different for different delivery platforms such as theatres, TV, and OTT because of fundamental differences (e.g. push versus pull) in how content is consumed via these platforms, as well as the role of adult consumers in exercising their free choices in selecting content.

Removing the role of the independent self-regulatory framework can have a hugely negative impact on the preservation of independent media and the voicing of minority perspectives. Retaining an independent self-regulatory framework, on the other hand, is crucial to ensure that India continues to foster a free, independent and pluralistic broadcast media consistent with the principles of a democratic society. Within content regulation, there are different principles for regulating content on different platforms. The appointment of a single media regulator is therefore likely to be challenging, let alone appointing one for both media and telecommunications. The necessary skill sets, knowledge bases and societal sensibilities are not the same.

Convergence of regulation of technologies can also bring other, unwelcome and more complex, issues, especially for consumers. This could include issues such as a limitation of choice as services become more bundled and thus limited; a lack of pricing transparency; downgraded service quality; and concerns around data privacy as companies may have increased access to information about consumer usage patterns and preferences. Any of these could negatively impact the consumer’s rights and experience.

We therefore recommend that the regulatory framework for content (within the confines of Article 19(2) of the Constitution of India) should be distinct and separate from the regulatory framework for carriage. For clarity, the regulatory framework for carriage should not result in impinging of rights guaranteed under Articles 19(1)(a) and 19(1)(g) of the Constitution of India. In fact, TRAI in its 2006 Recommendations on “Issues Relating to Convergence and Competition

in Broadcasting and Telecommunications” acknowledged 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.”*

This premise is still valid in today’s digitalised carriage eco-system. It is possibly the reason why the great majority of media regulatory authorities in Europe remain mainly in charge of regulating broadcast media including on-demand services, while a separate independent body is tasked with the regulation of telecommunications and the postal sector. This is particularly important in a scenario where one service provider is unilaterally dependant on another service provider. For example, if a digital service provider was dependant on a telecommunication service provider, converged regulations that both were subject to, could result in increased compliance costs to the digital service provider, which places higher entry barriers on the industry than currently exist and where such low entry barriers encourage innovation and competition.

Conclusion

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. It may be noted that even MIB in its communication dated 04.10.2022 to TRAI (*at page 142 of the Consultation Paper*) has, in the context of broadcasting services, stated that – *“... multiple agencies are involved for the purposes of company clearances like MHA for security clearance, DoT for wireless and spectrum clearance, DoS for satellite allocation to various licensees, MEA, DPIIT for FDI and foreign executives working in broadcasting entities, MCA for company matters, Meity for digital news and online curated content etc. and the MIB has established systems and processes to effectively coordinate with all these agencies”*. Whilst cooperation of regulators already occurs, e.g. with TRAI and MIB coordinating on issues such as net neutrality, consumer protection and anti-competitive practices, we would advocate for greater cooperation across regulators, along with harmonisation of legislation, rather than additional regulations or a converged regulator. The consultation has not shown that there is any need for additional regulations, or that there is something to be “fixed” in the current regulatory 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.

Recently, the global debate about the value of a single converged regulator appears to have shifted from a more stringent viewpoint focused on structure to a pragmatic approach favouring constructive dialogue and cooperation between the various sectoral authorities (or departments) to ensure compliance with regulatory goals and alignment with overall government vision. This regulatory co-operation would generally require regulators to tackle issues alongside each other in order that (i) businesses are able to operate with agility within the parameters of the law and (ii) innovation is not inadvertently stifled. This co-operation also ensures that any conflict arising from the blurring of boundaries around the regulatory parameters of each department, is minimised. Rather than a single converged regulator, the United Kingdom, through the Digital Regulation Co-operation Forum (“DRCF”), brings together 4 UK regulators (the Information Commissioner’s Office, the Competition and Markets Authority, OFCOM and the Financial Conduct Authority) who are separately tasked with regulating digital services to collectively drive greater regulatory co-operation and deliver coherent approaches to digital regulation. This non-statutory body functions as an advisory body with no decision-making powers, but given the unique challenges posed by regulation of online platforms and digital services aims to facilitate engagement between regulators on digital policy areas of mutual interest.

In its Consultation Paper, TRAI has suggested that even if current structures and regulatory oversight parameters are to be maintained, there are regulatory gaps that need to be filled given the advancement of technology. Assuming that is a correct assessment (TRAI has not identified what these gaps actually are), it might be prudent to examine whether harmonising the laws, rather than converging them, could create a more transparent, level playing field for example, by revisiting and reducing the heavy license requirements on traditional broadcast as opposed to implementing the same regulations for streaming service providers who offer very different types of services and function via very different business models. Legacy media companies, like print media, as they migrate their offerings to digital platforms, find that not only are they required to comply with the strict legacy media regulations, but they are also expected to comply with new regulations such as the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 (IT Rules). This places additional burdens on a legacy media player entering what is already a very competitive playing field.

We respectfully do not agree with the Consultation Paper’s observation that there is convergence in services between telecommunication services and broadcasting services. Additionally, the Consultation Paper does not provide sufficient data to conclude that carriage of broadcasting services and telecommunication services have converged and are the same nor is there any clear data to prove that the market has failed. Carriage over a single wire does not demonstrate digital convergence, any more than conveyance of different goods and services over a roadway demonstrates convergence of those industries. Therefore, we recommend that the regulation of broadcasting services and telecommunication services remain separate. In paragraph 1.14 of the Consultation Paper, TRAI observes that *“In India too, in 2004, TRAI was entrusted regulation of broadcasting sector, in addition to telecom sector. However, the actual benefits of convergence could not be realized, as most functions were with ministries that did not converge. Areas that may be of concern for a regulator may be market access, pricing,*

investment, and merger approval, etc. motivated by a broad range of market failure concerns.”
From the above, it is apparent that the present exercise is merely based on ‘market failure concerns’ and is not backed by any data evidencing any actual market failure. The only issue the Consultation Paper highlights is the issue of overlap between different ministries, which can easily be solved through better coordination between different authorities or amending existing regulations that overlap. Examples of such coordination include the division of roles between MIB and MEITY in the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, under which provisions relating to digital media are administered by MIB.

Convergence, in the manner suggested by TRAI, will require overhauling the legal, regulatory, licensing, administrative and institutional setup for both telecommunication and broadcasting services. This could potentially disrupt the current equilibrium and may even severely impact the growth of the telecommunication and broadcasting sectors at a time when digital innovation is growing exponentially.

About the Asia Video Industry Association (AVIA)

AVIA is the non-profit trade association for the video industry and ecosystem in Asia-Pacific. It serves to make the video industry stronger and healthier through promoting the common interests of its members. AVIA is the interlocutor for the industry with governments across the region, leads the fight against video piracy and provides insight into the video industry to support a vibrant industry ecosystem.

AVIA’s leading members include: Amazon, AsiaSat, Astro, BBC Studios, Warner Bros. Discovery, The Walt Disney Company, NBCUniversal, Netflix, now TV, Star India/Hotstar, TrueVisions, TV5MONDE, ViacomCBS Networks International, A&E Networks, Akamai, Baker McKenzie, BARC, beIN Asia Pacific, Bharucha & Partners, Bloomberg Television, Brightcove, Canal +, Cignal, Converge ICT, Dolby, Eutelsat, France 24, Globecast, Globe Telecom, IAS, Invidi, iQiYi, Index Exchange, Intelsat, Invidi, KC Global, Lionsgate, Magnite, Motion Picture Association, NAGRA, NBA, NHK World, Nielsen, Planetcast, Premier League, Pubmatic, SES, Singtel, Skyperfect JSAT, Sony Pictures Television, Starhub, Synamedia, TMNet, TV18, TVBI, The Trade Desk, Verisite, Vidio, Viaccess, Viacom18, White Bullet and Zee TV