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BSA COMMENTS ON THE CONSULTATION PAPER ON REGULATING CONVERGED DIGITAL TECHNOLOGIES AND SERVICES – ENABLING CONVERGENCE OF CARRIAGE OF BROADCASTING AND TELECOMMUNICATION SERVICES

Respectfully to: The Telecom Regulatory Authority of India

BSA | The Software Alliance (**BSA**)¹ appreciates the opportunity to submit comments to the Telecom Regulatory Authority of India (**TRAI**) on its consultation paper titled 'Regulating converged digital technologies and services – enabling convergence of carriage of broadcasting and telecommunication services' (**Paper**).²

At the outset, we commend TRAI's objective of promoting innovation and growth of India's digital economy.³ To achieve this, however, the TRAI should focus on liberalizing the existing telecommunication regulatory framework, as opposed to extending its application to Information Technology (IT) / Information Technology – enabled services (ITes) / digital services and products, and other non-telecom service providers like cloud service providers (**CSPs**). Rather than having the intended impact, the TRAI's proposals may have an adverse impact on the digital economy, if implemented.

Here is a summary of our key concerns:

1. Citing technological convergence, the TRAI makes a case for extending licensing requirements – like those applicable to Telecom Service Providers (**TSPs**) – to IT/ITes and CSPs under a converged regulatory regime. Subjecting such entities to the

¹ BSA is the leading advocate for the global software industry before governments and in the international marketplace. Our members are among the world's most innovative companies, creating software solutions that help businesses of all sizes in every part of the economy to modernize and grow. With headquarters in Washington, DC, and operations in more than 30 countries, BSA pioneers compliance programs that promote legal software use and advocates for public policies that foster technology innovation and drive growth in the digital economy.

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² TRAI, Consultation Paper on Regulating Converged Digital Technologies and Services – Enabling Convergence of Carriage of Broadcasting and Telecommunication services, dated January 31, 2023: https://www.trai.gov.in/sites/default/files/CP_30012023.pdf.

³ TRAI, Consultation Paper on Regulating Converged Digital Technologies and Services – Enabling Convergence of Carriage of Broadcasting and Telecommunication services, dated January 31, 2023: https://www.trai.gov.in/sites/default/files/CP_30012023.pdf, (see para 1.33, page 17)

onerous licensing conditions applicable to TSPs could hamper innovation and create regulatory and economic challenges.

2. The TRAI has incorrectly assumed that IT/ITes and CSPs are unregulated in India. To the contrary, these entities are already regulated by a robust legal regime.
3. The TRAI's proposals are not aligned with legal and regulatory frameworks in other jurisdictions – even those cited in the Paper.

BSA's recommendations

1. We recommend that the TRAI limit the scope of the consultation to the contours of the original Department of Telecommunication (DoT) reference, i.e., convergence of telecom and broadcast sectors.
2. We recommend not expanding the scope of the DoT reference to examine convergence in IT/ITes, CSPs and other sectors.

Here are our detailed submissions:

1. IT/ITes/CSPs and telecom services are functionally different.

There are important operational and functional differences between TSPs and CSPs. TSPs provide the infrastructure for connectivity and the connectivity itself, while IT/ITes and CSPs rely on the underlying telecom networks to provide services to their customers. Both types of entities operate at different layers,⁴ i.e., the network layer and application layer. Their functionalities and services compete for different users and are offered on different devices. Hence, each layer is typically subject to different regulatory frameworks based on its unique functionalities and considerations. The National Digital Communications Policy 2018,⁵ released by the Department of Telecommunications, also proposed an unbundling of the application and network layers – allowing them to be subjected to differential regulations.

TRAI's proposals could create regulatory and economic challenges. Imposing a licensing requirement on a wide range of cloud services will likely harm service create entry barriers for emerging platform and service providers,⁶ and increase compliance and cost burdens, thereby harming innovation in the ecosystem and service availability and adoption without enhancing quality of services.⁷

2. IT/ITes and cloud services are sufficiently regulated.

The Paper argues that there is an apparent regulatory vacuum within which CSPs operate in India.⁸ It also argues that IT/ITes services are not sufficiently regulated and that these entities

⁴ TRAI, Consultation Paper on Licensing Issues relating to Next Generation Networks, 27 January 2009, <https://www.trai.gov.in/sites/default/files/NGN.pdf>, stating, “The technological advancements have facilitated separation of network, service and application layers. This has brought in a new concept and changed the hierarchy of the network. Now different services can easily be launched on common backbone drastically reducing time and service provisioning cost.” (see paragraph 2.9)

⁵ National Digital Communications Policy 2018, <https://dot.gov.in/sites/default/files/EnglishPolicy-NDCP.pdf>, (see page 13)

⁶ Office of the US Trade Representative, 2014 Section 1377 Review on Compliance with Telecommunications Trade Agreements, <https://ustr.gov/sites/default/files/2013-14%20-1377Report-final.pdf>, (see page 9)

⁷ Office of the US Trade Representative, 2014 Section 1377 Review on Compliance with Telecommunications Trade Agreements, <https://ustr.gov/sites/default/files/2013-14%20-1377Report-final.pdf>, (see page 8)

⁸ TRAI, Consultation Paper on Regulating Converged Digital Technologies and Services – Enabling Convergence of Carriage of Broadcasting and Telecommunication services, dated January 31, 2023: https://www.trai.gov.in/sites/default/files/CP_30012023.pdf (See para 1.27 and Para 1.51)

should be subject to licensing requirements in a converged regulatory regime.⁹ However, cloud and IT services are already governed by a pre-existing legal and regulatory framework. This includes the Information Technology Act, 2000 and the various rules under it, which set compliances on data protection,¹⁰ cooperation with government authorities,¹¹ due diligence obligations,¹² cyber incident reporting,¹³ among others. IT/ITes and CSPs are also subject to Indian consumer protection,¹⁴ and contract laws,¹⁵ among others.

Moreover, according to the Allocation of Business Rules, the MeitY is responsible for developing policies for IT and the Internet.¹⁶ Any changes to the existing institutional and regulatory framework can create overlaps, confusion, and duplicative regulatory burdens. This could have the unfortunate consequence of stymying innovation and investment into these critical sectors. Further, increased and overlapping regulation would only lead to increased costs of access for Indian consumers.

3. The TRAI's proposals are unaligned with global frameworks.

TRAI has cited Singapore, South Korea, Australia, and the European Union as examples of countries with converged regulatory models.¹⁷ However, the TRAI's suggested position of imposing a licensing requirement for IT/ITes and CSPs – like traditional telecom licenses – is uncommon and does not align with other jurisdictions, including the ones TRAI has cited. Governments across the world generally recognize that licensing or regulatory obligations meant for telecom services are ill-suited for regulating IT/ITes or CSPs. Even in jurisdictions that follow a converged model, like Singapore, there is different regulatory treatment of

- i. entities that set up telecom networks and/or that, provide communications intermediation, connectivity, or Internet/mobile access through telecom networks, and
- ii. entities that provide content and services over telecom networks and services.

The latter are not subject to stringent telecom requirements or licenses, as explained below:

⁹ TRAI, Consultation Paper on Regulating Converged Digital Technologies and Services – Enabling Convergence of Carriage of Broadcasting and Telecommunication services, dated January 31, 2023: (See para 1.30 and Para 1.51) https://www.trai.gov.in/sites/default/files/CP_30012023.pdf

¹⁰ Section 71, Information Technology Act 2000 and Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011

¹¹ 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

¹² Part III, Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021

¹³ Information Technology (The Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013 and Indian Computer Emergency Response Team directions dated 28 April, 2022, https://www.cert-in.org.in/PDF/CERT-In_Directions_70B_28.04.2022.pdf

¹⁴ Consumer Protection Act, 2019

¹⁵ The Indian Contract Act, 1872

¹⁶ Government of India (Allocation of Business) Rules, 1961: https://cabsec.gov.in/writereaddata/allocationbusinessrule/completeaobrules/english/1_Upload_1187.pdf (see page 50)

¹⁷ TRAI, Consultation Paper on Regulating Converged Digital Technologies and Services – Enabling Convergence of Carriage of Broadcasting and Telecommunication services, dated January 31, 2023: https://www.trai.gov.in/sites/default/files/CP_30012023.pdf (see para 1.14 and Chapter 4)

- a. **Singapore:** Services like IT/ITes and CSPs, which include¹⁸ remote computing services, on-line information and database retrieval and processing services, electronic data interchange services, among others, are governed under the telecom law. These are however, exposed to a lighter regulatory and licensing obligations as compared to traditional telecom players.¹⁹ On the other hand, TSPs are subject to license application requirements, higher licence fees and strict network quality and service rollout obligations.
- b. **Australia:** The Australian federal telecom law regulates ‘carriers’ – entities that set up telecom networks – and carriage service providers, who provide Internet and connectivity services based on the infrastructure of the carrier.²⁰ Carriers require a license from the government,²¹ while carriage service providers must only follow the applicable law.²² Content service providers, who use carriage services to provide content or services to the public, do not require a license and are subject to lighter rules than both carriers and carriage service providers.²³
- c. **South Korea:** In South Korea, value-added communication services – including Over-The-Top (OTT) services – are excluded from the definition of telecom services²⁴ and do not require a license.²⁵
- d. **European Union:** The European Union’s European Electronics Communications Code (EECC) recognizes the fundamental differences between “number-based interpersonal communications services” (NB-ICS), such as those interconnected with the public telephone network,²⁶ and “number independent interpersonal communications services” (NI-ICS), which includes non-interconnected OTT communications apps that ride over the network.²⁷ The latter, i.e., NI-ICS is not subject to a licensing or authorisation requirement.²⁸
- e. **United Kingdom:** In the United Kingdom, while both electronic communication networks and services are governed by a general authorization regime - content services are excluded from this requirement.²⁹ The UK’s communications regulator

¹⁸ ‘First Schedule: Class Licence for Store-And-Retrieve Value-Added Network Services’, Telecommunications (Class License) Regulations: <https://sso.agc.gov.sg/SL/TA1999-RG3?DocDate=20161003&WholeDoc=1#Sc1->

¹⁹ Infocom Media Development Authority, ‘Services-based Operations (SBO) License’, IMDA, <https://www.imda.gov.sg/regulations-and-licensing-listing/services-based-operations--sbo--licence>

²⁰ Section 41, Telecommunications Act (Australia)

²¹ Section 41, Telecommunications Act (Australia)

²² About carriers and carriage service providers, Australian communications and media authority, [https://www.acma.gov.au/about-carriers-and-carriage-service-providers#:~:text=CSPs%20do%20not%20need%20a,and%20Service%20Standards\)%20Act%201999](https://www.acma.gov.au/about-carriers-and-carriage-service-providers#:~:text=CSPs%20do%20not%20need%20a,and%20Service%20Standards)%20Act%201999)

²³ Section 97, Division 4, Telecommunications Act (Australia). Except in the case of content service providers which provide gambling promotional content require a license to operate, see Rule 4, Broadcasting services (Online content service providers Rules), 2018

²⁴ Article 2 (13), Telecommunications Business Act (South Korea)

²⁵ Article 6 (1), Telecommunications Business Act (South Korea)

²⁶ Article 2 (6), EECC

²⁷ Article 2 (7), EECC

²⁸ Para. 44, EECC.

²⁹ General conditions of entitlement, Ofcom, <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/telecoms-competition-regulation/general-conditions-of-entitlement>

– the Office of Communications – has also determined that OTT communication services are different and not substitutable to traditional telecom services.³⁰

Conclusion

We thank the TRAI for considering our comments on the Paper. We look forward to the TRAI positively implementing our recommendations. We urge TRAI to continue open discussions to achieve common goals for developing a vibrant and competitive digital economy in India.

Please do not hesitate to contact Mr. Venkatesh Krishnamoorthy at venkateshk@bsa.org if you require any clarification or further information. Thank you once more for your time and consideration.

Sincerely,
BSA | The Software Alliance

³⁰ Department for Digital, Culture, Media and Sport, Audience Protection Standards on VoD services, 28 April 2022
<https://www.gov.uk/government/consultations/audience-protection-standards-on-video-on-demand-services/audienceprotection-standards-on-video-on-demand-services#ensuring-vod-services-are-regulated>