

**3 April 2023**

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**Sub:** Esya Centre's comments on TRAI's CP on Regulating Converged Digital Technologies and Services- Enabling Convergence of Carriage of Broadcasting and Telecommunication Services dated 30.01.2023

Dear Sir,

The Esya Centre is a New Delhi-based technology policy think-tank. Its mission is to generate empirical research and inform thought leadership to catalyse new policy constructs for the future. It simultaneously aims to build domestic institutional capacities for generating ideas that enjoin the triad of people, innovation and value, consequently helping reimagine the public policy discourse in India. More information can be found at: [www.esyacentre.org](http://www.esyacentre.org).

In this context, we are delighted to be afforded the opportunity to submit our comments on TRAI's CP on Regulating Converged Digital Technologies and Services- Enabling Convergence of Carriage of Broadcasting and Telecommunication Services. We laud the TRAI for holding this open consultation process and fielding feedback from a diverse set of stakeholders. Please find enclosed a copy of our comments.

Thanking you and looking forward to a favourable consideration of suggestions in the interest of the growth of the internet in the country.

Sincerely,  
Meghna Bal and Noyanika Batta  
Esya Centre

**Esya Centre's response to TRAI's CP on Regulating Converged Digital Technologies and Services- Enabling Convergence of Carriage of Broadcasting and Telecommunication Services**

**A. List of Acronyms**

<b>Sr. No.</b>	<b>Acronym</b>	<b>Full form</b>
1.	4K	4000 pixels (ultra-HD image format)
2.	BCG	Boston Consulting Group
3.	BIF	Broadband India Forum
4.	CAGR	Compound annual growth rate
5.	CP	Consultation Paper
6.	CRISIL	Credit Rating Information Services of India Limited
7.	CUTS	Consumer Unity & Trust Society
8.	CVV	Card Verification Value
9.	DoT	Department of Telecommunications
10.	DTH	Direct To Home
11.	FRAND	Fair, reasonable and non-discriminatory
12.	GAC	Grievance Appellate Committee
13.	GB	Gigabyte
14.	IDC	Inter-departmental Committee
15.	IP	Internet Protocol
16.	IT	Information Technology
17.	MIB	Ministry of Information & Technology
18.	NITI Aayog	National Institution for Transforming India
19.	OTT	Over-the-top
20.	QoS	Quality of Service
21.	RBI	Reserve Bank of India
22.	TRAI	Telecom Regulatory Authority of India
23.	TV	Television
24.	USD	United States Dollar
25.	v.	Versus

## **B. Responses to the issues raised for consultation**

<b>Sr. No.</b>	<b>Issues raised in the CP</b>	<b>Response</b>
1.	Is there a need for having a comprehensive/converged legal framework to deal with the convergence of carriage of broadcasting services and telecommunication services?	<p>In the context of broadcasting, there is limited evidence that there is any kind of device convergence. Illustratively, a 2022 market study by the Competition Commission of India on the Film Distribution Market found that there is only a small subset of premium users within the bracket of households that use television for private viewing and streaming, as there are reportedly only 10 million smart television connections in the country. Many of these may be in the same household or in offices.</p> <p>The CP has also failed to provide any concrete evidence of service convergence and the market structure of broadcasting and digital services does not seem to suggest any widespread trend towards the same.</p> <p>Moreover, there is no evidence of market failure that suggests any need for a converged framework for broadcast and telecom carriage.</p> <p>India is different from other countries that have converged regulatory frameworks in that it has different ministries and regulators dealing with different aspects of governance – in line with their years of expertise and experience. The current frameworks for telecom, broadcasting, and information technology are adequate for the industries under their separate purviews.</p> <p>Given that there are only two or three telecom service providers that are vertically integrated with broadcast carriage services – the MIB should continue to be the nodal ministry for licensing broadcast carriage as it has expertise in this field. Moreover, the MIB also has expertise in content regulation and detailed frameworks for content governance have been set out under the Programme Code in the Cable Television Networks (Regulation) Act, 1994 and the Information Technology Act and Rules. These are adequate and there is no need for another regulator.</p> <p>Given the aforementioned context, there is no need for a comprehensive/converged regulatory framework for broadcast content and carriage.</p>

		<p>We also highlight that the CP explores convergence beyond telecom and broadcasting and looks into the IT sector as well. This exceeds the scope of the DoT reference. OTT services and telecom services cannot be subject to a converged legal framework as they have different technical characteristics and distinct regulatory considerations.</p> <p>(Detailed submissions in Paras 1; 2.1. &amp; 2.2.)</p>
2.	Is the present regime of separate licenses and distinct administrative establishments under different ministries able to adequately handle convergence of carriage of broadcasting services and telecommunication services?	<p>Yes.</p> <p>Further, OTT services are comprehensively regulated under the existing regulatory framework. They are subject to several obligations governing privacy, confidentiality, interception, cybersecurity etc. under the existing laws. Introducing a permission-based regime for the online sector can hamper innovation.</p> <p>(Detailed submissions made in Para 2.3.)</p>
3.	How can various institutional establishments under different ministries be synergized effectively to serve in the converged era?	<p>There is no need for such synergy. It is prudent to regulate carriage and content separately as both require significantly different regulatory expertise and considerations. Moreover, the GOI has maintained a longstanding policy of keeping carriage and content regulation separate. Where synergies are required, they exist. Illustratively, the TRAI has a formal channel of communication with both DOT and the MIB. Additionally, MIB feeds into content moderation of digital services and MEITY through the IT Rules.</p> <p>(Detailed submissions made in Para 4.1)</p>
4.	What steps are required to be taken for establishing a unified policy framework for the carriage of broadcasting services and telecommunication services?	<p>It is not viable to establish a unified policy framework by subjecting OTTs to a licensing regime and an infrastructure cost-sharing mandate. Please see our detailed submission made in Paras 2 &amp; 3.</p>
5.	Beyond restructuring of legal, licensing and regulatory frameworks of carriage of broadcasting and telecommunication services, are other issues needed to be addressed for reaping the benefits of convergence holistically?	<p>Our response lays down the nine principles to aid the design of new-age IT legislation that fosters innovation, competition and growth. These principles and the IT legislation they will be encompasses in, most likely the Digital India Act, is best issued by the MEITY.</p> <p>(Detailed submission made in Para 5)</p>

## **C. Detailed response**

### **I. The TRAI CP exceeds the scope of the DoT reference**

Based on references dated 20.10.2021 and 12.08.2022, DoT sent a reference to TRAI for its recommendations on the following matters:

- Amending the licensing regime to enable the convergence of carriage of broadcasting and telecommunications services.
- Establishing a unified policy framework and spectrum management regime for the carriage of broadcasting and telecommunications services.
- Restructuring of legal, licensing and regulatory frameworks for reaping the benefits of the convergence of carriage of broadcasting and telecommunications services.
- Revising regulatory regime w.r.t. DTH and Cable TV services holistically.

However, the CP explores convergence beyond telecom and broadcasting and looks into convergence with the IT sector as well. It argues that due to technological development, no service provider should be able to disturb the level playing field by taking advantage of the regulatory gap or vacuum and it is necessary that a converged regulatory regime for telecom, broadcasting, information technology and satellite services be brought in place. In doing so, the CP exceeds the scope of the DoT reference.

### **II. OTT services should not be brought under the licensing or regulatory framework applicable to telecom service providers**

As per the TRAI CP, with the advent of OTTs, the boundaries between different services are blurring. Technological convergence leads to a hazy space where licensed telecom providers and other players are operating. As per the CP, this raises issues of policy regulation, data privacy, and data security.

The CP also notes that while the existing service providers follow certain licensing and regulatory compliance procedures, new service providers are not covered under the existing type of licensing or regulatory structure. This enables technology-driven new types of service providers to disturb the level playing field. In this context, the paper demands factoring in the OTT world for carrying out regulatory and licensing reforms. It also necessitates aspects such as new entry, interconnection, consumer protection, infrastructure sharing and QoS to be handled in the new market structure.

*Our response:*

**2.1. The level-playing argument is flawed:** The level-playing field argument does not apply to OTT services as they are not the same as/similar to services offered by licensed telecom service providers:

1. **OTTs and Telco services have fundamentally different technical characteristics:** They operate in different layers. Telecom service providers are responsible for the network layer and control and operate critical infrastructure. OTT providers function only on the application layer i.e. they offer applications to the public and provide content over the public internet. The distinction is important as functioning on the network layer requires the use of the spectrum – a scarce public resource. It is crucial to ensure its efficient management and use which is done through licensing, QoS and other compliance requirements. OTT providers, on the other hand, do not make use of the spectrum, so the need for subjecting them to a licensing regime does not arise. Based on these considerations the activities of licensed telecom entities which operate over the spectrum

differ greatly from service providers who are offering their solutions over the open internet. It is therefore conceptually flawed to treat OTT services at par with telecom services for the purpose of regulation.

2. **OTT providers depend on the physical infrastructure created by telecom service providers to deliver services to their customers as they do not control any internet access points.** OTTs are in fact the business customers of telecom service providers. OTT services are thus a dependent industry and are not equal to telecom service providers. They cannot be treated at par with telecom services as their dependence is not equivalently mutual i.e. while OTT providers require the services provided by telecom service providers, the reverse is not true. To be considered as peers, the first requirement is for services to be independent or mutually dependent.
3. **The similarity between OTT and telecom services is limited by technical shortfalls such as any-to-any connectivity or the ability to make emergency calls offered by telecom service providers.** In addition, telecom service providers enjoy several exclusive rights such as the right to acquire spectrum, the right to obtain numbering resources and the right of way to set up infrastructure while OTT services enjoy no such privileges.

## **2.2. OTTs and Telcos have completely separate and distinct regulatory considerations:**

The regulatory rationale underpinning telecommunications regulation does not apply to OTT providers. The regulation of telecom service providers stems from the fact that spectrum is a scarce natural/public resource of immense national importance which is susceptible to degradation due to inadequate/insufficient utilisation. Resultantly, government policy regulation has traditionally maintained tight control of access to spectrum frequencies. Additionally, telecom services are surrounded by unique regulatory considerations. These are three-fold: (i) The driving force behind the regulation of telcos is linked to the indispensability of telecom services to the general public. As a result, their access needs to be ensured universally like other essential utilities. Much like all essential utilities, the provision of telecom services too is heavily regulated. (ii) Telecom service networks are marked by immense initial costs, reliance on economies of scale and density and high barriers to entry. The combination of these factors tends to encourage monopoly in the sector, thereby demanding strict regulation. (iii) There are heavy switching costs associated with telecom services. Consumers have a limited choice of telecom service providers which depends on the availability of network/coverage of a telecom provider in an area and there may be costs associated with switching networks. For porting mobile connections from one telecom service provider to another, an elaborate process needs to be followed by the consumers. The switching costs are even higher for a wired connection, which requires the consumer to pay an installation fee to the new operator.

By contrast, OTT services ride on the backs of network infrastructure and do not make use of the spectrum or control the critical infrastructure. Consumers can also access multiple OTT applications on the same device. Thus, extending regulatory obligations such as licensing, quality of service, and network interconnection applicable to telecom service providers to OTTs is not optimal.

**2.3. The CP incorrectly presumes that regulation of OTT services is absent and there is a need to create it:** The TRAI CP incorrectly presumes that new-age services like OTT services remain out of the policy and regulatory oversight of the government. OTT providers are subject to several obligations governing privacy, confidentiality, interception, cybersecurity etc. under existing laws. Therefore, OTT services are already regulated. Some of the regulations applicable to OTT providers include:

	<b>Applicable Regulations &amp; Description</b>
<b>Lawful interception</b>	Under Section 69 of the IT Act 2000, both the Central and State Governments are empowered to direct a competent agency to intercept, monitor or decrypt any information generated, transmitted, received, or stored in any computer resource.
<b>Consumer Protection</b>	The Consumer Protection Act, 2019 and E-commerce Rules 2020 establish the framework for redressing consumer complaints and grievances regarding goods and services purchased online. The IT (Intermediary Guidelines) Rules, 2021 also establish a three-tiered redressal mechanism to address complaints against OTT providers.
<b>End-user regulation (cybercrimes)</b>	Section 43 of the IT Act deals with end-user cybercrimes. It applies to the end-users of OTT providers and telecom service providers.
<b>Privacy &amp; confidentiality</b>	Section 43A of the IT Act provides for compensation if an intermediary is negligent in using reasonable and good quality security and safety standards to protect data or information in a computer resource. The provision is applicable to OTTs.
<b>Blocking</b>	Section 69A of the IT Act empowers the Central Government to ask any intermediary (including OTTs) to block public access to any information generated through any computer resource.
<b>Digital Payment Regulations (indirect)</b>	The RBI Tokenisation guidelines (Circular dated 07.09.2021) apply to all e-commerce (though OTTs are not regulated entities, they must comply with these guidelines). Under the guidelines, merchants (websites/apps) cannot save/store customer card numbers, CVV, expiration date or any other sensitive card information. This is for enhanced card security.

**2.4. Data privacy and security issues cannot be covered under telecom regulation:** The Draft Digital Personal Data Protection Bill 2022 is already in the works to tackle issues related to data breaches, privacy and security concerns. The Bill operates as a comprehensive code to govern the data practices of all data fiduciaries, including OTT services. The Bill will dictate the grounds for processing personal data, the manner in which consent shall be obtained, and other obligations of data fiduciaries. The Bill sets out penalties for violation of its stipulations.

### **III. Why OTTs need not compensate telecom service providers for using infrastructure**

The CP notes that the recent increase in OTT media consumption has challenged telecom service providers to support more content, more devices and more users with limited infrastructure resources. The exponential growing availability of 4K and even higher-quality content with new technologies require a large amount of bandwidth to be streamed and appears as a new issue to be handled for network operators. It further emphasizes the need to factor in OTTs and other aspects such as sharing of infrastructure in the new market structure.

*Our response:*

The observations made in the CP are based on the demands made by telecom service providers to make OTTs contribute to the cost of digital infrastructure. The primary argument of telecom service providers is that OTTs deliver services through the physical infrastructure built by them. OTTs are however freeloading off their networks as they just get to ride the network for free without incurring costs for delivering services. OTTs should therefore pay telecom providers for delivering these services. Their ask is for a mechanism to levy a usage charge on OTTs that would level the playing field with telecom. Telecom service providers claim that the current situation is

not sustainable for their companies and this fee is necessary for them to bear to increased cost of delivering internet services. This is false.

Demands for such a mandatory cost-sharing arrangement can hurt consumers and break the status quo that has facilitated the rapid spread of the global internet. It also raises crucial questions about net neutrality. Opening the door to infrastructure cost-sharing could lead to further issues as well- it may distort competition and impact the final prices for consumers.

**3.1. OTTs are drivers of investment in telecommunications:** The content provided by OTTs is driving the demand for the transmission capacity provided by telecom service providers. The more people use OTTs, the more internet usage time (data packs) they need to buy from the telecom providers. As consumers begin to use more bandwidth-intensive OTTs, they are willing to pay for higher-tiered services that offer faster speeds and greater bandwidth. Thus, the growth in traffic driven by the success of OTT apps is beneficial to telecom service providers as it has led to an increase in data usage and revenue for telcos. As per a report by Ericsson, growth in mobile traffic is amongst the foremost drivers of next-generation wireless networks<sup>1</sup>. The average data traffic per smartphone in India is the highest globally and is projected to grow from 25 GB per month in 2022 to 54 GB per month in 2028 – a CAGR of 14%<sup>2</sup>. OTT apps also have a broader economic impact – a 2017 study by WIK Consulting found that each 10% increase in the use of OTT apps leads to an average increase of USD 1 billion in additional global GDP daily.<sup>3</sup> In addition, data tariffs have jumped by as much as 57% in some telecom circles. In the Haryana and Odisha circles, Airtel decided to scrap its cheapest Rs. 99 plan that offered users 200 MB of 2G mobile data for 28 days. With the plan’s withdrawal, the cheapest plan in these circles now starts at Rs 155 and offers 1 GB of mobile data for 24 days.<sup>4</sup> A report by CRISIL estimates that the combined revenue of Reliance Jio, Bharti Airtel and Vodafone Idea may rise by 20-25% in fiscal 2023 on the back of these recent tariff hikes.<sup>5</sup>

Second, telecom service providers claim that an increase in data traffic caused by OTTs directly translates into higher costs for them. **This is not true.** The cost of IP infrastructure is not very traffic sensitive. As per an Analysys Mason report<sup>6</sup>, **the annual spend of telecom operators remained stable despite a rapid increase in global internet traffic.** This is because the marginal costs of additional data usage are very low. Only when the demand reaches the network’s higher peak capacity, does investment in network expansion and upgrades become necessary. The cost of such upgrades is very low compared to the total network capacity, even though they bring a significant increase in capacity. As per a report by Ericsson, the cost per GB for network service providers declines as user traffic increases because traffic grows more than investment, reducing the cost of each additional GB delivered.<sup>7</sup> Thus, the economic and technical conditions weight strongly against the introduction of any usage fee on OTTs.

**3.2. Cost-sharing arrangements would create barriers to entry for smaller digital businesses:** The introduction of a network access fee would create a barrier to entry for small digital businesses, hurting innovation and the economic prospects of India’s digital economy. Such a practice would also create an opportunity for telecommunication service providers to preference

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<sup>1</sup> Ericsson, ‘*Understanding the Economics of 5G Deployments*’ (June 2020), p. 4.

<sup>2</sup> Ericsson, ‘*Ericsson Mobility Report*’ (November 2022)

<sup>3</sup> T. Ramachandran, ‘*OTTs are telecom growth drivers*’, Hindu Businessline (October 2022)

<sup>4</sup> S. Barik, ‘*Why Airtel’s tariff hike is significant and what it means for the sector*’, Indian Express (November 2022)

<sup>5</sup> K. Rathee, ‘*Telecom revenue of private mobile operators to rise 20-25% in current fiscal*’, Financial Express (June 2022)

<sup>6</sup> D. Abecassis, M. Kende, S. Osman, R. Space & N. Choi’ ‘*The impact of tech companies network investment on the economics of broadband ISPs*’, Analysys Mason (October 2022)

<sup>7</sup> Ericsson, ‘*Understanding the Economics of 5G Deployments*’ (June 2020)



their own applications i.e. admitting them onto the network without any charge. It would severely distort competition in the digital sphere.

Cost-sharing would also operate as a restriction on the freedom of speech, as it would constrain the ability of OTT players to distribute their content by creating an entry barrier to the OTT market for smaller players. The Supreme Court has previously recognized that the right to propagate one's ideas includes the right to publish, disseminate and circulate them. In the matter of *Sakal Papers Pvt. Ltd. vs Union of India (1961)*<sup>8</sup>, the issue concerned the State's regulation of the number of pages in the newspaper. The Supreme Court struck down the regulation. It noted that if the number of pages was limited, the space related to advertisements would reduce. Were advertisements to reduce, the cost of newspapers would increase, affecting the affordability and access to information for the citizens. Ultimately, it would affect the dissemination of news and the circulation of newspapers amounting to a violation of freedom of speech and expression as the right extends to the ability to circulate such speech as well. Thus, the Court concluded that the right to freedom of speech and expression under Article 19(1)(a) includes the right to publish and circulate one's ideas, opinions and views. For reasons similar to Sakal Papers, the Court struck down the Newsprint policy in *Bennett Coleman & Co. vs Union of India (1972)*<sup>9</sup>. In this case, the Times of India group complained against a newsprint quota and argued that this commercial policy impacted press freedom as it limited news space. The Supreme Court held that quantitative restrictions such as page limits and other such regulations were not justified as they limit freedom of expression. This decision recognized that freedom of the press is not restricted to freedom from direct regulation of content.

**3.3. OTT providers already invest in network infrastructure, saving TSPs billions of dollars:** OTT providers invest heavily in the physical infrastructure of the internet too. From 2011-2022, OTT providers invested almost USD 900 billion into network infrastructure, with an average spend of about USD 120 billion a year from 2018 to 2021.<sup>10</sup> OTT providers have made significant contributions to network infrastructure by building physical facilities such as data centres, cache servers, and content delivery networks.<sup>11</sup> These facilities have not only helped speed up data access for consumers but have also reduced the strain on telecom service provider networks for free<sup>12</sup>. Instead of having to bring data from thousands of miles away, a telco can instead tap into a cache server placed close by to deliver that same data.<sup>13</sup> The cost difference in delivering this data from thousands of miles versus a few miles across billions of content requests is what is saved and it adds up to billions every year for telecom service providers.<sup>14</sup>

**3.4. Network usage fee hurts consumers:** The barrier to entry created by network usage/carriage fee will lead to a reduction in consumer choice and welfare.

**3.5. Implications for net neutrality:** The principle of net neutrality revolves around the idea of equal/non-discriminatory treatment of content by those providing access to the internet. It requires telecom service providers to treat all internet traffic equally, without prioritizing access to any particular content by creating fast lanes or by blocking or throttling access to others. The

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<sup>8</sup> *Sakal Papers (P) Ltd. v. The Union of India*, 1962 SCR. (3) 842.

<sup>9</sup> *Bennett Coleman & Co. & Ors. v. Union of India & Ors.*, 1973 SCR (2) 757

<sup>10</sup> C. Liu, E. Falcon & K. Trendacosta, 'Network usage fees will harm European Consumers and Businesses', Electronic Frontier Foundation (December 2022)

<sup>11</sup> Ibid

<sup>12</sup> R. Browne, 'U.S. tech giants face pressure from Europe's telcos to pay for building the internet', CNBC (October 2022)

<sup>13</sup> C. Liu, E. Falcon & K. Trendacosta, 'Network usage fees will harm European Consumers and Businesses', Electronic Frontier Foundation (December 2022)

<sup>14</sup> Ibid

introduction of a network usage/carriage fee conflicts with the concept of net neutrality as it automatically discriminates against smaller networks.

**3.6. Barriers to Entry in OTT are low, several Telecom players have their own OTT applications:** Several telecom SPs have their own OTT applications and have entered a number of digital markets.

**IV. There are no gaps in online content regulation in India. The regulatory approach for regulating content is comprehensive and balanced enough to encourage growth in a fast-changing content sector.**

As per the TRAI CP, due to the increasing popularity of OTT streaming platforms, content has become more important today. The OTT revolution has led to many gaps in the policy space of content regulation. The existing oversight framework for content regulation is patchy and inadequate and may need a complete overhaul in the converged era in line with many other nations where a converged regulator regulates carriage and content.

*Our response:*

**4.1. Content and carriage should be regulated separately:** The separation of content and carriage is a longstanding principle of Indian and global telecommunications law and policy. The need to regulate content and carriage separately was acknowledged by the TRAI itself in its recommendations on convergence in 2006. A similar view has also been reiterated by the MIB in its response to the TRAI dated 04.10.2022.<sup>15</sup>

Regulation of carriage and content should be separated as they both require significantly different skill sets. Regulation of carriage is concerned with technical and economic aspects of policies. It primarily focuses on competition, with a view to ensure that a scarce resource i.e., spectrum is allocated to its most productive and efficient uses. These considerations typically translate into quality of service, tariff, and interconnection regulations to manage the relationships between the telecom service provider and different market participants, i.e., end-consumers and other telecom service providers respectively.

In contrast, content regulation is driven by matters pertaining to digital governance such as privacy, cyber-security and content moderation. Content regulation takes into account the impact of content on the sensibilities, morals and value systems of society. Thus, artistic and creative persons from the field of fine arts, drama, films etc. may be more suited for content regulation than technocrats and economists.

Moreover, content and carriage entail separate and distinct business models and means of operation. The business of telecom carriage services is primarily concerned with the transmission of voice and data, whereas the business of content services concerns the generation or creation of data.

**4.2. Content is already comprehensively regulated under Indian laws:** There are no gaps in OTT content regulation. Currently, in India, content on OTT platforms is regulated by several codes and provisions of the Information Technology Act, 2000 (IT Act), Indian Penal Code, 1860 and special legislations like the Indecent Representation of Women (Prohibition) Act, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 etc.

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<sup>15</sup> Telecom Regulatory Authority of India, '[Annexure-III, Consultation Paper on Regulating Converged Digital Technologies and Services](#)', TRAI (January 2023)

### Information Technology Act, 2000

With respect to the regulation of content, the IT Act, 2000 provides for various sections: Section 67-punishment for publishing or transmitting obscene material in electronic form; Section 67A, 67B and 67C provide for a penalty as well as imprisonment to be imposed on anybody who has published or transmitted any kind of obscene material, any sexually explicit material including those where children are depicted in sexual acts. Further, Section 69A of the IT Act grants power to the government to remove any content that is objectionable or harms India's sovereign interests but does not give it the power to restrict it arbitrarily.

### Intermediary Guidelines, 2021

The Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021 (IT Rules 2021) also regulate content on OTT platforms and set up a grievance redressal structure that will look into any violation of the rules. Rule 2(u) of the IT Rules 2021 defines a publisher of online curated content as any publisher who makes available to users, on demand, audio-visual content (that is owned or licensed by the publisher) via a computer resource over the internet. Thus, OTT platforms squarely fall within the ambit of the IT Rules, 2021 as publishers of online curated content.

Under Rule 8(2) of the 2021 Rules, such publishers are bound by Part III of the 2021 Rules, and Rule 9 requires such publishers to adhere to the Code of Ethics found in the Appendix to the Rules. This Code lays down five broad principles ranging from age classification of content, parental controls, displaying the classification rating at the beginning of each show and exercising due caution and discretion while depicting India's multicultural background.

Under Part III of the IT Rules 2021, publishers of online curated content are subject to a three-tier grievance redressal mechanism. Any complaints against a publisher's content are addressed through this structure i.e.: (i) Self-regulation by the OTT platform; (ii) Self-regulating bodies of the publishers or their associations; and (iii) Oversight Mechanism by the Central Government. The first tier is an internal Grievance Officer for each OTT platform, who must address user complaints within 15 days. Complaints not resolved within 15 days can be referred to the second tier, a self-regulatory body, headed by a retired Supreme Court/High Court judge. Rule 12(3) requires that the self-regulation body register itself with the MIB. This registration depends on the subjective satisfaction of the MIB. Thus, effectively the self-regulating body is not independent of government influence. Additionally, the government enjoys increased oversight over OTT content at Level III i.e. the Oversight Mechanism under Rule 13. The Oversight Mechanism requires the MIB to form an inter-departmental committee. As the IDC is constituted by the MIB, the Central Government has the final say in the online content that can be published by OTT platforms. This committee has the power to take down objectionable content and even take suo moto cognizance of any issue pertaining to an OTT release.

Apart from this, the Centre has also established three Grievance Appellate Committees (GACs) with three members each.<sup>16</sup> It will be led by a chairperson and will have two whole-time members from different government entities and retired senior executives from the industry. The GAC will be a virtual digital platform that will operate only digitally. Users will have the option to appeal against the decision of the grievance officer of the social media

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<sup>16</sup> Ministry of Electronics and IT, '[Three Grievance Appellate Committees \(GACs\) notified on the recently amended IT Rules 2021](#)' (January 2023)

intermediaries and other online intermediaries before this new appellate body. Thus, the IT Rules 2021 grant the MIB significant oversight over digital content on OTT platforms.

### Indian Penal Code 1860

Under the Indian Penal Code, there are various provisions which are applicable to OTT platforms. These include Section 295A- which criminalizes Acts intended to outrage religious feelings. This can also apply to the content displayed on OTT platforms. Moreover, to prevent defamatory content from reaching the highly impressionable minds of people in India, Sections 499 and 500 of the IPC keep a check on preventing defamatory content from being published on such platforms.

There are also no gaps in content regulation in broadcasting. The Cable Television Network (Regulation) Rules, 1994 encompass comprehensive programming and advertising codes and the [amendments](#) to the rules in 2021 brought in a 3-tier oversight framework for grievance redressal regarding television content.

**4.3. OTT streaming is different from traditional broadcasting:** A 2022 market study on the Film Distribution Chain in India by the Competition Commission of India found that television and OTT operate in distinct relevant markets. It noted that the TV and OTT were distinct in several ways, including<sup>17</sup>:

1. **Temporality:** OTT streaming operates on a pull basis i.e. consumers need to actively seek out and extract the content for themselves. Consumers also have the option to forward or skip any content. OTT content viewing is thus dependent on the choice of the consumer, who can decide the kind and timing of content. Traditional broadcasting, on the other hand, operates on a push basis i.e. the consumer has no control over the timing or type of content shown.
2. **The setting within which a consumer wishes to watch content also differs:** Television is seen as a family medium and has a high- proportion of co-viewing among one's friends and family. According to a report by BCG, approximately 98 per cent of households in India which, on average, comprise 4.25 individuals,<sup>18</sup> own a single TV.<sup>19</sup> The BIF-CUTS International survey found that 38 per cent of respondent consumers watch television as a family bonding exercise.<sup>20</sup> The content on traditional broadcasting is thus meant for public viewing. In contrast, OTT content is predominantly viewed by individual users over their smartphones.<sup>21</sup> While some argue that the trend is reversing<sup>22</sup>, it is only a small subset of premium users within the bracket of households that use television for private viewing and streaming, as there are reportedly only 10 million smart television connections in the country. Thus, OTT content is akin to private viewing.
3. **Type of content:** consumer preferences for content choices vary through different mediums. Consumers may prefer to watch niche or small-budget content on OTT platforms and prefer theatres and television for major releases.

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<sup>17</sup> Competition Commission of India, '[Market Study on the Film Distribution Chain in India](#)', October 2022

<sup>18</sup> Ad Gully, '[BARC India 2018 Survey Analyses Impact of Co-Viewing on TV Viewership](#)', 13 October 2018.

<sup>19</sup> BCG-CII, '[Blockbuster Script for the New Decade: Way Forward for Indian Media and Entertainment Industry](#)', BCG-CII, December 2021

<sup>20</sup> A. Kulkarni, S. Narayan, and V. Sinha. '[Towards Effective Choice: A Nation-Wide Survey of Indian TV Consumers](#)', CUTS International and Broadband India Forum (2022)

<sup>21</sup> BCG-CII, '[Blockbuster Script for the New Decade: Way Forward for Indian Media and Entertainment Industry](#)', BCG-CII, December 2021

<sup>22</sup> Divya Dixit, '[How OTT Viewership Has Evolved from Single Viewing to Family Experience](#)', The Financial Express

An emerging industry like OTT needs minimal government or regulatory intervention and the policies on OTT content regulation should not create unnecessary hurdles. A balance needs to be struck between the government's regulatory power and the people's right to creatively express their ideas and tell their stories. This balance is achieved by the exist governance framework surrounding digital applications.

#### V. Clarification on the discussions at the December 2020 meeting convened by the NITI Aayog to discuss the principles for India's digital economy

*Our response:*

In para 1.65. of the CP, TRAI relies on the discussions held at a meeting convened by the NITI Aayog in December 2020 with representatives from various ministries and organisations to push for convergence regulation.

The Esya Centre was present for the discussion, the CP references in para 1.65 and we kindly highlight that the CP that the focus of the deliberations was to initiate discussions around Principles for India's Digital Economy based on a report prepared by us. The report titled 'Nine Principles for India's Digital Economy' authored by the Esya Centre in partnership with the Digital India Foundation is available in the public domain [here](#). Convergence regulation and a converged regulator were not within the frame of these discussions.

Recognizing the size of India's growth opportunity in the digital sector, the report suggests the establishment of a digital charter to incentivize innovation in India's digital economy that mimics the success of American and Chinese digital businesses. The report recommends a principles-based framework for the governance of information technology. It argues that frenetic changes to governance frameworks without appropriate focus on first principles, can erode value, precipitate disputes and disincentivize innovation. Specifically, it lays down nine principles to aid the design of new-age IT legislation that fosters innovation, competition and growth. These include:

- **Legal recognition:** provide adequate legal recognition and clarity to new digital businesses;
- **Level playing field through deregulation:** level the playing field for small businesses and entrepreneurs to compete effectively through deregulation;
- **Risk-based regulation:** encourage regulations that are activity-specific and prioritize consumer welfare over state control;
- **Functional classification of intermediaries through a co-regulatory model:** leverage co-regulation to help digital intermediaries evolve, innovate and scale. This would involve industry-led bodies developing common codes of practice and standards with facilitation, supervision and feedback from the government;
- **Transparent and accountable self-regulation:** employ self-regulatory and co-regulatory bodies to offset the need for regulatory constructs.
- **Platform neutrality:** ensure that large businesses do not discriminate between equal business partners in providing technical access to their service. Private companies' gatekeeping functions may also need to be monitored i.e. such entities may be required to abide by fairness and transparency requirements.
- **Privacy and security by design:** Promote privacy and security by design so that local products/platform standards are interoperable with their global counterparts and local companies can access global markets with low compliance costs.

- **Fair, reasonable and non-discriminatory terms:** Local laws and regulations must have a pro-competition bias which doesn't transfer heavy economic regulations and controls to the governance of the digital economy. The new IT Act must thus guide business conduct through the FRAND principle, to minimise the need for economic regulation.
- **Trust and global internet:** Promote the use of standards and protocols that build trust in the internet and leverage the wealth of Indian experience in multi-stakeholder collaboration and open design.

The focus was on deregulation and the need to keep governance of the digital economy away from legacy economic regulations and controls. While it was acknowledged that the complexity of multi-utility platforms will demand sectoral oversight, it was suggested that the state's need for traditional oversight be offset by well-designed self-regulatory and co-regulatory bodies. The key to such self-regulation is transparency and accountability, which requires the appointment of an independent ombudsman, effective grievance redressal and good governance. The MEITY is working towards such frameworks under the IT Rules. Illustratively, the Draft Online Gaming rules provide for governance of online gaming companies through recognized self-regulatory bodies.<sup>23</sup>

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<https://www.meity.gov.in/writereaddata/files/Draft%20notification%20for%20amendment%20to%20IT%20Rules%202021%20for%20Online%20Gaming.pdf>