Internet Regulation, Convergence and TRAI

February 2023

MEDIANAMA

MediaNama held an event in Delhi to discuss TRAI's consultation paper on convergence on February 24, 2023. The paper by the telecom regulator considers a regulatory environment where there is convergence between the Internet, broadcast, and telecommunication, and considers applying the same norms across the domains, as well as a single regulation and regulator for this converged environment.

In our event we explored what are the issues with the proposals made by TRAI, should same service have same rules, how will a licensing regime work and whether it will create barriers to entry, is TRAI equipped to deal with issues related to quality of service, does it have the jurisdiction to be a unified regulator, will a single regulator have the competency to regulate multiple areas, etc. We also touched upon the impact of 5G on convergence, competition concerns highlighted by TRAI, and what led to TRAI's interest in content regulation.

Session #1: Convergence, 5G, permission and regulatory overlap

- Dr Mahesh Uppal, Telecom Analyst and Director at Com First
- Amrita Choudhury, Director, Cyber Café Association of India (CCAOI)

Session #2: Regulating broadcast, television, telecom and streaming

- Abhishek Malhotra, Managing Partner, TMT Law Practice

Session #3: A single converged regulation and regulator?

- Vibodh Parthasarathi, Associate Professor, Centre for Culture, Media and Governance at Jamia Millia Islamia
- Prateek Waghre, Policy Director at the Internet Freedom Foundation

> We saw participation from organizations like Microsoft, Simplilearn, Chase India, Shardul Amarchand, Polygon Technology, Disney Star India, Deloitte, BTG Legal, SFLC.in, Apollo Hospitals, Advag, IndiaMART, Data Security Council of India, Truecaller, Primus Partners, Ikigai Law, Giz – German Agency For Development Cooperation, PRS, Junglee Games, Cybertech, The Quantum Hub, PwC, Netflix, K&S Partners, Kaspersky Lab, Prosus, Logically, Koan Advisory, BSA | The Software Alliance, CUTS International, COAI, Zebra Technologies, Saraf & Partners and more.

The discussion was hosted with support from Netflix, Meta, and Disney-Star. Internet Freedom Foundation was MediaNama's community partner for this event.

The following document captures and summarizes the key points raised during the discussion. You can also [view a recording of the discussion](#) on our YouTube channel.

Executive Summary

TRAI's consultation paper, which proposes a converged regulatory framework and single regulator for Internet, broadcast, and telecommunication, presents several problems. It jumps to the design aspects of the framework without defining the objectives of the regulation and the problems the regulation will solve, proposes a 'same service same rules' regime that overlooks the nuanced differences that exist between services that appear to be the same on the surface, suggests a lone regulator for overseeing the varied and complex use cases of the internet, raises the possibility of turf wars between government departments due to regulatory overlaps, calls for Quality of Service assessments for cloud services despite there being no performance concerns in this domain, and suggests an unnecessary license-based regime for internet services that discounts the regulatory burden and barriers of entry that such a regime will bring.

TRAI could achieve some of the objectives that it sets out to do with this paper by not treating convergence as a means to an end. For example, it can wait for other regulations, like the Data Protection Bill, Telecom Bill, Digital India Act, etc., and then plug in the gaps, focus on harmonization of rules rather than convergence, consider easing existing conditions that apply to telecom operators instead of introducing new regulations for OTT services, let each sectoral regulator regulate aspects that fall within their area of expertise rather than appointing a single regulator, and recognize the potential and harness the power of market competition to increase the quality of services.

I. Issues with TRAI's proposal for a converged regulation and regulator

TRAI fails to identify the problems that a converged regulation/regulator will address:
TRAI says there are gaps in the current regulations, but doesn't identify what these gaps are. It says there's overlap in how different regulators regulate different sectors, but doesn't identify the overlaps. There are different aspects of convergence to be looked at, mainly technological, economic, and institutional. The TRAI paper does not offer clarity over TRAI's vision for convergence and how the aspects they are focusing on now are different from their 2001 and 2006 papers on convergence. Two main concerns with TRAI's proposal are:

1. Not defining the object of regulation and jumping to design
2. Within the design itself, there's a lack of clarity over the various sites or fields of regulation

> *"The problem is we are already talking about the feasibility of a certain design of the regulator. That's sort of putting the cart before the horse. The question for me is, what are the aspects, which in a sense would attract regulatory intervention? [...] So is there a laundry list for people to say that these are the various aspects that need to be regulated? " – Vibodh Parthasarathi, Associate Professor, Centre for Culture, Media and Governance at Jamia Millia Islamia*

Better approach is to wait for other regulations, then plug in gaps: Convergence shouldn't be a priority at the moment. Instead, we should wait for various other regulations, such as the Data Protection Bill, Telecom Bill, Digital India Act, to be enacted, identify the gaps and then plug them accordingly.

Focus on harmonization of rules rather than convergence: Who is this regulation for? If broadcasters are already being regulated and OTT has IT rules that are governing it, then who is this law for? Sectoral regulators already ensure the regulation of broadcasters and OTT, so if there are gaps, harmonization between rules is better than convergence.

India's plan is not an outlier, but the proposed institutional structure is way different: A number of countries have worked out frameworks for a unified system, which includes aspects of content moderation as well.

a. Malaysia's Malaysian Communications and Multimedia Commission, which oversees the convergence of telecom, broadcasting, and online activities.
b. UK's Ofcom, which is the regulator for communication services including broadband, mobile phone services, TV and Radio, and wireless devices.
c. Singapore's Infocomm Media Development Authority, which regulates the infocomm and digital media sector.
d. United States' Federal Communications Commission, which is primarily about access but there have been cases where it looked at content too.

> *"It's not really an outlier in terms of the way things have been thought about. But the institutional structure is very different from the way it's being proposed in India, especially considering we have different ministries and they themselves are not even coming on the same page." – Deepak Maheshwari, Public Policy Consultant*

Why do we need regulations for the internet: There is a fundamental question of why do we want to regulate the internet. Earlier print, movies, TV, etc., were regulated because of the type of content. But this was in the 1800s and 1900s. Since then what the public sees as acceptable or moral has evolved. There used to be an outrage on the word "sexy" a few years ago, which is not the case now. Secondly, content consumed through OTT is very different from TV and cinema in the sense that you consume it in private and you have a choice of what to see, unlike TV where you watch what is broadcasted. Given these changes, let us go back and answer the question of why the internet needs to be regulated before we come up with frameworks for the same.

Substitutability is real, but doesn't warrant convergence of regulations: It's true that a WhatsApp call is a substitute of a normal telephone call, but that doesn't mean it is a reason or a basis to converge other things which haven't converged, or to merge things which are not meant to be substitutable. Telecom regulation is no substitute for broadcast regulation.

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Thanks,

Nikhil Pahwa,
Editor and Publisher

II. Issues with "same service same rules"

Technology might have merged, functions haven't: Just because everything is digital, doesn't mean all the functions that are built upon the technology have merged. Most of these functions don't have anything to do with telecom to be clubbed together with it. Each function has their own issues which should be left to the different regulators to deal with.

> *"For example, calling somebody on the phone is not the same thing as broadcasting something, having a health service online doesn't mean that health and telecom have converged, getting financial markets online does not mean that financial services and telecom services have merged."* – Dr Mahesh Uppal, Director, Com First

Broadcasting and online streaming are different, don't deserve same regulations: "There are at least three differences— (i) discovery is totally different in OTT and broadcasting, (ii)

repeatability is there in OTT (iii) sachet pricing in OTT which is not possible or offered in broadcast services," one of the attendees explained.

We don't need new regulations for OTT, rather relax existing rules and fees for telcos: If you want 'same service same rules', then new regulations are not needed for OTT services but existing conditions that apply to telecom operators can change because they are too strict right now. We should also look into whether we can reduce the cost for telcos in terms of the spectrum fees they pay.

Idea of "same service have same rules" runs afoul when competition regulation kicks in:

> *"I will not hesitate to say that 'same service, same rules' is regulatory fiction. It's absolutely ridiculous to even argue this position, because if that was the case, you would not have competition regulation. The whole idea of competition regulation is that you and I both provide the same service except that I have market power and you don't and therefore, certain kinds of rules must apply to me and not to the others. Similarly, you would not have area specific regulation, you would not have different reserved prices for spectrum for 'C' circles from 'B' circles after all it is the same mobile service." – Dr Mahesh Uppal, Director, Com First*

III. Issues around TRAI's jurisdiction and competency

Content is not under TRAI jurisdiction:

> *"As of now, TRAI is governed by the TRAI Act… and content is not governed by it. TRAI always wants to overreach or try to exercise its jurisdiction." – Vibodh Parthasarathi, Associate Professor, Centre for Culture, Media and Governance at Jamia Millia Islamia*

Can a single regulator oversee multiple use cases: The internet has multiple use cases; how can a single regulator be expected to regulate all of them? Will any converged regulator have the capacity to manage such complex issues?

> *"Certainly competition is a very core aspect of it. Data is a core aspect of it. You talk about social media, then you look at narratives, do you regulate narratives? […] If we're talking about healthcare, then there's a whole other dimension. So, can you have a single regulator, encompassing all this? I think that's a very hard ask for anyone around the world globally, people are struggling with this question." – Prateek Waghre, Policy Director, Internet Freedom Foundation*

Could result in regulation by people who are not competent: Attempting to merge and regulate all services under one regulation would be a "gross travesty" as it could lead to regulation by people who are not competent, specialized, and focused enough to deal with these issues.

Broadcast regulator can regulate broadcast activities carried out by telecom services: Rather than having a converged regulator, let each sectoral regulator regulate aspects that fall within their area of expertise. For example, a telecom service provider can use their

infrastructure to provide broadcasting services, but this doesn't mean that the telecom regulator must regulate broadcasting. Instead, the broadcasting part of telecom services can be regulated by the broadcast regulator.

TRAI cannot get into the copyright domain as per Supreme Court: In 2017, TRAI came out with the MRP regime, which overhauled how broadcasters carried out their business. The regime was challenged in Madras High Court and then eventually went to the Supreme Court. One of the main arguments revolved around how the Copyright Act allows broadcasters to fix the prices of channels of their content but the TRAI regulations trampled upon this right, which essentially amounts to regulation of content, something that TRAI does not have the powers to do. The Supreme Court clearly said that TRAI cannot get into the sphere of content and can only look into the delivery of content. It can, however, make recommendations in that direction.

IV. Issues with regulatory overlap

Who calls the shots: If there is a converged regulation and regulator, there is bound to be a power tussle between TRAI and the Ministry of Information and Broadcasting because their roles will overlap in terms of licensing, permissions and regulation of content.

> *"In most of the countries, which had this kind of regulator, you don't have the line ministries. So, you have got this kind of hybrid system of having multiple ministries, and therefore your regulatory framework is fragmented. And then you also have a fragmentation of powers." - Vibodh Parthasarathi, Associate Professor, Centre for Culture, Media and Governance at Jamia Millia Islamia*

Possibility of turf wars: We've already had the Ministry of Information and Broadcasting write to TRAI expressing their concerns about this paper "Will MeitY or MIB want to give their power to someone else? There are turf wars between departments, would we want that?" Amrita Choudhury, Director, CCAOI, cautioned. Separately, we've had TRAI and the Competition Commission of India (CCI) run into issues in the past already. If TRAI now comes and says it's a super regulator, that could lead to more such conflicts.

MIB has capacity for content regulation, TRAI doesn't: When it comes to state capacity, the Ministry of Information and Broadcasting has the capacity for content regulation as it has information services officers to deal with it. MIB has reiterated the same in its response to the consultation paper, where it essentially states that the ministry required "separate skill sets of creative and artistic persons than that of technocrats or economists who can factor the impact of content on sensibilities, morals and (the) value system of the society" for content regulation.

Can convergence address the issue of regulatory arbitrage? Historically, the design of regulations in India has been to keep them as broad as possible to implement them flexibly wherever and whenever required. This phenomenon is broadly known as regulatory arbitrage wherein stakeholders tap into the loopholes of existing laws to use them as per their convenience. One of the arguments for convergence may be to do away with this regulatory arbitrage, but the current consultation paper, given its broad nature, does not address that problem.

V. Issues with Quality of Service proposals for cloud service providers

Cloud services regulated under IT Act: TRAI argued in its paper that telecom is monitored for its performance as a part of the regulations, but cloud services are not because they are unregulated. TRAI highlighted this as a problem because people are transitioning from services offered by regulated providers to unregulated ones, and such transitions impact consumers. Contrary to what the TRAI thinks, cloud services are not unregulated as they fall under the IT Act, 2000.

Leave quality of service to competition in the market: The best way to deal with quality of service issues is to leave it to market competition. A telco may have a reason for why its service is poor but it will have to deal with the perception of its service quality when there is competition in the market. Similarly, a lot of unregulated services continue to improve in quality because the company is not worried about regulation but worried about the perception of its quality of service, and the effect on its market share. No one will hire a cloud service provider whose downtime is very high.

TRAI cannot deal with quality issues in other domains:

> *"Quality of service is an area where existing approaches are not working. The fact is there is no way for the TRAI (Telecom Regulatory Authority of India) to even remotely deal with quality of service given the number of subscribers, given the circumstances in which services are provided, and the number of different elements." – Dr Mahesh Uppal, Director, Com First*

Quality of Service calculation is flawed, not reasonable to use it as rationale: Most surveys that gather quality of service data are done on the street, whereas most of the mobile phone usage takes place indoors. Therefore, it is not appropriate to use quality of service as a rationale for requiring more regulations for cloud service providers.

> *"I have a poor quality of service, now it may be because the network is poor, it could be that there is a physical barrier between me and the tower next door, it might mean that I am a miser and bought a cheap phone. It's going to be a nightmare to demonstrate without doubt that the reason behind poor quality of service is the telecom operator." – Dr Mahesh Uppal, Director, Com First*

QoS is defined in a specific way, but means different things to different people: QoS is defined with MOS (Mean Opinion Score) in the telecom sector. It means that a voice call sample is played to different people, and they give a score from one to five about the quality of the call, and the average is called MOS. TRAI should consider how different consumers are looking at quality in different ways and use cases. A uniform and monolithic definition of QoS is extremely difficult.

> *"When mobile telephones came initially, the QoS, especially on MOS, scored very, very low, but mobiles were still very popular. People had to pay a lot and they were paying a lot for other features rather than the clarity of the voice, because it was about being in a position to talk." - Deepak Maheshwari, Public Policy Consultant*

VI. Issues with having a licensing regime

IT Act cannot be the justification to require licensing for everything: The telecom regulator quoted the IT Act's Section 6(a) to state that all service providers using electronic means to deliver services must have the "permission of the appropriate Government in accordance with the policy governing such service sector." TRAI added that the policy for the same remains ambiguous, which is why "there is an urgent need to review the existing policy/institutional framework in the country." However, Section 6 of the IT Act only gives the government an option of regulating whatever they want to regulate without there being an obligation to regulate, or require permission.

> *"Just because the section was badly drafted doesn't mean that we can reinterpret it to mean whatever we want it to be 20 years later. There has to be some continuity that comes in the policy stance which underlines how this section has been interpreted and used so far." – An attendee at the event*

Licensing comes with a huge regulatory burden: Permission for telecom operators comes with a huge regulatory burden which cannot be an excuse for TRAI to say that the burden should be shared by everyone. The burden itself is a cause for concern.

> *"I've always argued that there are three kinds of rules which I don't think anybody would have problems with, the rules to protect consumers, rules to protect networks, and rules to protect national security. For almost everything else, you need a very good reason to have any other obligations or burdens." – Dr Mahesh Uppal, Director, Com First*

Licensing will create barriers to entry: A permission-based/licensing structure reduces competition rather than increasing competition because it creates barriers to entry.

> *"On (the) one hand, we want ease of business. We want start-ups to grow. We want innovative services to come up from India. Are we supporting people to entrepreneurship or are we creating a barrier if there is a licensing regime?" – Amrita Choudhury, Director, CCAOI*

What do entities get in return for a license: There is no clarity on what entities get in return for a license. Licensing as a principle involves the government providing the right over an asset owned by the state or to prevent harm. It's usually in place when there's a natural resource involved, but there is no natural resource here. The spectrum is already licensed, so it makes no sense to license products built on the spectrum. For example, for telecom licenses you get spectrum in return, but if you create an app or provide a service, what is the government giving you in return?

There is ambiguity on whether broadcast has a real licensing regime: There is an element of ambiguity whether there is a real licensing regime as understood under the Telegraph Act. There is downlinking and uplinking permission that is given, which is akin to a license, but the jury is still out on whether or not that is licensing.

Essential Reading

- **The consultation paper:** The consultation paper released by the Telecom Regulatory Authority of India (TRAI). [Read here]
- **Summary:** Our summary of the consultation paper, key sections, and their implications. [Read]
- **MediaNama's take:** MediaNama Founder and Editor Nikhil Pahwa's assessment of the paper. [Read]
- **MIB pushback:** The consultation paper has not gone down well with India's ministry for information and broadcasting. [Find out why]
- **TRAI's past initiative:** The regulator had conducted a consultation on 'Convergence and Competition in Broadcasting and Telecommunications' dealing with regulation of the telecom and broadcasting industries in January, 2006. [Read]
  - Recommendations: The regulator issued its recommendations after two months (March 2006) to address regulatory gaps in converging telecommunication and broadcast carriage issues. [Read]
- **Stories from MediaNama event on paper:**
  - Video of Internet Regulation, Convergence And TRAI event, Delhi, Feb 24, 2023 [Watch]
  - Turf Wars And Competence: Is Indian Telecom Regulator's Framework For Converged Regulation Feasible? [Read]
  - Does India's Telecom Regulator Have The Jurisdiction To Be A Unified Regulator? [Read]
  - No Clarity On Aspects That A Converged Regulator Will Focus On: Expert On TRAI's Convergence Paper [Read]
  - Is India's Telecom Regulator Equipped To Deal With Issues Related To Quality Of Services? [Read]
  - How Will A Licensing Regime For Online Services In Convergence Framework Create Barriers To Entry? [Read]
  - What Led To TRAI's Interest In Content Regulation? Abhishek Malhotra Speaks At #NAMA [Read]
  - Will Self-Regulation By Streaming Platforms Help Curb Harmful Content? [Read]
- **Telecom Bill, 2022:** The Indian government called for a licensing framework for online services in the draft Telecom Bill, 2022. [Read]
  - **MediaNama's deep dive:** The video of our discussion on the draft Telecom Bill, 2022, where we discuss everything from definitions and the flaws in the 'same service, same rules' argument, among other things. [Watch]
  - **Need for specific definitions:** Our discussion saw two hours of intense discussion on the scope of definitions laid down in the draft Telecom Bill, 2022. [Read]
  - **Dangers of regulatory overlap:** MediaNama's event on the draft Telecom Bill, 2022, had a session discussing the problems arising out of regulatory overlap. [Read]

- ○ **AIC's objection to same service, same rules:** The Asia Internet Coalition (AIC) asked the government for separate laws for OTT platforms and telecom service providers (TSPs) in its comments on the draft Telecom Bill, 2022. [Read]
- **EU's approach to convergence:** The European Union addressed challenges from technological convergence by issuing the European Electronic Communications Code (EECC) directive adopted in December 2018. [Read]
- **Advantages and challenges of convergence:** There are various benefits and issues emerging out of technological convergence laid down in this research paper carried by the Scientific Journal Publication. [Read]

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Nikhil Pahwa | Founder & Editor | nikhil@medianama.com
Harneet Singh | Operations & Partnerships | harneet@medianama.com

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