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New Delhi, India

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Re: Comments on the Draft Indian Telecommunication Bill, 2022

To whom it may concern:

The Computer & Communications Industry Association (CCIA) submits the following comments regarding the draft Indian Telecommunication Bill, 2022 (“Draft Bill”). CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms.¹ CCIA appreciates the opportunity to provide its views in this consultation.

CCIA welcomes the Department of Telecommunications’ initiative to modernize the regulatory framework in the telecommunication sector in India. Internet companies operating in India and in the global marketplace share many of the desired goals of the Government to support the next generation of digitally-enabled economic growth while strengthening trust and reliability in Internet services and communications. These companies have provided significant contributions to the telecommunication sector in India, including through the development of passive infrastructure and subsea cables.² Internet services also place special focus on ensuring user safety through collaborative efforts with the Government as well as independently to introduce security features and configure their application interfaces to reduce the spreading of fake news, phishing attacks, online harassment, and misleading information.

The Department of Telecommunications (DoT) circulated the draft Indian Telecommunication Bill, 2022 (Draft Bill) on 21 September, 2022,³ pursuant to the consultation paper *Need for a new legal framework governing Telecommunication in India* published by the DoT in July 2022.⁴ CCIA notes that the Draft Bill seeks to replace: (i) the Indian Telegraph Act, 1885, (ii) the Indian Wireless Telegraphy Act, 1933, and (iii) the Telegraph Wires (Unlawful Possession) Act, 1950, and amend the Telecom Regulatory Authority of India (TRAI) Act, 1997 (TRAI Act).

¹ For fifty years, CCIA has promoted open markets, open systems, and open networks. The Association advocates for sound competition policy and antitrust enforcement. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit www.ccianet.org.

² See *2Africa Pearls Subsea Cable Connects Africa, Europe, and Asia to Bring Affordable, High-Speed Internet to 3 Billion People*, Engineering at Meta (Sep. 28, 2021), <https://engineering.fb.com/2021/09/28/connectivity/2africa-pearls/>.

³ Draft Indian Telecommunication Bill, 2022, <https://dot.gov.in/sites/default/files/Draft%20Indian%20Telecommunication%20Bill%2C%202022.pdf>.

⁴ Consultation Paper on ‘Need for A New Legal Framework Governing Telecommunication in India’, available at <https://dot.gov.in/sites/default/files/Consultation%20Paper%20final%203072022-1.pdf?download=1>.

As an overall matter, CCIA is concerned about the inclusion of many over-the-top (OTT) services in the scope of the Draft Bill. While we understand that the intention behind the Draft Bill is to address all telecommunication-related innovation and development in the past years, there are fundamental technical and business differences between many OTT services and traditional telecommunications services as explained throughout these comments.

The inclusion of many OTT services also confers on the Government the ability to determine the OTT services that may be allowed in the OTT market in India, as these services may need a ‘license to operate’ from the Government—departing from two decades of practice, consistent with other liberalized markets. The legislation as drafted also confers powers to the Government in relation to a licensing regime that is excessively broad and could result in unprecedented and invasive oversight into OTT providers’ security standards and business practices, as well as expanded powers to demand user information and message contents that undermine privacy and security.

Such a broad scope potentially conflicts with India’s WTO GATS commitments (*e.g.*, if requiring local presence), and would result in additional compliance and administrative costs for businesses seeking to operate and offer their services in India.

CCIA’s comments address the broad scope of the Draft Bill to include many OTT services with respect to the following elements: (1) Scope of Draft Bill and Definitions; (2) Licensing Requirements; (3) Power to Prescribe Standards; (4) Lawful Interception and Monitoring; (5) Spectrum Assignment; (6) Penalties; and (7) General concerns with application of regulations to OTT services and details additional concerns with regulating all OTTs in the same manner as traditional telecommunications providers.

1. SCOPE OF DRAFT BILL AND DEFINITIONS

a. The Draft Bill defines ‘message’ in a broad manner.

The Draft Bill in clause 2(9) defines ‘message’ in a very broad manner. This could result in including in-app messages and notifications as well as data-based messages offered by businesses within its definitional ambit.

CCIA recommends that the definition of ‘message’ should exclude data-based messages offered by businesses; and any in-app notifications/messages provided to users by businesses within the application. Chat messaging specific to B2C supports ease of doing business and innovation. Regulatory oversight pursuant to the IT Rules of 2021 already covers this space. Additional licensing requirements will stifle the ease of doing business and innovation and over-regulate the entire data-driven ecosystem.

b. The Draft Bill defines ‘telecommunication’ in a broad manner.

The definition of the term ‘telecommunications’ in clause 2(17) of the Draft Bill is, effectively, the reception of any message on any electro-magnetic system. In its current form, it is likely to affect the entire spectrum of telecommunication services—from telecom service providers to app developers. CCIA recommends that the definition of ‘telecommunication’ be narrowed in its scope.

c. The Draft Bill's definition of 'telecommunication equipment' lacks sufficient clarity.

The Draft Bill effectively defines 'telecommunication equipment' in clause 2(18) as any equipment that may be used for telecommunication and shall include 'software integral to such telecommunication equipment'. However, it does not provide any further clarity on the meaning of the phrase 'any equipment' or what such software 'integral to such telecommunication equipment' could be, giving rise to the possibility of the terms being interpreted broadly. Due to this, there may be uncertainty on whether cloud service providers can be considered as telecommunication equipment since they are used to transmit information to data centers for telecommunication platforms. There may also be uncertainty pertaining to the kinds of software and associated devices that are subject to the provisions of the Draft Bill. For instance, the DoT has been empowered to issue standards for – *inter alia* – telecommunication equipment. The DoT further has the power to take temporary possession of a 'telecommunication network' (which includes 'telecommunication equipment') in the interest of public safety or during times of public emergency and may also issue directions with respect to the same in times of war. It is not clear what it would mean for DoT to "take possession" of software used on devices.

CCIA recommends that the language of the definition of telecommunication equipment be narrowed down to specifically state telecommunication equipment used to provide telecommunication services (subject also to the definition of telecommunication services also being made clearer); and clearly excludes data centers as it does not seem to be the intended target of the definition. Further, that DoT excludes software from the ambit of telecommunication equipment given the lack of clarity on what it may include and the potential for the definition to veer outside the realms of the stated goals of the Draft Telecommunication Bill. 'Software' does not seem to be comparable with the other terms mentioned in the definition of 'telecommunication equipment' which appear to relate to physical equipment.

d. The Draft Bill defines 'telecommunication infrastructure' in a broad manner.

The broad definition of 'telecommunication infrastructure' under clause 2(19) of the Draft Bill could include cloud service providers as a part of the infrastructure used to provide telecommunication services since they support telecommunication service providers.

CCIA recommends that the language of the definition of telecommunication infrastructure be narrowed to only include state telecommunication infrastructure used to provide telecommunication services. Cloud services or infrastructure used for a data center should be excluded from the definition of telecommunication infrastructure (as it does not seem to be the intended target of the definition to cover enterprise cloud service providers under telephony legislation).

e. The Draft Bill defines 'telecommunication network' in a broad manner.

The broad definition of 'telecommunication network' as per clause 2(20) of the Draft Bill could be too broad. Enterprise cloud services or business services are typically offered to larger organizations through customized or individually negotiated arrangements.

Therefore, CCIA recommends that enterprise services should be exempt from such legislation. Furthermore, cloud services are already governed and regulated by other ministries such as MEITY. Therefore, there is no requirement to bring cloud services under the ambit of the Bill.

f. The Draft Bill defines ‘telecommunication services’ in an overbroad manner.

The definition of ‘telecommunication services’ as per Clause 2(21) of the Draft Bill is overbroad as it includes, in brief, services of any description made available to users over telecommunications networks, including broadcasting services, Internet-based communication, interpersonal communication services, OTT communication services, and more.

First, this definition includes different services than those that other countries have included for ‘telecommunication services’. The Draft Bill appears to be casting a very wide net in defining ‘telecommunication services’. Not only does it include traditional telecommunication services such as Internet access and mobile telephone services, satellite-based communication, etc., but it also seeks to extend the regulatory framework to services that have typically fallen under other frameworks such as, Internet-based communication services, interpersonal communication services and OTT communication services.

Bringing all these services under the same broad definition suggests that they share in common important underlying characteristics and therefore deserve to be regulated similarly. This conclusion may not be accurate as it ignores the fundamental differences between such services and the markets in which they operate. This approach further fails to recognize the distinctive characteristics and uses of OTT and other Internet-enabled services resulting in the potential application of telecom regulation that may be a poor fit and have unintended consequences.

Second, there are many terms included in the definition of ‘telecommunication services’ itself that lack sufficient clarity. The Draft Bill does not define the terms used to describe the scope of ‘telecommunication services’. While some of the terms find reference in the definition of ‘telecommunication services’ under the TRAI Act, several others have been introduced for the first time under the Draft Bill.

As a result, the scope of ‘telecommunication services’ and entities sought to be regulated pursuant to this definition appear overbroad. The lack of definitions or explanations in relation to these terms may also perpetuate confusion regarding the type of services the Draft Bill seeks to bring under its scope.

For example, ‘Internet based communication services’ may refer to any and every service being offered through the use of the Internet that allows users to communicate with each other. The intent of the inclusion of this term within the definition of ‘telecommunication services’ is unclear. Due to uncertainty regarding the term, it may prove difficult for entities to determine which types of services will be covered under relevant obligations under the Draft Bill and subordinate legislations, if any.

Similarly, ‘interpersonal communication services’ does not find explicit reference in Indian law and there appears to be limited guidance on how the DoT may seek to interpret it.⁵

Further, as per the Draft Bill, an entity will be required to procure a license, approval, authorization, and/or permission to provide any telecommunication services, telecommunication network or broadcasting services under the Act. The license could be subject to registration or license fee.

CCIA notes that the definition of “telecommunication services” incorporates services which cannot be classified as services which are of the exclusive privilege of the Central Government. Article 39(b) of the Indian Constitution provides that the State needs to direct its policy in such a manner that the ownership and control of the material resources of the community are so distributed as best to subserve the common good. In the context of telecommunications, the material resources of the community are spectrum and associated services that enable distribution of this resource such as for *e.g.* Internet and broadband services.

However, services that run as application layers over these distribution services such as Internet-based services cannot be considered as a resource or service which is owned and controlled by the Central Government or that the Central Government has exclusive privileged over because in essence these do not distribute the natural resource but are services which are provided utilizing the services that distribute spectrum. Further, these services are offered over the Internet, and service providers do not directly exercise control over the underlying spectrum.

Further, OTT services are already regulated under the Information Technology Act, 2000 (“IT Act”) and the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 (“IT Rules”). Under the IT Rules, OTT services are subject to dedicated compliance and reporting requirements. Introduction of a licensing regime may qualify as an act of over-regulation on the OTTs and not only increase compliance but introduce a crippling financial burden. This could hamper innovation and consumer choice.

Lastly, regulation of OTT services would not be in line with the international practice on OTT regulation. International organizations such as International Telecommunication Union (“ITU”) does not prescribe any regulatory mechanism for OTT communication services, apart from certain standards for consumer and data protection. In fact, the ITU encourages voluntary agreements between TSPs and OTT service providers to strengthen commercial cooperation. It should be noted that most countries including countries such as Argentina, Chile, Israel, South Korea, South Africa, Thailand, Sri Lanka, Japan have not adopted any formal regulatory approach for OTT services and as a result have instituted regimes that have supported innovation.

The definition in the draft legislation also allows the Central Government to notify any other services as telecommunication service without setting out any parameters for such determination. Such broad

⁵ The term has been referenced in the European Union’s European Electronic Communications Code, 2018 (EECC), where it has been defined, in brief, as a service normally provided for remuneration which facilitates interpersonal and interactive exchange of information between a finite number of persons through electronic communications network, where the person sending the message can choose the recipient. The EECC also makes a distinction between number based interpersonal services (i.e., the services that use public numbering resources and interact with PSTN) and non-number based interpersonal services (i.e., the services that do not use public number resources).

definitions and powers of the government must therefore be restricted. If there is a need to revise these definitions in the future, it must be done after detailed stakeholder consultations.

Therefore, CCIA recommends that the scope of “telecommunication services” be reviewed and be limited to only services which distribute spectrum in a utilizable form.

Pursuant to this recommendation:

- the definition should be limited to services that provide telecommunications and not include Internet-based services. The longstanding distinction between spectrum-controlling entities (which are regulated) and spectrum using companies should be maintained as it has been the basis that has allowed innovation and deeper penetration of the Internet in India;
- the following services should be removed from its scope: email, Internet-based communication services, machine to machine communication services, over-the-top (OTT) communication services;
- clarification must be provided on what would be classified as “interpersonal communication” services and machine to machine communication services; and
- regulators should exempt enterprise cloud service providers from any telecom legislation as they are already governed by MEiTY.

g. The Draft Bill should revise the definition of ‘user’ in a manner that is limited to only those persons that are being charged for the telecommunications service.

The Draft Bill defines a ‘user’ as any person using a telecommunication service. The term further finds reference in other provisions under the Draft Bill, such as the provisions specifying protection measures for users and their duties. However, the scope of ‘user’ sought to be brought under the ambit of the Draft Bill is broad and should be limited to only those users being charged for the service. Certain other user-oriented frameworks such as the Consumer Protection Act, 2019 (CPA) provide a narrow and specific definition of a consumer. The CPA defines a ‘consumer’ – in brief – as any person who hires or avails of any service and provides consideration for the same. It may also be noted that the definition of ‘service’ under the CPA includes ‘telecom’ and excludes any service provided free of charge. In light of the fact that the CPA is a consumer protection focused legislation, the Draft Bill may consider following a similar approach and may harmonize the definition of ‘user’ with that of ‘consumer’ under the CPA. In addition to that, we note that telecommunications service suppliers (TSPs) generally charge their subscribers to avail their services. Thus, even in current practice, the telecommunication framework primarily encompasses users paying for the telecommunication service.

CCIA recommends that the DoT consider providing a scope to the definition of a ‘user’ in such a manner that it is limited to only those persons that are being charged for the telecommunication service.

2. LICENSING FRAMEWORK

a. The Draft Bill grants wide-ranging powers to the Central Government regarding licensing.

Under clause 3(1)(a), wide powers have been granted to the Central Government, which would be the sole authority to determine provision of telecommunication services; establishment, operation and maintenance of telecommunication network and infrastructure; and usage, allocation, and assignment of spectrum. By doing so, this could result in the removal or dissolution of Telecom Regulatory Authority of India's (TRAI) powers, which has so far been an independent and unbiased authority.

b. The Draft Bill inclusion of all Internet services in its licensing framework fails to account for existing frameworks that already regulate several aspects of providers of Internet-based services and OTT services.

Several existing laws regulate aspects such as content regulation, interception, competition, consumer protection, cyber security, etc. that may have an impact on online services.

The Information Technology Act, 2000 (*IT Act*) and rules thereunder (such as the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, (*IG Rules*)) already govern various aspects of intermediaries (a category that most OTT and other Internet-based providers are likely to fall under). These aspects include safe harbor obligations for intermediaries to avail protection from liability for third party content (Section 79 of IT Act), lawful interception and monitoring obligations (Section 69 and 69B), etc. They further include personal data protection measures for users of online services under the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (*SPDI Rules*). The SPDI Rules provide for, among other obligations, notice and consent requirements for Internet-based services/apps collecting and processing sensitive personal data or information. They also provide reasonable security practices to be followed by online service providers to protect personal data. In this regard, CCIA notes that the Government is in the process of developing a new legislative framework to govern all intermediaries and other players in the digital economy by way of the "Digital India Act", which it intends to frame into law in the near future. Similarly, the Government is also in the process of developing a new data protection framework and the framework is likely to apply to entities processing personal data in a sector-agnostic way. Thus, all Internet-based apps and services will be regulated under the upcoming data protection framework as well.

Further, the consumer protection framework under the CPA already covers various issues addressed by the Draft Bill, such as issues relating to misleading advertisements, unfair trade practices, etc. The IG Rules too require intermediaries (including certain OTT providers) to establish grievance redressal mechanisms for users with specific timelines for grievance resolution.

Along with such overlapping laws, the Draft Bill is also seeking to amend the TRAI Act to – *inter alia* – include licensees providing telecommunication services within TRAI's regulatory ambit. This may potentially subject online service providers considered licensees under the Draft Bill to TRAI's jurisdiction as well.

Given the extensive existing measures governing Internet-based apps and services and the significant compliance burdens accompanying such legislations, the DoT should evaluate whether the creation of an additional legal framework to regulate Internet-based apps and services is necessary, and whether compliance with a new system may be counterproductive to the ease of doing business as well as create confusing and contradictory oversight regimes.

c. The Draft Bill’s licensing requirements places a disproportionate burden on certain covered services and may lead to adverse consequences.

There are several reasons why traditional telecommunications providers are often regulated differently than Internet-based apps and services, and these reasons may lead to disproportionate burdens on regulatory compliance if the Draft Bill is applied to services provided online.

First, traditional telecommunications providers have been provided with an important and exclusive position in the telecommunication industry.

Radio-based services have been granted the exclusive privilege to commercialize spectrum for the purpose of making a natural resource available for access to the public at large. Consequently, heightened regulatory oversight of such suppliers is justified to ensure the equitable distribution of a natural resource, and ensure that it is used in the best interests of the public. Such suppliers are subject to a licensing requirement from the Government in order to ensure that the spectrum is allocated and used efficiently. They are further required to comply with several terms and conditions prescribed under the Unified License framework (*UL*). The role played by these services in facilitating access is critical to the communication network in the country. Inefficient use of the license may impact the wider public adversely. It may also negatively impact telecommunication-related development in the country and curtail the public’s ability to exercise its rights and freedoms.

Second, TSPs have ownership rights and control over what is considered critical infrastructure in the country and administer what is considered the “network layer” over which all digital applications run. Telecommunication infrastructure has been recognized as essential connectivity infrastructure on par with other infrastructure such as roadways, railways, airlines, etc., by the Government in the National Digital Communications Policy, 2018. Consequently, any adverse effect on networks administered by TSPs can have a disastrous impact on the country’s ability to communicate. Thus, high compliance burdens on TSPs are key to ensuring that the spectrum is utilized efficiently and so that access to such an essential service is not disrupted.

In comparison, OTT providers do not directly utilize a limited natural resource for their functioning and have no control or rights over critical telecommunication infrastructure, as they provide their services on the “application layer” that such telecommunication infrastructure enables. As a result, the accountability and responsibility required out of these telecommunications services cannot be extended to OTT providers who do not have any comparable impact on critical infrastructure or networks.

Applying such expanded regulatory compliance to OTT services will lead to adverse effects on innovation and growth and discourage the development of new Internet services.

Third, the fundamental nature of OTT services, and the OTT market generally is a regime characterized by flexibility and innovation in order to grow organically and develop unique services for users. With

low barriers to entry and consequently intense competition, constant innovation in services and deployment of new technologies is the only way OTT providers can distinguish themselves in the market. In comparison, the telecommunication services market has limited competition (primarily due to high barriers to entry).

Fourth, the scope of the Draft Bill extends to OTT and other Internet-based services, it may create an unpredictable legal regime due to various overlapping laws. This may create an uneven playing field among OTT communication and non-communication online services, which as stated above, have far more in common with each other than they do with services offered by traditional telecommunications providers.

Fifth, the Government has been empowered to introduce subordinate legislation to implement substantive provisions under the Draft Bill. Due to this, it is unclear how OTT providers may be expected to comply with all overlapping laws and reconcile contradictions in compliance obligations that may be specified by the Government under the Draft Bill and conflict with or overlap with existing requirements. The flexibility that OTT providers currently enjoy, pursuant to the existent regulatory framework, allows them to invest in innovative methods for their products and contribute to the development of diverse infrastructure such as data centers⁶, undersea cables⁷, etc. OTT providers also add to the revenue of TSPs by driving increased demand for broadband. If this flexibility of OTT providers is taken away by the imposition of onerous regulatory regimes, it may pose roadblocks to their investments, collaborative capacity, competitive pricing, usage of technology, etc. High regulatory burdens may also disincentivize OTT providers from investing in the sector and contributing to the economy.

Finally, heavy regulatory burdens act as high barriers to entry to the market. OTT services currently are expanding into unexplored areas and markets with an aim to bring to the user a complete Internet experience. They are also constantly innovating in futuristic technologies, such as artificial intelligence and cloud computing. Thus, increased regulatory compliances, such as the proposed licensing regime or additional financial obligations (including capital needed for license fees) may have an adverse effect on new entrants to the market (including domestic start-ups).

d. Identification of users

The Draft Bill provides in clause 4(7) for licensed entities to unequivocally identify users to whom it provides services through a verifiable mode of identification. The government is empowered to prescribe any mode of identity verification. Further, the identity of a person sending a message using telecommunication services is also made available to the user receiving such a message under clause 4(8). There is also a lack of clarity—given the broad definition of ‘message’—on the type of messages that clause 4(8) would apply to.

⁶ See *Amazon Leases Mumbai Industrial Land from L&T for Data Centre*, Mint (Aug. 2, 2022), <https://www.livemint.com/companies/news/amazon-leases-mumbai-industrial-land-from-l-t-for-data-centre-11659440461358.html>; *Microsoft Acquires 3 Land Parcels in Hyderabad to Establish Largest Data Center*, The Economic Times (Mar. 8, 2022), <https://economictimes.indiatimes.com/industry/services/property/-/cstruction/microsoft-acquires-3-land-parcels-in-hyd-to-establish-largest-datacenter-region-in-india/articleshow/90048427.cms>.

⁷ See *A Giant Web of Submarine Cables Connect India to the Internet and World*, India Times (Apr. 3, 2021), <https://www.indiatimes.com/technology/news/submarine-cable-network-india-internet-link-world-537327.html>.

Collection and storage of user data can lead to privacy concerns. This would also be a privacy concern as all private entities will have to mandate sharing of personally identifiable information to its users with it which can be passed on to the recipients. This provision challenges the right to privacy under the Constitution of India. The clause contradicts principles of data minimization as service providers will have to collect additional users' data to comply with this provision.

CCIA recommends that verification of identities must be restricted to sender of messages through SMS and for phone calls only. Pursuant to this recommendation,

- it would not be feasible to implement verification processes especially for communication services through emails and pure-play video conference applications;
- implementation of verification of identities for communication services such as email communications and video conferencing facilities would also disrupt daily day-to-day business activities;
- collection of personal information for the purposes of verification may result in unnecessary collection and storage of personal data of individuals in large volumes; and cause privacy concern (including failure to prioritize user safety and security);
- for enterprise customers or business users it would not be feasible to identify individual users; and
- identification process implemented should be consent based as a user may not always want to share their identity with the recipient of each message they send.

e. Breach of terms and conditions

The Draft Bill in clause 7 provides for cancellation, suspension, curtailment, or revocation of license depending on the breach of terms and conditions. The risk of license cancellation will bring uncertainty to businesses and would cause undue delay in processing the license formality as the broad definition would require hundreds of companies to register themselves.

CCIA recommends that the relevant authority may lay down guidelines for the service providers to ensure self-declaration and compliance with the legal requirements. These guidelines should offer sufficient flexibility to different kinds of service providers to appropriately incorporate the guidelines into their terms. However, the industry players must be consulted while drafting the guidelines.

3. POWER TO PRESCRIBE STANDARDS

The Draft Bill in clause 23 empowers the central government to issue standards, as may be prescribed, in respect of telecommunication equipment, telecommunication services, telecommunication network and telecommunication infrastructure; manufacturers, importers and distributors of telecommunication equipment; or reliability of the provision of any telecommunication services to the public.

The provisions vest in the Central Government the autonomy of standardization and related powers which may have impact on the existing technological infrastructure/equipment available with relevant parties such as CSPs. This may add to the compliance burden and costs.

CCIA recommends that the existing standards DoT has already prescribed for the manufacture, import, sale, and distribution of telecommunication equipment in India remain. No new standards should be introduced unless the effort is to consolidate all standards in one place.

In support of the stated goals under this clause of the new proposed regulatory framework, an approach embracing global best practices is best suited for the rapid development and deployment of new technologies in the telecommunications sector.

Such best practices include:

- continued adoption of globally, harmonized EMC & Safety standards;
- adopting conformity acceptance procedures modelled on practices in the EU, North America, Australia, New Zealand, and Japan such as manufacturer Declarations of Conformity (DoC), supplier Declarations of Conformity (SDoC) or other self-certification and labelling procedures;
- a system of accrediting both domestic and foreign test laboratories in a mutual recognition arrangement (MRA) utilizing accrediting bodies such as NVLAP, A2LA, ILAC, etc.;
- a system of mutual acceptance of EMC, Safety and Telecom reports and data from all test labs accredited by said bodies without the requirement of repeat, in-country testing in India;
- adopting a system of conformity assessment procedures for out of scope or exempt devices conducted by accredited bodies that result in Letters of Opinion or other such documentation suitable to prove exemption status at customs; and
- a system of enforcement that reserves the right of the Indian Government and related agencies to monitor compliance of telecommunications products by inspection and/or testing using internationally accepted statistical sampling techniques.

4. LAWFUL INTERCEPTION AND MONITORING

a. The Draft Bill must account for privacy in its surveillance provisions.

Under the Draft Bill, the Central Government, State Government (in certain cases), and authorized officers all have the power to undertake various actions in the event of a public emergency or war, for public safety, in the interest of sovereignty, integrity or security of India, national security, etc. These powers include the ability to directly intercept and disclose communication, the ability to take temporary possession of telecommunication services, telecommunication network, etc., to issue relevant directions, and to suspend transmission of communication. Such directions would also prove disruptive to cloud service providers that rely on telecommunication networks for the deployment of their services.

Currently the issue of temporary suspension of networks is governed by the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 (“Suspension Rules”). The Suspension Rules empower the Ministry of Home Affairs and State Home Departments to issue orders of suspension [Rule 2(1)]. However, for want of appropriate procedural safeguards and judicial oversight, the Suspension Rules were found to be inadequate by the Supreme Court. These limited procedural safeguards present in the text of the Telecom Suspension Rules were found to be inadequate by the Supreme Court in *Anuradha Bhasin v. Union of India*, and additional requirements were read into the Suspension Rules by the judiciary. The Supreme Court issued directions requiring

(a) proactive publication, (b) time limitation and (c) periodic review of Internet shutdown orders. Further, Internet shutdowns will not only lead to grave violation of constitutional freedoms such as the freedom of speech and expression and the freedom to carry out trade or businesses, but will also have a detrimental impact on the economic interests of private entities.

The grounds provided under the Draft Bill that the Government may rely on for taking such actions are broad in nature. However, the Draft Bill does not provide any guidance on the interpretation of terms such as 'public safety' and 'public interest'. The Draft Bill also does not provide any definitive timeframe which such Government actions must be limited to, and neither has any requirement for the Government to implement procedural safeguards been specified under the Draft Bill. The Draft Bill enables the Government to continue its actions until 'a public emergency exists, or the interests of public safety require'. In that regard, even in relation to existing rules relating to interception, such as Rule 419A of the Indian Telegraph Rules, 1951, which continue to apply to Clause 24 of the Draft Bill due to Clause 53, no guarantee for procedural safeguards has been provided. Further for instance, the Government's ability to monitor, intercept, or decrypt information under the IT Act is subject to several safeguards, including a requirement for interception orders to be placed before a review committee every 60 days. Notably, the Draft Bill does not prescribe such safeguards or contain an enabling provision for the publication of such safeguards through rules.

There are also concerns with how the application of these rules would align with existing legal precedent and protections afforded to citizens under existing law.⁸ For instance, the requirement that every recipient of a message using telecommunication services should have the identity of the sender available to them would effectively force all email services providers to mandate sharing of personally identifiable information of its users which can be passed on to the recipients. This raises significant privacy concerns which conflict with the right to privacy under the Constitution of India.

CCIA would also note that there are already lawful interception and monitoring provisions in India law under the IT Act and rules issued thereunder which cover a broad range of entities under its scope, including intermediaries such as OTT providers. There is little justification for introducing an additional set of lawful interception and monitoring provisions on OTT providers.

CCIA recommends that the provisions pertaining to interception and suspension be revised to exclude subject categories such as services provided by Internet intermediaries that are already subject to the IT Act and IT Rules. For the remaining part, the provision should only come into effect under very limited circumstances. Additionally, sufficient procedural and judicial safeguards must be put into place to ensure that the government enacts these provisions in a transparent and accountable manner.

b. The Draft Bill should reflect that encryption is a necessary tool to safeguard the privacy interest of users.

The terms and conditions under the current UL framework administered by DoT prohibit licensees from employing bulk encryption equipment in their network. At present, it is unclear if this UL

⁸ *Shreya Singhal v. Union of India* (holding up the rules under Section 69A of the IT Act which pertained to blocking for access of information through a computer resource as the rules laid emphasis on the fact that a reasoned order must be provided for such blocking under the section and several prescribed procedural safeguards, including the provision of a hearing to the originator and the intermediary, must be complied with); *Justice K.S. Puttaswamy v. Union of India* (establishing privacy related principles to be used as the standard for evaluating the actions of the Government).

framework shall extend as is to OTT providers being brought under the ambit of the Draft Bill and, thus, prohibit encryption provided in OTT services. Given that OTT communication services have also been included under the definition of telecommunication services, end-to-end encryption and the privacy of users also stand to be undermined to intercept the communications.

As one of the main focuses of the Draft Bill is on prevention of cyber fraud and ensuring user safety, it may be noted that encryption mechanisms are used by OTT providers to reduce a user's exposure to cybercrime. It would be detrimental to force these OTT providers to break encryption to facilitate interception as that may worsen the problem the Government is seeking to address. It may always be possible for malicious actors to use alternative technology to bypass real time monitoring and other interception forms. Additionally, these encryption mechanisms used by OTT providers facilitate user trust in their services and any attempt to dilute these mechanisms may have immediate impacts on the trust of users in the OTT service and consequently the providers. Often, users choose a service based on protection measures the supplier employs in relation to their identity and information. In the event that OTT services are required to break encryption or dilute their security measures to comply with standards mandates from the Government that are empowered through the Draft Bill in Section 25(1), it may have a negative impact on the users' trust and reasonable expectation of privacy from the OTT service and force users to shift to other services. If OTT services are compelled to do away with encryption, it may have detrimental impacts on the right to privacy and freedom of speech expression of users.

Additionally, the Draft Bill also requires licensed entities (including OTT providers) to identify persons using their services through a verifiable mode of identification and make the identity of a sender of a message known to the receiver. As this is also likely to require the dilution of encryption mechanisms, it may violate the right to privacy of users.

The power to intercept messages and communications could cause grave privacy violations for the users of encrypted services that have been recognized as a fundamental right. The inclusion of interception and encryption in multiple statutes could also lead to over-regulation and multiple and parallel penalties.

In light of the above, CCIA requests that the DoT consider explicitly allowing OTT services to maintain and strengthen the encryption mechanisms used by them in any legislative effort it pursues.

c. The Draft Bill should not impose priority call routing during public emergencies.

The Draft Bill empowers the Central Government or State Government—if satisfied that it is necessary or expedient to do so—to provide for a priority call routing scheme for routing of certain calls on priority during public emergencies. Fundamentally, such a requirement is unnecessary as OTT communications services do not have the same capacity constraints as the PSTN given the flexible, redundant nature of the Internet. As noted above, it is not practicable to create a clear distinction between OTT communication and non-communication services. For example, many gaming services incorporate chat or voice functionality into the game, as an ancillary service. Consequently, in this case, it may prove difficult to determine which entity shall be required to implement priority call routing. Further, there is a lack of clarity on whether systems used by OTT services may even have the ability to implement requests for priority call routing. In the event that they do not, OTT providers may be required to make substantial investments to upgrade relevant IT infrastructure and any

product changes may fundamentally alter the nature of the OTT service being provided. In this regard, OTT services are not comparable to and are not substitutable with services provided by traditional services providers.

A more practicable method of furthering the crucial necessities of public safety would be through the traditional emergency alert system over broadcast and cable television systems as well as wireless telecommunications providers.

In light of the above, the DoT may consider limiting requests for priority call routing to TSPs or entities connected to the PSTN.

d. The Draft Bill's grant of expanded powers to conduct searches and obtain information should be removed given existing applicable criminal laws.

As per Clause 51 of the Draft Bill, specially authorized officers of the Central Government and other State-level or Union Territory-level Governments have been empowered to seek information, documents, or records in the possession or control of licensees relating to telecommunication services for 'any pending or apprehended civil or criminal proceedings'.

The Draft Bill also enables authorized officers of the Central Government to search premises of licensees in the event that they believe that any unauthorized telecommunication network or equipment with respect to which any punishable offence may have been committed has been kept or concealed (Clause 50). However, the Draft Bill does not provide any minimum procedural safeguards that the Government and/or the authorized officers must adhere to before any search is conducted. It is also unclear how the powers under the aforementioned provisions shall be exercised in light of existing criminal law provisions, such as section 91 of the Code of Criminal Procedure 1973 (CrPC) and clause 6 of the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 wherein authorized officials may ask for the certain information that may aid and assist the enforcement agency in any pending or apprehended civil or criminal proceedings. However, in both cases, the language of the provisions provides greater specificity that restricts the number of people that have access and places responsibilities on such officers to protection such data or information received. The Bill provides additional avenues for law enforcement authorities to conduct search and seizure – this could lead to arbitrary use or misuse of power by the government.

Further, the Draft Bill does not provide clarity on what 'apprehended criminal or civil proceedings' shall include. Typically, law enforcement officers are empowered to seek information under legislations such as the CRPC in order to conduct investigations only post the filing of a First Information Report and not in relation to any 'apprehended' proceedings.

In light of the above, DoT should consider the removal of the above-mentioned provisions and allow the same to be covered under applicable criminal laws which contain adequate search, seizure, and information request provisions.

On search and seizure, this provision must be amended to specifically call out instances at which these powers will be exercised; and ensure this power is only exercised after all other powers to investigate have been exhausted. Further, guidelines must also be prescribed on the number of officers that can

conduct such searches and lay down clear responsibilities and rules to be adhered by such officers during such search.

On the power to seek information, clause 51 is quite broad and empowers the government to mandatorily seek any information pertaining to telecommunication services, networks, and infrastructure. As the definition of telecommunication services may also include encrypted services, cloud and software services, an unfettered power to seek information could raise user privacy and intellectual property concerns.

The power to mandatorily seek information should also be accompanied by clearly laid down guidelines which provides for circumstances during which such information can be requested for. In order to also maintain confidentiality of such information, the Bill must also prescribe modes of channels, such that information is shared only through secured channels.

e. The Draft Bill provides for measures for protection of users

Clause 33 empowers the government to prescribe measures for ‘specified messages’, which include messages offering, advertising or promoting goods, services, interest in property, business opportunity, employment opportunity or investment opportunities.

To protect users from unsolicited commercial communications, the government can mandate licensed entities to: (i) obtain prior consent of users for receiving certain messages, (ii) the preparation and maintenance of one or more ‘do not disturb’ registers’ to ensure that users do not receive specified messages without prior consent, or (iii) a mechanism to enable users to report specified messages received in contravention to these requirements.

Today, unsolicited commercial communications (“UCC”) are only governed if transmitted through voice call or SMS. TRAI governs UCCs under the Telecom Commercial Communications Customer Preference Regulations, 2018 (“UCC Regulations”). The UCC Regulations mandate (i) registration of senders (businesses and telemarketers) with TSPs (ii) registration of headers, i.e., alphanumeric string of characters or numbers assigned to a sender of commercial communications for segregating different types of messages related to one-time passwords, balance enquiry, flight alerts, special offers, etc.; and (iii) complete control to the subscriber to consent to receiving commercial communication and the ability to revoke the consent already granted.

It is unclear whether messages that are merely incidental to a service would be considered as ‘specified messages’. A reading of the definitions of ‘messages’ and ‘telecommunication’ together may be interpreted broadly to include all messages using telecommunication. For instance, notification messages within an app (i.e., in-app notifications/pop-up notifications), should not be treated/excluded from the scope of ‘specified message’.

As the term ‘specified messages’ is broadly worded, it is possible that such communications could include internal app-based notifications. These notifications can be traced back to ‘commercial’ OTT services and therefore could lead to broad coverage.

CCIA recommends that the definition of ‘message’ should exclude data-based messages offered by businesses; and any in-app notifications/messages provided to users by businesses within the application. Push messages and notifications of new features and pop-ups that are incidental to OTT

communication services should also not be included within the ambit of ‘specified messages’. Regulatory oversight through IT Rules, 2021, already covers this space. At present, unsolicited commercial communications are only governed if such communications are sent through SMS. Considering the TRAI already governs unsolicited commercial communications under Telecom Commercial Communications Customer Preference Regulations, 2018 (“UCC Regulations”), there is no requirement to further govern these communications as proposed under the Bill.

5. SPECTRUM ASSIGNMENT

The Draft Bill contemplates assignment of spectrum for telecommunication through: (a) auction; (b) administrative process for governmental functions or purposes in view of public interest or necessity as provided in Schedule 1; or (c) in any other manner as may be prescribed.

While the draft law provides for a range of alternatives for the assignment of spectrum, specific reference to unlicensed spectrum (e.g., Wi-Fi) and the inclusion of GMPCS license/authorization to point 15 of Schedule 1 are necessary to add clarity to this draft law.

6. PENALTIES

The schedule 3 of the Draft Bill prescribes a penalty for providing telecommunication services and networks without license. Violation of the licensing provision can lead to imprisonment of up to one year, which can also be accompanied with fine up to INR 50 lakhs.

Additionally, the government also has the power to impose civil liabilities under clause 38, Draft Bill. While the power is not new, its scope has been widened. The government can now prescribe fines, penalties, and compensation payable by any person, who has caused damage to telecommunication infrastructure or network, to the licensee or registered entity.

The government may impose penalties – which span civil and criminal repercussions. The penalties under the Bill cover damages to telecommunication infrastructure or network. It also gives the government the freedom to decide on the quantum of penalty/ fine and compensation. Coupled with regulatory uncertainty and wide power of the government to notify additional telecommunication services operating on license, the penalties could cause an impediment in innovation and ease of doing business.

CCIA recommends that all criminal penalties are removed.

7. GENERAL CONCERNS WITH APPLICATION OF REGULATIONS TO OTT SERVICES

The Draft Bill will place many OTT services under the same regulatory framework of traditional telecommunications services providers. As noted throughout these comments, the regulation of OTT services should be done in a manner distinct from regulations designed for the broadband and telephony landscapes. In addition to the explanations cited elsewhere in these comments, the below section provides additional overall concerns with the application of these regulations to OTT services.

Services by OTT providers and TSPs cannot be treated as substitutable to each other. OTT providers and TSPs offer fundamentally different services to users, and consequently they should not be regulated under the same framework. The Draft Bill appears to be proposing a licensing regime for a vast variety of services, which are not comparable to each other. For instance, ‘telecommunication

service’ as defined under the Draft Bill may include services provided by a TSP or a social media platform (such as Reddit, Twitter, LinkedIn, etc.) or even an e-commerce platform (such as Amazon, BigBasket, eBay, Flipkart, etc.) or even email services. The services provided by these platforms are fundamentally different and thus should not be regulated under the same regulatory framework.

TSPs and OTT providers are functionally different— where TSPs operate on the network layer (i.e., the layer which connects different networks and drives the operation of the Internet), OTT providers operate on the application layer (i.e., the layer that rests above the network layer and utilizes it to transfer data). Such a distinction between the layers has also been recognized by TRAI in its recommendations on ‘Regulatory framework for Internet Telephony’.⁹ Further, they operate in significantly different markets: TSPs operate in the market for *Internet access* whereas OTT providers operate in the market to facilitate *Internet content and applications* and thus compete for different groups of customers.

Additionally, OTT providers bring to the table a broad range of services for users with supplementary functionalities compared to traditional communication features. For instance, OTT services such as WhatsApp allow users to communicate not only through text, but also through images, graphics such as stickers, GIFs, etc. Illustrative of this, users do not perceive TSPs and OTT providers as comparable to each other. Users can use both types of services concurrently or choose to only use legacy TSP services. Further, users are well aware of the broader experience that OTT services offer. As a result, OTT services and traditional telecommunication services are not comparable on a functional level. Several foreign jurisdictions have also recognized the need to treat OTT services and services provided by TSPs differently.¹⁰

In relation to the privileges available with respect to telecommunication resources, it may be noted that TSPs have a significant edge over OTT providers and are crucial for the functioning of the telecommunications industry. TSPs control and have the privilege to use and monetize the critical natural resource (the spectrum), on which the application layer depends. TSPs have control over not only the underlying infrastructure but are empowered to interconnect with the PSTN, lease spectrum, rights of way to build other infrastructure, etc. In comparison, OTT providers are heavily dependent on the infrastructure provided by TSPs to offer their services and thus are subject to how TSPs may choose to exercise their rights and privileges over the infrastructure that they own. Further, OTT providers have no control over how telecommunication infrastructure may be developed or deployed.

Thus, OTT services and services provided by TSPs require different frameworks for effective regulation. While TSPs have the right to control and operate the critical infrastructure which supports telecommunication services, OTT providers merely make available their services that have been built on top of such critical infrastructure which the public accesses on the public Internet (made available by TSPs). Consequently, regulating such fundamentally different services using the same yardstick is

⁹ The TRAI Recommendations on Regulatory framework for Internet Telephony dated October 24, 2017, stated the following: “The separation of network and service layers of telecom service offerings is the natural progression of the technological changes in this domain. It is now possible to separate provision of service contents, configuration and modification of service attributes regardless of the network catering to such service.”

¹⁰ For instance, it was determined by the Australian Competition and Consumer Commission in its April 2018 Communications Sector Market Study that: “*there is no basis for requiring equivalent regulatory treatment of OTT and traditional voice services.*” It was further reasoned that “*the extent of substitution from traditional voice services to OTT voice services is limited by technical shortfalls (such as any-to-any connectivity) and consequently we do not consider OTT services to be full substitutes for voice services at this time.*” https://www.accc.gov.au/system/files/Communications%20Sector%20Market%20Study%20Final%20Report%20April%202018_0.pdf.

unjustified and unfeasible. This is also likely to suffer from constitutional infirmities by virtue of being manifestly arbitrary in categorizing all such services under the same definition.

Conclusion

CCIA greatly appreciates the opportunity to provide input into the DoT's consideration of the Draft Telecommunications Bill and welcomes any opportunity to engage further to share the perspectives of industry.