

Singapore, 8 November 2022

Ministry of Communications,
Department of Telecommunications
New Delhi

Via email: Naveen.kumar71@gov.in

Dear Sir

Submission on Draft Indian Telecommunications Bill 2022

AVIA welcomes the opportunity to comment on the Draft Indian Telecommunications Bill 2022 (the “Bill”), as issued by the Department of Telecommunications (“DoT”). AVIA is the trade association for the video industry and ecosystem in Asia Pacific. It serves to make the video industry stronger and healthier through promoting the common interests of its members. Our membership consists of a combination of local, regional and multi-national companies, many of which are substantial cross-border investors; creating and purchasing video content to meet rapidly-expanding consumer demands and investing in India’s communications and creative industries.

Our members acknowledge and appreciate the efforts of DoT to update and consolidate the extant regulatory framework currently comprised of three different legal instruments, the Indian Telegraph Act, 1885, the Wireless Telegraphy Act, 1933 and the Telegraph Wires (Unlawful Possession) Act, 1950. This acknowledgment by the Ministry of the need to modernise a framework in a way that is fit for purpose, is laudable.

Furthermore, the massive growth in wireless technologies – terrestrial and satellite – underlines the importance of effectively managing the spectrum. AVIA therefore sees value in the Bill’s approach to address spectrum management in the parent telecom legislation. Including spectrum management in the primary legislation can empower regulators to ensure the efficient use of a finite resource. However, our members are concerned that the Bill goes quite a way beyond what may be strictly necessary to achieve the intended objective. In particular, we would like to draw the Ministry’s attention to the following provisions:

1. **The definition of “telecommunications services”** appears to be all-encompassing. It seeks to bring satellite based communication services, broadcasting services and OTT services, which are made available to users via telecommunication, within the ambit of the Bill. The provisions of the Bill would further compel these telecommunication service providers to obtain a licence. While a less strict requirement of authorization, not licence, is required to utilise wireless equipment, including any wireless transmitter that is capable of use for broadcasting or emission of wireless communication, it remains significant that the Bill seeks to regulate not just the infrastructure that facilitates communication but also the services that sit on top of that infrastructure. These could potentially include service sectors like fintech & payments, insurance, edtech, medtech, ticket booking, online entertainment, digital citizen services and services that offer ancillary communication features such as a customer care chatbox enabled on a direct-to-consumer digital platform (eg the chat on Google docs or the chat features offered to participating gamers within a

gaming app). Similarly, the definition of “message” could also bring push notifications and in-app messages within internet-based apps under the purview of the DoT. The Bill provides no clarity on how an “over-the-top communication service” will be distinguished from an “over-the-top non-communication service”. While almost all types of service providers nowadays enable communication features on their platform, this does not necessarily mean that these service providers are primarily engaged in the business of providing a communication service. It remains unclear to our members whether the intention of the Ministry was to include, within the ambit of the Bill, OTT content platforms that are not primarily communication services however it remains our members’ view that (i) OTT media players which merely facilitate access to audio and/or audio-visual curated content and (ii) communication features which are simply incidental to a service, should be excluded from the scope of the Bill.

We would also respectfully draw the Ministry’s attention to the fact that a definition of “telecommunication services” already exists within the law. The definition of ‘telecommunication services’, as set out in the Bill, is in direct conflict with the definition of “telecommunication services” which is set out in Section 2(k) of the Telecom Regulatory Authority of India Act, 1997 (“TRAI Act”). The definition under the TRAI Act expressly excludes “broadcasting services” from its ambit. The definition under the Bill is much wider in scope and includes services such as internet and broadband services, satellite-based communication services, internet-based communication services, in-flight and maritime connectivity service, interpersonal communications services, machine to machine communication services and OTT communication services. These two definitions of “telecommunication services” conflict with each other, rendering compliance almost impossible to achieve for those organisations which fall within the scope of the enabling instruments.

- 2. Extension of the licensing regime by notification** - The list of telecommunication services is non-exhaustive and the Central Government is at liberty, at any point in the future, to include, purely by notification, any other service as a telecommunications service. We would suggest that the powers of the Central Government to notify any other services as telecommunication services should be subject to appropriate and clearly defined parameters in order to ensure that legislation is not unpredictable but instead compliments the Indian government’s stated intention to provide business certainty and promote ease of doing business in the market.
- 3. Potential overlap or conflict with other regulatory regimes:** The media and entertainment sector is currently regulated by determining whether the service provider in question provides the pipes to carry content or in fact provides the content for which a conduit is required. The services provided by telecommunications providers (“TSPs”) are significantly different from those provided by OTT service providers. While the TSPs are primarily engaged in the business of providing internet access, OTT service providers provide content over the internet. In this regard, it is important to highlight that TRAI itself has previously acknowledged this crucial difference in its report entitled, [Recommendations on Regulatory Framework for Over-the-Top Communication Services](#) –:

“OTTs and TSPs operate in different layers, and OTTs are not substitutable but dependent on TSPs for network access. TSPs have exclusive rights like spectrum, interconnect with PSTN, network infrastructure, and obtain numbering resources.”

The Cable Television Networks (Regulation) Act, 1995 and the Telecom Regulatory Authority of India which regulates broadcasting clearly separates the regulation of content or programming service from the regulation of carriage by distribution platform operators. Similarly, the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 govern content on streaming services. The Bill purports to include, within its scope, the well-established and defined ambits of other Ministries such as the Ministry of Electronics and Information Technology (MeitY) and the Ministry of Information and Broadcasting (MIB). Beyond entertainment, the Bill will similarly cause conflict with other sectoral regulators such as in payments (RBI), insurance (IRDAI), securities (SEBI). The Bill’s blurring of boundaries between the parameters of regulators’ responsibilities will most likely lead to greater business uncertainty.. Given that many of our members provide OTT services and already fall under the purview of regulation administered by other Ministries, we would kindly request DoT’s clarification on which specific services would fall under this Bill; alternatively, may we suggest that the definition of “telecommunication services” be revisited with a view to (a) extending regulation only to those providers which use scarce resources and thereby establish the “pipes” for carriage, and (b) expressly excluding the regulation of “broadcasting services” and “OTT platforms” from the ambit of the Bill.

We also take the opportunity to highlight that the Bill’s proposed amendments to the TRAI Act, 1997 potentially confers TRAI with additional power to issue predatory pricing-related directions to licensees. This is unwarranted as predatory pricing is already governed by the Competition Commission of India.

4. **Overriding provision-** It is also important to highlight Section 40, which states that the Bill will override any existing law in the event of a conflict. It is unclear if OTT service providers will be able to avail themselves of the safe harbour protections and other beneficial provisions offered to intermediaries under the Information Technology Act, 2000 (“IT Act”) and accompanying rules. The overriding provision also implies that OTT service providers would have to additionally adhere to the licensing regime of the Do. For reasons already discussed, this is not feasible considering that the nature of services provided by OTT services providers are fundamentally different to those provided by TSPs.
5. **User identity verification:** The Bill requires those service providers which fall within the scope of the Bill, to identify their users through a verifiable mode of identification. This has implications for the user’s right to privacy, especially if sensitive and confidential information, has been provided.
6. **Intercepting messages and suspending telecommunication services-** Section 24 (2) (a) of the Bill provides that the Central Government or a State Government or any specially authorised officer may, *in the interest of the sovereignty, integrity or security of India, friendly relations with foreign states, public order, or preventing incitement to an offence*, by order direct that any message to or from any person or relating to any particular subject, transmitted or received by any

telecommunication service, shall not be transmitted or shall be intercepted or detained or disclosed to the officer mentioned in such order.

Regulations for interception/blocking of information already exists for OTT service providers under the IT Act, Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009 and The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009. The inclusion of additional interception provisions under the Bill are of great concern to our members. An issue as sensitive as interception should be governed by one parent act and accompanying regulations. Multiple governing authorities and overlapping laws on interception could dilute and weaken encryption mechanisms and sow user distrust.

DoT's broad powers to intercept a "message" are drafted in a manner that is wide and open to interpretation. There is no well-defined, clear threshold requirement laid down for lawful intercept. In addition, this provides DoT with powers similar to those given to the Ministry of Electronics and Information Technology (MeitY) but without the clear safeguards imposed on MeitY within the Information Technology Act. Furthermore, the Bill fails to offer any redress for the wrongful interception or detention of any message as it does not provide for the judicial review of such decision.

7. **Search and seizure provisions and seeking information from telecom service providers:** The Bill empowers the government to conduct search (Section 50) and seizure (Section 51) "notwithstanding anything contained in any other law for the time being in force". Section 50 enables officers authorised by the Central government to enter any building, vehicle, vessel, aircraft or place where said officer believes that unauthorized telecommunication network or equipment or wireless equipment pertaining to an offence is kept and take possession of it. Section 51 states that such authorised officers shall have the right to direct a licensee entity to furnish any document required. The current search and seizure provisions under India law, are set out under Criminal Procedure Code, 1973 ("**CrPc**"). The Telegraph Wires (Unlawful Possession) Act, 1950 clearly states that the provisions of CrPC would apply to any instances of search and seizure. The Ministry has expressly stated that the Bill is intended to replace the extant legislation, including the Telegraph Wires (Unlawful Possession) Act, 1950. On that basis, we would suggest that the same approach should be adopted under the Bill ie any activities in relation to search and seizure should be conducted in accordance with applicable and existing law. In addition, we would urge the Ministry to specify the eligibility criteria for those officers who may be authorised to conduct search and seizure activities.
8. **Curtailment of provisions for seeking TRAI's recommendation:** Eliminating the requirement that DoT seek TRAI's recommendation before issuing a new license, will diminish the transparency and consultation process that is in place between various stakeholders. A mechanism to foster consultation and collaboration should be provided to enhance the transparency of the process and safeguard the checks and balances that currently exist.
9. **Satellite based broadcasting services are not telecommunication services** - Traditional telecommunication uses terrestrial spectrum, which is territorial to India and controlled by the

Government. However, broadcasting uses satellite spectrum which is not linked to a territory or country and is managed by the International Telecommunication Union – a United Nations specialised agency. Thus, the role of the national Government is only that of an administrator, and it does not undertake spectrum allocation in the case of broadcasting. Consequently, we would humbly suggest that there is no basis for bringing broadcasting within the Indian government’s telecom licensing framework.

In addition, we wish to draw your attention to the Central Government’s subsequent query on the matter in 2012, when the Court clarified that it does not see auctions as a constitutional principle. It acknowledged that auctions may not always be appropriate¹. In light of this, it not necessary nor accurate for the Explanatory Memorandum to the Bill to specify that auctions are the “primary” method for assigning all spectrum.

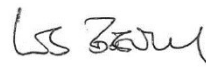
In closing, given the comprehensive nature of the Bill as well as the complex ecosystem associated with the telecommunications industry, we are of the opinion that a longer timeline for consultation with all relevant stakeholders and a longer timeline for comment, would have been welcomed. In any event, we would urge the Ministry to carefully consider stakeholder feedback and consult more closely with industry before moving ahead with the implementation of the Bill.

There are existing frameworks in place to effectively deal with content regulation. Introducing an additional, all-encompassing licensing framework could add significant business uncertainty for an industry that is moving at rapid speed to satisfy rising user content demand. In some ways, this licensing-approach sits in stark contrast to the paradigm shift we have seen in India with Prime Minister Modi’s “Minimum Government, Maximum Governance” approach in which citizens' interaction with the functionaries of government was sought to be reduced through digitalisation and consolidation of ministries. This new, proposed compulsory licensing of internet services could instead create barriers to entry for innovative startups, reduce competition and ultimately, offer less consumer choice.

Digital India, the government’s flagship program, has been transforming the country into a digitally empowered society and knowledge economy. To truly reap the benefits of this new digital economy, it is imperative that frameworks which are non-ambiguous, simple, predictable and transparent are established.

We thank you for your consideration and remain ready to answer any questions you may have.

Sincerely yours,



Louis Boswell
Chief Executive Officer
Asia Video Industry Association

¹ More specifically the Supreme Court opined, in its advisory jurisdiction in the Presidential Reference in the 2G case, that “Auction, as a method of disposal of natural resources, cannot be declared to be a Constitutional mandate under Article 14 of the Constitution of India” and that “auction may be the best way of maximising revenue, but revenue maximisation may not always be the best way to serve public good”.

About the Asia Video Industry Association (AVIA)

AVIA is the non-profit trade association for the video industry and ecosystem in Asia-Pacific. It serves to make the video industry stronger and healthier through promoting the common interests of its members. AVIA is the interlocutor for the industry with governments across the region, leads the fight against video piracy and provides insight into the video industry to support a vibrant industry ecosystem. AVIA evolved from CASBAA in 2018.

AVIA's leading members include: AsiaSat, Amazon, Astro, BBC Studios, The Walt Disney Company, Warner Brothers Discovery, NBCUniversal, Netflix, now TV, SES, Disney Star India, TrueVisions, Turner International, TV5MONDE, ViacomCBS Networks International, A&E Networks, Baker McKenzie, BARC, beIN Asia Pacific, Bloomberg Television, Blue Ant Media, Brightcove, Canal +, Cignal, CMS, Dolby, Eutelsat, France 24, Globecast, Globe Telecom, Irdeto, Intelsat, La Liga, Kantar Media, Measat, Media Kind, Media Partners Asia, Motion Picture Association, NAGRA, NBA, NHK World, Nielsen, Premier League, Singtel, Skyperfect JSAT, Sony Pictures Television, Starhub, Synamedia, Telstra Global, TMNet, TV18, TVBI, Verisite, Viaccess, Viacom18, and Zee TV