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SUBJECT: BSA COMMENTS ON THE CONSULTATION PAPER ON THE REGULATORY MECHANISM FOR OVER-THE-TOP (OTT) COMMUNICATION SERVICES

Dear Sir,

BSA | The Software Alliance (**BSA**), welcomes the opportunity to submit comments on the consultation paper 'Regulatory Mechanism for Over-The-Top Communication Services and Selective Banning of OTT Services' (**Paper**), released by Telecom Regulatory Authority of India (**TRAI**).^{1 2} BSA appreciates some of the high-level objectives of the Paper, including the goal to develop a holistic approach for harnessing emerging technologies and TRAI's consultative approach on the policy issue.³

In our submission to the Department of Telecommunications (DoT) on the draft Indian Telecommunications Bill, 2022 (Bill), we had recommended that the DoT exclude IT and Digital software services and Business-to-Business (B2B) enterprise software services and products from the scope of

¹ BSA | The Software Alliance (www.bsa.org) is the leading advocate for the global software industry. Its members are among the world's most innovative companies, creating software solutions that help businesses of all sizes in every part of the economy to modernize and grow. With headquarters in Washington, DC, and operations in more than 30 countries, BSA pioneers compliance programs that promote legal software use and advocates for public policies that foster technology innovation and drive growth in the digital economy. Follow BSA at [@BSAnews](https://twitter.com/BSAnews).

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² TRAI, "Consultation Paper on Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services". See: <https://www.traigov.in/notifications/press-release/traireleases-consultation-paper-regulatory-mechanism-over-top-ott>

³ TRAI, "Consultation Paper on Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services". Para 1.8-1.9, and 2.47-249.

the Bill especially given the Bill's onerous licensing and regulatory framework.^{4 5} We are concerned about the overbroad application of telecom regulations in the Bill to a nascent and growing software sector. Further, overlapping rules and regulations would hurt the contribution of the software sector to Prime Minister Modi's goal of achieving \$1 trillion in digital economy by 2026.

We share similar concerns with TRAI as a response to this Paper. We recommend that TRAI exclude Business-to-Business (B2B) enterprise software services, such as Infrastructure-as-a-Service (IaaS) and Software-as-a-Service (SaaS) providers, from the scope of this Paper. The definitions for 'OTT services' mentioned in the Paper are overbroad and do not account for the array of cloud-based software solutions that may not even rely on underlying telecommunications infrastructure, but rather may be applications at the service layer.⁶ As a result, the scope of the Paper may inadvertently impact B2B enterprise and other software services where there is neither sufficient functional nor technical rationale for it doing so. If so, this could subject a broad range of digital services to disproportionate regulatory burdens that are meant for consumer-facing telecommunication businesses. Such excessive regulations can have a detrimental impact on India's digital ecosystem and the development of emerging technologies.

Here are our detailed inputs:

- 1. The criteria underlying the proposed definition of "OTT communication" services is overbroad:** The broad framing of 'OTT services' suggested in the Paper is inappropriate, as it would adopt a one-size-fits-all approach that ignores the service-level, technical, functional, and user-base related distinctions among various entities operating in the digital economy. Many digital services, including B2B and enterprise communication services have specialized features that distinguish them from traditional telecom services. As detailed below, those services, which utilize fundamentally different technical and delivery means and serve different customer segments, are presently subject to different, existing regulatory regimes and requirements. Moreover, the policy objectives associated with the other OTT services mentioned in the Paper — like broadcast, gaming, e-commerce, fintech — while individually unique, aim to prevent user harm and ensure public safety. Given that this term can mean different services or products to different stakeholders, proposing a single legal definition can result in uncertainty for both the regulator and entities potentially subject to regulation. These services carry a specific kind of risk, linked to the services they provide and the nature and size of their user base.
- 2. B2B enterprise software services are already sufficiently regulated:** B2B enterprise service providers are already regulated by the Ministry of Electronics of Information Technology (**MeitY**). For instance, they qualify as an 'intermediary' under the Information Technology Act, 2000 (**IT Act**), 'data processors' under the new Digital Personal Data Protection Act 2023 and will continue to be regulated under the new upcoming Digital India Act (DIA).⁷ These services rely on different technical delivery mechanisms than traditional telecommunications services. They must adhere to various provisions under the said statutes, including obligations for personal data protection, cooperation with government authorities (for interception, decryption, takedown/blocking), due

⁴ BSA's submission to Department of Telecommunications on Draft Indian Telecommunications Bill, date: November 08, 2022 accessible at: <https://www.bsa.org/files/policy-filings/11082022indiatelcom.pdf>

⁵ Draft Indian Telecommunications Bill, 2022 accessible at: <https://dot.gov.in/sites/default/files/Draft%20Indian%20Telecommunication%20Bill%2C%202022.pdf>

⁶ TRAI, "Consultation Paper on Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services" Para 2.34.

⁷ Digital Personal Data Protection Act, 2023 <https://www.meitY.gov.in/content/digital-personal-data-protection-act-2023>
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diligence requirements, customer verification/user identification, and cyber-incident reporting. If the framework recommended by the TRAI were to cover such entities, it would result in overlaps and overregulation. Since B2B enterprise software services are developed for enterprise customers, they typically operate within a closed user base. This reduces the likelihood of harm through spam, misinformation, fraud, and other risks.

Accordingly, BSA recommends that the TRAI exclude B2B enterprise software service providers from the scope of the current consultation and appropriately narrow the definition of OTT services.

Thank you for the opportunity to participate in this consultation process. If you have any inquiries or require more information about our submission, feel reach out to us at venkateshk@bsa.org.

Sincerely,

Venkatesh Krishnamoorthy

Country Manager – India