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RECOMMENDATIONS ON THE
**Broadcasting Services
(Regulation) Bill 2023**



To,

Shri Sanjiv Shankar,

Joint Secretary (Broadcasting-I) and CVO,

Ministry of Information and Broadcasting

Email: jsb-moib@gov.in

Date: January 5th, 2024

SUB: DeepStrat Recommendations on Broadcasting Services (Regulation) Bill 2023

Dear Sir,

Greetings from DeepStrat, a New Delhi-based think tank and strategic consultancy.

At the outset, we would like to commend the Ministry of Information and Broadcasting for the release of the Broadcasting Services (Regulation) Bill, 2023 for public consultation.

The Bill covers many key issues and is an important legislation that will have a major impact for India, its citizens and industry bodies. We find that the Ministry has broken new ground on several aspects and delivered a simplified law to cater to the model needs of the broadcasting industry.

In our comments we have kept three broad principles in mind:

- **Clarity on Definitions and Regulations:** Precise definitions are vital, especially for digital media like OTT streaming, to avoid ambiguity. Collaborative efforts should refine definitions, ensuring clear boundaries without hindering freedom of expression.
- **Balanced Regulation and Inclusivity:** Regulations should promote diversity, competition, and inclusivity in media. Inclusive registration criteria and fair compliance standards are crucial to maintain a vibrant media landscape without stifling innovation.
- **Safeguards and Transparency:** Clear protocols, checks against misuse, and transparent mechanisms are necessary to ensure fairness, protect privacy, and prevent arbitrary decisions in regulatory actions.

Our comments are clause-by-clause and broadly in two parts. Part One is the recommendations. Part Two is the rationale behind the recommendations along with explanatory notes.



We will be grateful if you could acknowledge our comments and give serious consideration to them before the Bill is tabled in Parliament.

With warm regards,

Yours sincerely

Shachi Solanki

Deputy Chief of Operations

DeepStrat



DeepStrat is a New Delhi-based Think Tank and Strategic Consultancy specialising in Risk Management and integrated solutions to business continuity threats across sectors.

It was founded with the vision to combine rich experience in government with the best talent available in the private sector to produce sustainable solutions. At DeepStrat we focus on a broad spectrum of issues – Public Policy, Cyber Security, Governance, Risk Assessment & Mitigation, Technology, Sustainability, Capacity Building, Foreign Policy, and Defence Policy.



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Sr. no	Particulars (clause, Sub-Section, Section)	Views/Comments/Suggestions/Remarks/Recommendations
1.	Clause 1(dd)	<p>Recommendations: To ensure clarity and prevent unintended consequences, it is crucial to revise the definition of "Programme" to explicitly delineate its scope and specify whether digital websites fall under its purview.</p> <p>Reason: The definition of "programme" encompasses a wide range of audio, visual, or audio-visual content transmitted through broadcasting networks, including written material. This means content published via YouTube or any website will have scope to be covered within this regulation.</p>
2.	Clause 2(v) 'Definitions' (news and current affairs programmes)	<p>Recommendation: To address the ambiguity and safeguard freedom of expression, it is imperative to refine the definition of "news and current affairs programs" by establishing a clear and objective criteria. This should involve a collaborative effort among stakeholders, including media experts, legal professionals, and representatives from diverse viewpoints, to draft a more specific definition.</p> <p>Reason: The current definition raises significant issues that could impede the freedom of expression which is enshrined as a fundamental right under Article 19 of the Constitution of India</p> <ul style="list-style-type: none"> • The description of "news and current affairs programmes" is overly broad and subjective, lacking clarity and specificity. The ambiguous nature of the definition, especially the phrases "newly-received or noteworthy audio, visual or audio-visual programmes" and "about recent events primarily of socio-political, economic or cultural nature" leaves room for wide interpretation and potential abuse. • The inclusion of subjective criteria such as "import and meaning" further exacerbates the vagueness, allowing authorities or regulatory bodies excessive discretion in determining what qualifies as news or current affairs. <p>This approach to defining news and current affairs aligns with the Supreme Court's decision in <i>Shreya Singhal v. Union Of</i></p>

		<p>India¹ safeguarding the right to freedom of expression in the digital landscape while allowing for responsible content creation and consumption.</p>
3.	<p>Clause 2(y) 'Definitions' (Over-the-top broadcasting services)</p>	<p>Recommendation: OTT services operate differently than broadcasting services and should not be regulated in the same manner.</p> <p>Reason: Traditionally, a broadcasting service has been different from a narrow cast or unicast, because it extends to the masses Broadcast is one-to-many, which makes it valid for the Government to exert some control on the content. In case of an OTT streaming, the user can control what they choose to watch, it is a one-on-one experience, on personal devices. The objective of the Bill is to replace the Cable TV Act 1995 and cater to the evolving needs of the broadcasting sector. However, by categorising OTT services under the umbrella of broadcasting, it will subject these platforms and their wide array of services to regulatory scrutiny, which will not effectively accommodate their diverse nature of services.</p> <p>This merging of two separate components will have a chilling effect on production companies due to the restrictive nature of regulations that does not suit the personalised user experience in OTT streaming.</p> <p>The definition outlined for an OTT broadcasting service lacks precision and clarity by:</p> <ul style="list-style-type: none"> • Usage of terms like "made available on-demand or live to subscribers or users in India", and the existence of a "curated catalogue of programmes", pose several challenges in identifying OTT services accurately because some OTT services such as YouTube operate differently from a Netflix, making it difficult to clearly distinguish which services fall under this classification • The inclusion of the term "curated catalogue" without explicit boundaries or qualifiers raises concerns about the scope and definition's subjectivity and arbitrary classification. • The term "closed network" being excluded from the definition will result in encompassing a wide range of

¹ *Shreya Singhal v. Unionof India AIR 2015 SC 1523*

		<p>internet-based content services, potentially affecting innovative platforms and limiting consumer choice.</p> <p>Australia and Singapore have pursued OTT service regulation through means of classification, which better serves the nuances and needs of the sector</p> <ul style="list-style-type: none"> - Singapore focuses on categorising these services based on age restrictions, service offering, etc., rather than crafting precise definitions. This approach streamlines content restrictions and facilitates comprehensive regulation within a unified framework.² - Australia is looking at OTT regulation from a harms-perspective, where all OTT contents are classified based on their services offered, age restrictions, etc.
4.	Clause 2(z) 'Definitions' (Person)	<p>Recommendation: The Bill needs clarify whether foreign persons or foreign companies are within its scope.</p> <p>Reason: The definition of "Persons" in the Broadcasting Bill includes "Company," which is to be read with section 2(20) of the Companies Act, 2013.</p> <ul style="list-style-type: none"> • The definition in Section 2(20) of the 2013 Act specifies that "company" refers to entities incorporated under the Companies Act 2013 or preceding company laws. Hence, a company incorporated under foreign legislation would not fall under the classification of a "company" as per the 2013 Act. <p>However, it remains unclear if this definition explicitly excludes foreign entities or individuals from regulation within this Bill, given that many OTT streaming platforms in India are foreign entities.</p>
5.	Clause 4(4) 'Requirements for Broadcasters and Broadcasting Network Operators.'	<p>Recommendations:</p> <ul style="list-style-type: none"> - The grounds for carving out exceptions for certain entities to be registered need to be defined. Ensure transparent criteria for registration to guarantee fairness instead of broad terms such as fulfilling "social objectives" which remain unprescribed. <p>Reason: The provision grants substantial latitude to the Government to allow registration or intimation as a broadcaster or broadcasting network operator, without specifying clear and defined criteria for such registrations.</p>

² <https://www.imda.gov.sg/-/media/Imda/Files/Regulations-and-Licensing/Regulations/Codes-of-Practice/Codes-of-Practice-Media/OTT-VOD-Niche-Services-Content-Code-updated-29-April-2019.pdf>

		<p>Granting exclusive registration privileges to government-controlled entities for fulfilment of “<i>social objectives</i>” may lead to limited diversity in content, curtailing freedom of expression and potentially monopolising the broadcasting space.</p>
	<p>Clause 6 ‘Compulsory transmission of certain channels’</p>	<p>Recommendation: Amend the Section Reconsider the ban on state governments and political parties in television broadcasting to uphold federalism and ensure equitable access to diverse information.</p> <p>Reason: This provision read with Clauses 4(2)(b) and 4(2)(d), imposes a prohibition on state governments and political parties engaging in the business of television broadcasting and cable distribution. This effectively bars them from owning or operating television channels and cable networks. By prohibiting state governments from owning television broadcasting and cable distribution, it prohibits it from doing what the Central government is otherwise allowed to do.</p> <p>While a Prasar Bharti is allowed to own their broadcasting channels, the State government is not. The reason behind this remains unclear.</p> <p>The divestment of state-owned channels, especially those dedicated to education and public service, poses a significant threat to the autonomy of state governments in shaping their educational and information dissemination strategies.</p> <p>The potential for increased private sector dominance in the absence of state-backed channels raises concerns about the accessibility and affordability of information for citizens. This may disproportionately disadvantage underprivileged communities and limit their access to diverse viewpoints and educational programming.</p>
<p>6.</p>	<p>Clause 9 ‘Appeals’</p>	<p>Recommendation: We recommend establishment of a measured framework that balances regulatory objectives with industry dynamism, thereby ensuring both compliance and continued innovation. This would discourage platforms or artists from entering or remaining in the Indian market. This framework should be developed in collaboration with stakeholders.</p> <p>Reason: This provision grants the Registering Authority the power to suspend or revoke registrations of broadcasters or operators that violate the terms and conditions. These Terms</p>

		<p>and Conditions for registration of entities will be prescribed at a later date, as per the Bill.</p> <p>It provides a "<i>reasonable opportunity of being heard</i>" before any action is taken. While intended for compliance, the provision's catch-all raises concerns about potential misuse and its impact on industry innovation and flexibility. The provision aims to maintain regulatory standards but requires careful implementation to avoid arbitrary decisions and ensure fairness in the broadcasting sector.</p>
7.	Part C Clause 16(2)	<p>Recommendation: The obligation on OTT broadcasting services to inform Central Government should be reconsidered on grounds:</p> <ul style="list-style-type: none"> • The lack of guiding principles or criteria to determine the threshold raises concerns that extend beyond its definition. • In its absence, the Central government retains the capacity to alter the threshold with minimal accountability and oversight. • This will disproportionately impact small players or startups, limiting their ability to navigate regulatory requirements by not notifying thresholds, and prescribing a months' notice to comply with such provisions.
8.	Clause 19 and Clause 20 (Advertisement and Programme Codes)	<p>Recommendation: We urge the Ministry to acknowledge the risks associated with granting regulators, the power of censorship in the online content curation space and the news/current affairs publishing domain. Consequently, we recommend excluding these spaces from the purview of the Codes to preserve and protect the fundamental rights of free speech and creative expression.</p> <p>Reason: The Bill categorises streaming services as broadcasting services. Although streaming and broadcasting are both methods of distributing content, they vary through means of transmission, delivery methods, interactivity and control. Prescribing similar codes for cable broadcasting and OTT streaming can lead to higher compliance requirements for a wide range of digital media, legal disparities going forward and create barriers to entry across digital players.</p> <p>The provision mandates compliance with the Programme and Advertisement Codes for OTT broadcasting services The impact depends on how the forthcoming Codes are formulated:</p>

		<ul style="list-style-type: none"> - Clear guidelines will aid compliance, while vague regulations will burden operations and editorial independence. <p>Clause 20 mandates compliance with the Programme and Advertisement Codes for digital platforms broadcasting news and current affairs, excluding publishers of newspapers and their replicas.</p> <p>While recognising the distinction between traditional print media and digital platforms, this exclusion creates a regulatory distinction that could impact digital news entities in a business, or commercial capacity. However, the provision lacks specificity regarding the nature, scope, and applicability of the Codes.</p> <p>The absence of detailed guidelines raises concerns about how these Codes will be applied, interpreted, and enforced for diverse digital news platforms, potentially leading to compliance ambiguities and operational challenges.</p>
9.	<p>Clause 27 ‘Broadcast Advisory Council’</p>	<p>Recommendation:</p> <ul style="list-style-type: none"> • Ensure a balanced composition in the Broadcast Advisory Council (BAC) that includes independent members with diverse expertise to uphold impartiality and mitigate concerns of government dominance. • Conduct extensive public consultations to ensure broader stakeholder participation and legitimacy in establishing such regulatory bodies. • Align the structure and mechanisms with constitutional principles and legal standards to prevent potential legal challenges, ensuring compliance and legitimacy. <p>Reason: Clause 27 lays down the composition of the BAC. The proposed BAC lacks balanced representation, raising concerns about its independence and impartiality, as it constitutes many government members.</p> <p>The absence of widespread public consultation undermines the legitimacy and accountability of this structure, echoing concerns about its constitutional validity. Similarities to controversial IT Rules, 2021, invite constitutional challenges.</p> <p>The resemblance to the controversial IT Rules, 2021, especially the three-tier mechanism, raises concerns. These</p>

		rules have faced legal challenges and stay orders in high courts like Bombay and Madras, indicating potential legal uncertainties for this proposed structure.
10	Clause 30(2) ‘Power of Inspection’	<p>Recommendations:</p> <ul style="list-style-type: none"> • Establish clear oversight guidelines to prevent privacy infringements and increase in compliance burdens. • Define boundaries for inspection rights, avoiding unwarranted intrusion. Ease cost burdens on operators for equipment provision and ensure fairness. <p>Reason: Granting broad inspection rights without clear boundaries or supervision raises worries about unwarranted intrusion into private networks. While oversight is crucial, these provisions lack clarity and safeguards, potentially infringing on privacy and burdening operators. These broad powers enshrined in the Bill to regulate "OTT" broadcasting services do not justify the standards of necessity, proportionality and legality, outlined in <i>Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors</i>³.</p> <p>Mandating operators to provide equipment at their cost may strain resources, particularly for smaller entities. To ensure fairness and protect privacy, clear protocols, stringent safeguards against misuse, and transparent supervision mechanisms must be established.</p> <p>This could mean selective banning of OTT broadcasting platforms in particular regions. This would require user data for assessment and implementation. OTT broadcasting operators would bear the brunt of heightened compliance demands due to selective bans, placing the burden on streaming services rather than internet providers, and raising significant privacy concerns.</p>
11	Clause 31 ‘Power to seize and confiscate equipment’	<p>Recommendation: Re-evaluate Clause 31, considering the risks associated with granting authorised officers the power to seize broadcasting equipment based on ‘reason to believe’. Such broad powers pose threats to procedural fairness, operational continuity, and potential misuse of authority.</p> <p>Reason: This provision grants authorised officers the power to seize broadcasting equipment based on suspicion of violations bring certain negative implications. It poses risks</p>

³ *Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors. (2017) 10 SCC 1, AIR 2017 SC 4161*

		<p>related to procedural fairness, operational disruptions, and potential misuse of authority.</p> <p>It could lead to unjustified disruptions for broadcasters without a transparent investigation, impacting services and viewers.</p> <p>In a Supreme Court hearing between Foundation for Media Professionals v. Union of India and Ors⁴, Justice Kaul recommended, "<i>There has to be a balancing of interests and proper guidelines need to be in place to protect the interest of media professionals. We would like the learned ASG to work on this and come back on this issue, particularly considering that privacy is held to be a fundamental right.</i>"</p> <p>Such broad seizure powers might be misused, hindering innovation and creating a risk-averse atmosphere within the industry. Coupled with excessively harsh penalties for non-compliance, it is bound to result in self-censorship.</p>
12	<p>Clause 36(2) ‘Power to prohibit transmission of programme or operation of broadcaster or broadcasting network’</p>	<p>Recommendation: Clause 36(2) grants the Central Government sweeping censorship powers to prohibit broadcasting services in notified areas without clear safeguards. Recent incidents, like the blocking of MediaOne⁵, highlight the misuse of such powers due to the absence of checks. This trend towards censorship contrasts with inconsistent judicial decisions, sometimes stifling free speech while allowing propaganda, indicating a need for more consistent safeguards and transparent criteria in regulation.</p> <p>Reason: This provision, empowering the Central Government to halt broadcasting services in specific areas for public interest, poses significant concerns. It may restrict free expression, disrupt communication, and harm communities reliant on these services. Industry bodies will be in fear of shutting shop, since India is an important market for these platforms.</p> <p>Potential misuse and lack of transparent guidelines underscore the need for careful implementation to ensure genuine public interest and prevent arbitrary shutdowns.</p>

⁴ *Foundation for Media Professionals v. Union of India & Ors.* | WP (Criminal) No. 395 of 2022

⁵ *Central ban on Media One channel draws flak.* <https://www.thehindu.com/news/national/kerala/central-ban-on-media-one-channel-draws-flak/article38354354.ece>