TRANSPARENCY INTERNATIONAL BANGLADESH
Social movement against corruption

SUBMISSION BY TRANSPARENCY INTERNATIONAL BANGLADESH ON 'THE BANGLADESH TELECOMMUNICATION REGULATORY COMMISSION REGULATION FOR DIGITAL, SOCIAL MEDIA AND OTT PLATFORMS, 2021' ISSUED BY BANGLADESH TELECOMMUNICATION REGULATORY COMMISSION

No.	Clause	Comments
1.	1	(a) **Broad and ambiguous scope.** According to the extended title of the draft regulation, the intention appears to be to regulate digital media, social media, and OTT platforms. On the other hand, clause 1(3) states that the draft regulation shall apply to internet-based service providers delivering content, a service, or an application provided to end-user over the public internet. We note that the draft regulation does not define the terms "internet-based service provider", "service", or "application", making it difficult to ascertain the scope of the draft regulation's application. Furthermore, there is no requirement for nexus with Bangladesh, suggesting that the draft regulation could potentially have a worldwide application. This ambiguous and overly broad application is strongly discouraged, as it will create uncertainty for non-resident service providers and result in unintended bycatch. *Recommendations:* BTRC should appropriately amend the draft regulation to (i) limit its application to Bangladesh; (ii) clearly define the terms "internet-based service provider", "service", or "application". (b) **Date of effectiveness.** According to clause 1(2), the draft regulation will come into force on the date of its publication on the official website of BTRC, which is not suitable for the following two reasons. (i) It is inconsistent with section 99 of the Bangladesh Telecommunication Regulation Act, 2001 ("**2001 Act**"), which empowers BTRC to make regulation provided it has: (i) obtained prior approval of the government; and (ii) published it as gazette notification. In addition, as the draft regulation is being drafted pursuant to a direction of the Hon'ble High Court Division, it is also subject to judicial approval.

		A non-compliance with the statutorily mandated or judicial process is strongly discouraged, as it will affect the draft regulation's effectiveness and/or enforceability. (ii) Generally, legislation (whether primary or secondary) comes into effect immediately when the government publishes it in the official gazette (and, of course, after complying with the relevant due process). While the draft regulation can be enacted shortly, its implementation should be deferred by two years to allow companies to clearly understand the legal requirements and update their internal processes and policies to ensure compliance without technically being in violation. This cooling-off period is essential for BTRC, which needs time to modernise its system and introduce processes to ensure smooth implementation. *Recommendations:* Clause 1(2) should be amended to specifically state that the draft regulation will become effective: (i) after receiving the endorsement of the Hon'ble High Court Division; (ii) after complying with the requirements set out in section 99 of the 2001 Act; and (iii) two years after its enactment, on the notification in an official gazette.
2.	3	(a) **Misaligned objectives.** As mentioned above, our understanding is that the draft regulation is intended to regulate online content and online service providers. However, the language of the objectives in clause 3 is reminiscent of the legacy telecommunication and broadcasting regulations. Whether curated, uncurated or otherwise, services delivered over the internet today are fundamentally different from traditional telecommunication and broadcasting services. The overall regulation and its stated objectives should reflect the same. Clauses 4 and 5 are perfect examples of the one-dimensional approach towards crafting this draft regulation. These are requirements traditionally applied to telecommunication service providers (like internet service providers and mobile network operators). Such languages are strongly discouraged, as it could incentivise the regulators to adopt measures against and apply standards on online services appropriate for legacy telecommunication and broadcasting services. *Recommendations:* Clause 3 should be amended to focus on, amongst others: (i) online harm; (ii) protection of consumers, especially vulnerable class of citizens (e.g., women, children, journalists, dissidents) from harmful contents; (iii) protection of creativity of service providers in relation to curated content providers; (iv) protection of fundamental rights to free speech and press and to privacy; (v) equitable and fair treatment towards both resident and non-resident service providers; (vi) redressal mechanism; (vii) parental control system; and (viii) intellectual property rights.

3.	4, 5, 6.02, 7.02	(a) **Unwarranted registration requirement.** As stated above, the local registration requirements on service providers in clauses 4.01, 4.02, 4.03 and 5 appear to have been incorporated from the legacy telecommunication regulations, and such requirements, in principle, are problematic for several reasons: (i) There is a built-in assumption that the applicant will have to be locally incorporated, complete with taxpayers' identification number, trade license, value-added tax registration, to apply for registration with BTRC. Whether or not a company will have to be incorporated in Bangladesh by non-resident service providers as a prerequisite to obtaining registration should be clearly articulated, as otherwise, it creates uncertainties for non-residents from a compliance perspective. (ii) In any event, local incorporation and/or registration requirements fail to consider that there is no correlation between internet-based services and local presence in Bangladesh. Unlike traditional telecommunication services, which rely on local infrastructures and require active engagement by a locally situated workforce, internet services (whether relating to curated or user-generated contents) can be offered on a cross-border basis using the existing local infrastructures of the telecommunication service providers, without the intermediaries owning them. This requirement is wholly disproportionate and unreasonable and not in line with internet-based services' cross-border and trans-national nature and how internet companies operate. It will deter non-resident service providers from targeting local consumers, and it could result in internet fragmentation and increase the cost of doing business for companies. (iii) Specifically, the right of BTRC to cancel, suspend or revoke registration certificate pursuant to clause 5 (e) creates substantial business continuity risks for non-resident service providers, which will serve as a significant deterrent for many companies to enter the Bangladesh market, or offer services to local consumers, and, as a result, may disincentivise foreign investment in Bangladesh. It is worth noting that the 2001 Act is a law that was enacted for locally situated telecommunication service providers, and it is inadvisable to apply the same rationale and considerations and impose the same standards on internet companies as their business model and operations substantially differ from legacy telecommunication service providers. Legal requirements should be proportionate to legitimate objectives. Adopting a legal framework for companies that are functionally and operationally different from those for whom the 2001 Act was initially enacted is unreasonable, ill-advised and therefore strongly discouraged.

		(iv) Local registration requirement creates disproportionately high enforcement risks against companies. Notably, under sections 64 and 66A of the 2001 Act (referred to in clauses 10 and 12), monetary penalties can be imposed up to a maximum amount of BDT 300 crore and imprisonment could extend to a maximum term of five years. There is no requirement for the authorities to take a graded and proportioned approach, which, from a law enforcement perspective, means that the companies will constantly have to run the risk of being subjected to disproportionately high penalties. It is a well-settled principle of law that punishments must be proportionate to the seriousness and gravity of the mischief it seeks to deter and not retributive. In addition, this regulation will apply in addition to, and not in substitution of, other laws currently in force: so, technically, an intermediary will not only be liable under the 2001 Act but also laws like the Digital Security Act, 2018, the Pornography Control Act, 2012 and the Penal Code, 1860. By failing to incorporate procedural safeguards in the draft regulation and ensure proportionality, these provisions are inherently defective and create substantial enforcement risk that not all companies would be willing to submit themselves to, which may discourage local registration. (v) Local registration requirement exposes the non-resident companies to a risk of surveillance and interception. In particular, under section 97A of the 2001 Act, the government has the power to authorise the national security, intelligence or law enforcement agencies to "intercept, record or collect information" of any person on national security or public order grounds, and service providers are bound to assist such agencies. Additionally, under the 2001 Act, BTRC has extensive authority to ask for information from service providers. Without delving into the legitimacy or constitutionality of such powers, it is submitted that many non-resident companies may not be willing to incorporate a company in Bangladesh or register with BTRC with the knowledge that it may have to disclose information belonging to its customers, merely at the request of the government agencies and without a valid court order, on the grounds that are arbitrarily interpreted and applied by the authorities. Not only will such disclosure obligation potentially violate the fundamental rights protected under Articles 39 and 43 of the Constitution, but it could also force companies to violate the laws of the countries in which it is situated and their international commitments. (b) **Enforcement risks against local representatives.** According to clauses 6.02 and 7.02, every intermediary is required to appoint a resident compliant officer, compliance officer and agent. This imposes onerous cost implications and compliance obligations on non-resident service providers and creates appreciable enforcement risks against the resident officers and representatives. It is deeply concerning that under section 76 of the 2001 Act, an individual is presumed guilty unless proven innocent, which contradicts the laws of Bangladesh. There

		are clear precedents in favour of a presumption of innocence – the Appellate Division of the Supreme Court of Bangladesh in *Muslimuddin v. The State* [reported in 7 BLD (AD) 1] observed: "[t]he fundamental principle of a criminal trial is that the accused shall be presumed innocent and that he is not required to adduce evidence to prove his innocence, but the entire burden of proof of his guilt lies on the prosecution alone and till that time the presumption of innocence continues, whether the case is before the trial Court or at higher forums." Similarly, the High Court Division of the Supreme Court of Bangladesh in *Hakim Ali v. The State* [reported in 11 BLD 371] recognised it to be "a settled principle of criminal jurisprudence that there is always a presumption of innocence in favour of the accused." Such an unjustifiable reversal of a well-established legal principle, in effect, means that the officers and representatives of the company will have to prove their innocence or could face the same penalties as the company. Enforcement risks are significantly increased without a clear 'safe harbour' provision. This is clearly disproportionate and strongly objectionable and will further deter the companies from coming to Bangladesh. *Recommendations:* Clauses requiring local incorporation or registration and resident officers and representatives should be deleted in their entirety.
4.	6.01 (d)	(a) **Content removal regime too broad and disproportionate.** According to clause 6.01 (d), either the BTRC or a court of competent jurisdiction can issue a content removal request on grounds like sovereignty, integrity or security of the country, decency or morality, friendly relationship with foreign countries, or defamation. An intermediary must remove the contents promptly, but in any event within 72 hours. Fundamentally, this requirement raises several concerns: (i) We have seen interpretation of the abovementioned grounds arbitrarily to suit motivated objectives over the years. There is no standard of reasonableness that is ascribed when assessing whether an action tantamount to a severe and genuine violation of these grounds. In fact, under section 57 of the Information and Communication Technology Act, 2006 and the Digital Security Act, 2018, we have seen thousands of arrests over a period of over one decade for expressions on social media that can be reasonably assessed to be lawful – and the abuse is so flagrant and frequent that even the law minister recently admitted to a need for adopting appropriate corrective measures, including amending the digital security law. Many of the cases filed under these laws were ultimately dismissed due to the absence of evidence or on procedural grounds. This clause will open a floodgate for further abuse without procedural safeguards against abuse expressly articulated in the draft regulation.

(ii) As mentioned above, the penalty for non-compliance with a removal order is disproportionate and unacceptable.

(iii) From a constitutional perspective, moderation of online contents amount to restraint on freedom of speech, expression and press guaranteed under Article 39 of the Constitution. This fundamental right is not absolute, but a restriction must be reasonable to pass the test of constitutionality. If a removal order is aimed at a political or anti-government expression or even unpopular opinion, it will violate the fundamental right. Accordingly, there is a need for safeguards to prevent abuse and misuse. Additionally, the fixed timeline could also prompt intermediaries to impose prior restraint on expression or excessively remove due to the fear of avoiding penalties, further violating the citizens' fundamental rights.

(iv) Relatedly, every removal request must be reasoned. There are many precedents decided by Bangladeshi courts that requires both judicial and administrative orders to be reasoned. We would like to highlight a few for reference:

(A) *Aman Knitting Limited vs. Government of Bangladesh*: "An administrative order must be a reasoned one. Fairness and transparency of administrative decisions require to be recorded. The requirement of recording reasons by every quasi-judicial or even an administrative authority entrusted with the task of passing an order adversely against an individual and communication thereof to the affected persons is one of the recognised facets of the rules of natural justice, and violation thereof has the effect of vitiating the order passed by the authority concerned."

(B) *Md. Akmol Hossain and Others vs. Kulsum Nessa*: "The impugned order passed by the learned Senior Assistant Judge … is absolutely a non-speaking order and in my view, it is no order in the eye of law and the same deserves interference under the revisional jurisdiction of this Hon'ble Court ... This sort of order is exfacie illegal, misconceived order and also no order in the eye of law. The learned Assistant Judge in passing the impugned order committed serious illegality and miscarriage of justice which deserves interference … and the same is liable to be set aside."

(C) *Abdul Quddus Khan Salafi vs. The State*: "It is also necessary to point out here that freedom of assembly, right to association and freedom of thought and speech are inviolable fundamental rights guaranteed under articles 37-39 of the Constitution. So, any order restricting the above rights must be well reasoned and supported by law enacted within the constitutional scheme."

		Recommendations: BTRC should appropriately amend the draft regulation to (i) ensure procedural safeguards against abuse of the content moderation regime; (ii) ensure that the penalty is graduated and proportioned to the non-compliance; (iii) remove fixed compliance timeline, and require intermediaries to conduct thorough assessments of the contents and remove unlawful contents promptly; and (iv) require only court orders announcing a content to be unlawful on reasoned grounds to be removed within a fixed timeline.
5.	7.03	(a) **Unconstitutionality of enabling identification of the first originator of a message.** According to clause 7.03, a messaging service is required to trace the first originator of a message and disclose information about him/her on receipt of a court order or instruction of BTRC. Effectively, this provision requires every message, photo, video and other communications sent over a messaging service to be 'fingerprinted' – i.e., attributed a unique identity that will allow the service provider to trace and track it to its original sender. Most messaging services now use end-to-end encryption, which means that this clause will require the services to break those encryptions, violating the legitimate expectation of citizens to the privacy of their correspondence and other means of communication. Government intervention is only warranted where the threat is imminent and severe – e.g., in terrorism situations or to prevent the spread of child pornography – and not as a preemptive measure or to target political opponents and dissidents. Globally, privacy considerations have shifted significantly, with governments and corporations increasing their surveillance and monitoring activities; however, end-to-end encryption ensures no government or corporations access private chats. While the intended objective is to prevent misinformation and disinformation using these services, when read with section 97A of the 2001 Act (as mentioned above), it opens another floodgate for abuse by the government. It could also stifle free speech, as users would be deterred from expressing themselves openly over private messaging services. In India, the equivalent provision was challenged by WhatsApp for violating the privacy rights of citizens, and in Bangladesh, the position should be no different. As a result, such a requirement raises significant constitutional concerns under Articles 39 and 43 of the Constitution. Otherwise, many messaging services will cease their service in Bangladesh. *Recommendations:* BTRC should appropriately amend the draft regulation to (i) mandate that only a valid court order with reasoned grounds and in respect of real and imminent threat can compel traceability and disclosure of information, and (ii) list out the other less intrusive means that must first be deployed before a traceability order can be issued by a court. To avoid doubt, BTRC should not be allowed such an overarching mandate.
6.	10, 12	(a) **Constitutional concerns around penalties.** As mentioned above, the penalty provisions mentioned in the draft regulation (and supported by the 2001 Act) raises constitutional concerns. Sections 64 and 66A of the 2001 Act

		are overarching and disproportionate, and penalties are not graduated and proportioned, resulting in violation of fundamental rights under Articles 31 and 39 of the Constitution. In addition, the risk to the employees and representatives of an intermediary under section 77 of the 2001 Act creates an unwarranted threat to liberty, contrary to Article 31 of the Constitution. These will create substantial enforcement risks on intermediaries and their local employees, which would, in turn, deter offshore service providers from registering with BTRC or offering services to consumers in Bangladesh. (b) **No 'Safe harbour' provision.** A safe harbour provision ensures that intermediaries are not held liable for simply facilitating/enabling transmission of user-generated contents, and the absence of such protection in the draft regulation amplifies the constitutional concerns raised above. If an intermediary is not allowed such protection, it will remove contents excessively to avoid penalties, infringing fundamental rights under Article 39 of the Constitution. Notably, protection like this is central for innovation, especially in a developing country like Bangladesh. *Recommendations:* We strongly recommend: (i) amendment of sections 64, 66A and 77 of the 2001 Act, to ensure that penalties for noncompliance are graded and proportioned, increasing with each instance of noncompliance, and there is no liability on employees and representatives who are merely carrying out their functions in line with the company's policies and procedures; (ii) incorporating clear clauses that impose penalties for systemic noncompliance only, instead of failure to remove individual contents; (iii) incorporating a robust 'safe harbour' provision in the draft regulation that offers robust protection to intermediaries; and (iv) incorporate explicit provisions that prevent multiplicity of proceedings under several laws for same noncompliance.
7.	08, 09	(a) **Unclear powers of the Ministry of Information and Broadcasting.** According to Part III of the draft regulation, the Ministry of Information and Broadcasting ("**MoIB**") has the authority to regulate publishers of online curated content, publishers of news and current affairs content and web-based programs. It is unclear as to what authority is intended to be conferred to MoIB, as the powers are undefined. In the absence of specificity regarding the authority of MoIB, it creates substantial exposure for both video-on-demand services and social media intermediaries to a risk of being subject to the stringent screening and censorship standards that MoIB uses in the legacy broadcasting services. This is also supported by the fact that the draft policy prepared by MoIB requires compliance with its broadcasting policy, which is not the right way forward. (b) **Questions over jurisdiction.** We note that MoIB created a separate framework on the same matter. First of all, it is unclear why there are two frameworks – one created by BTRC and another by MoIB – in the first place.

		Secondly, there are no clear guidelines on how the two frameworks will interact. But most importantly, there is a big question over the legal competence of MoIB to regulate internet-based services. Unlike certain countries (like Hungary, where one converged authority deals with legacy media, telecommunications and internet-based services), in Bangladesh, there is a clear institutional and jurisdictional demarcation for different types of content services. After the amendment to the Rules of Businesses in November 2018, a clear mandate to regulate OTT services (in addition to telecommunication services, data communication and associated services, both in Bangladesh and abroad) is accorded to Post and Telecommunication Division under which BTRC operates. On the other hand, MoIB has the authority to deal with films and other matters relating to broadcasting. Resultantly, there is a question over jurisdiction to regulate broadcasting services on internet-based platforms. Arguably, both authorities can jointly exercise jurisdiction due to the convergence of broadcasting services with internet services. However, such authority cannot be exercised by MoIB alone, and MoIB cannot extend its regulatory arms to non-broadcasting services. *Recommendations:* The draft regulation should: (i) clearly articulate the powers and authority of MoIB drawn upon this Act; (ii) ensure that traditional broadcasting standards are not applied to online services; and (iii) clarify who the nodal authority is for the various online services. More importantly, both BTRC and MoIB should work together to formulate one framework that addresses different types of services whilst considering the operational and functional differences between those services.