



# Policy Opinion

## Comments on the draft Indian Telecommunication Bill 2022

NOVEMBER, 2022



## **Comments on the draft Indian Telecommunication Bill, 2022**

### **By the Centre for The Digital Future**

The preamble to the Indian Telecommunication Bill, 2022 (henceforth the 'Bill') lays out two major principles

1. Firstly, it states that telecommunication is a key driver of economic and social development. And that telecommunication infrastructure and telecommunication networks are important parts of public infrastructure, and it is necessary to ensure the availability of affordable, reliable, secure, and universal telecommunication services
2. Secondly, spectrum is a valuable and inexhaustible natural resource, has an element of public good, and it is vital to ensure efficient management and use of the spectrum

These are sound and worthy principles on which to base the Bill. However, some definitions and provisions contained in the Bill are at odds with these principles, especially the first one. And we believe that they are also at odds with the evolution of the telecommunication market and the direction in which it is evolving.

Our detailed submission below is structured in two parts. We first present our recommendations on the presentation and content of the bill in its entirety. In the second part we focus in detail on one specific aspect of the bill – the definition of telecommunications services and the inclusion of over-the-top or OTT communication services<sup>1</sup> within the definition.

#### **Overall recommendations**

- The erosion of the Telecom Regulatory Authority of India (TRAI)'s powers is unwarranted. No reasons have been adduced in the Bill for the proposed alterations to the status quo. Even as things stand, TRAI's powers, in comparison to those of telecom regulators around the world, are more limited. Besides, the removal of TRAI's role in advising the government in certain key areas covered under section 11(a) including licensing, is inexplicable. It is puzzling why Government would want to deprive itself of the expert body's views on matters where it anyway has the final say. This is particularly strange considering that the Bill seeks to extend the role of telecom regulation into areas that were hitherto not under its purview, like OTT communication, Right Of Way (ROW), etc.

---

<sup>1</sup> As in TRAI's 2015 consultation paper, OTT communications services include messaging and voice/video communication.

- The attempt to ease problems in obtaining ROW permissions to lay telecom infrastructure is laudable. However, it is far from clear how the provisions will change the status quo, since it does not alter the applicability of the Land Acquisition Act and the process laid down therein, to private property. Secondly, as far as Central Government property and associated ROW permissions are concerned, this is under the direct administrative jurisdiction of the Central Government, so the necessity of a law to govern such administrative decisions of government is unclear.

Finally, if the intention is to empower the Central Government to intervene directly in according ROW permissions for State Government and Local Body (LB) properties, then this would appear to conflict with the constitutional scheme of things and the powers of the three constitutional tiers of government: Centre, State and LBs and infringe the rights of the State and LBs. It may be more appropriate to empower the central government to put a ceiling on the compensation sought (possibly zone-wise: metro, urban, semi-urban, rural, remote, etc.) and on the time to take a decision with publicly stated reasons in case of refusal of permission. These would be more practical measures that would actually impact the situation at the ground level.

- The renaming of the Universal Service Obligation Fund (USOF) as the Telecom Development Fund (TFD) and widening of its scope is well-intended. However, budgetary provisions each year for USOF have been extremely low and far less than the accruals. Without enhancing the allocations to match the accruals, the inclusion of R&D is likely to erode the primary role of USOF, namely ensuring that the unreached are covered. Further, funding R&D should be confined to smaller, innovative Indian firms.

Secondly, it is desirable that the funding is channeled to reputed academic institutions, with a stipulation that a private sector partner should co-fund the research to some extent, say 10-25%. This ensures that the private sector players also have some 'skin in the game'. There should also be a requirement regarding generating patents (with some further stipulations regarding usage metrics) to ensure that the research is applied and has real commercial value. A model like the National Science Foundation (NSF) of USA<sup>2</sup> could be followed, where proposals are invited for research in specific areas or for specific technologies or products. The law needs to provide the guard rails for funding private sector entities and not be open ended.

---

<sup>2</sup> <https://beta.nsf.gov/funding>

- Some provisions of the Bill including those relating to TDF, ROW, KYC, interception, categorization of offences, auction of spectrum, etc. confer powers on the central government without clearly defining the boundaries or a due process in respect of matters that impact individual citizens or private service providers. This could inadvertently lead to undue devolvement of legislative powers on the executive, contrary to the constitutional division of powers between the executive, legislature and judiciary. The failure to exclude content and applications from the scope of the Bill and the inclusion of machine to machine communications within the scope would result in regulatory burden falling on DOT in areas that it is neither equipped nor trained to deal with. At the administrative level, it may be advisable to retain the existing mutually exclusive areas of responsibility of DOT, Meity and I&B Ministry.
- The equivalence drawn between OTT communication services and telecommunication services is erroneous, and they should not be included in the Bill. If at all OTT services need to be governed that should be through the rules in the IT act or the soon to be enacted Digital India Act.

We elaborate on the last point above in more detail in the following section

### **Inclusion of OTT communications services in the definition of telecommunications services**

1. The main argument advocated for inclusion is the principle of “same service, same rules”. Superficially, it seems logical that communication services whether provided by telcos or OTTs should be treated similarly. While there is some substitutability between the two, ‘same service’ means that as a user one should be able to substitute one for the other at his or her own volition.<sup>3</sup> But no OTT provider including those providing communication services like WhatsApp, Zoom, email etc. can reach a customer without the intermediation and services of a telecom service provider – in the Indian context, Airtel, Jio, Vodafone or BSNL. But the converse is not true. The absence of any OTT communication service poses no impediment for a telco to provide its services. Clearly, OTT communication services are applications or value-added communication services that ride on the basic communication services that telcos provide. The latter is in the domain of carriage and the former is in the domain of applications that organize content in various ways such as group and video communication, encryption, etc.

---

<sup>3</sup> As an illustration consider the case of an area with only 2G connectivity but OTT applications which require 4G connections to be carried. Users in this area can still make voice calls. And indeed can make voice calls on other telecom providers too. So while voice calls are indeed substitutes for each other, OTT communications and voice calls are not.

2. The inclusion of OTTs in the Bill seems to be driven by the desire to preserve the arbitrage that exists between the way that regular voice calls are charged and the way that VOIP calls are charged. In the latter case, the telco gets only the data traffic tariff and not the much higher voice charge. That arbitrage is anyway doomed and will be extinguished sooner rather than later. Biting the bullet now makes more sense than bringing in a convoluted interpretation in the law to stymie the growth of OTT communication services and innovation and competition in that sphere.
3. There are compelling arguments as to why OTT communication services should be kept out of the ambit of Telecom law which regulates terrestrial carriage. OTT communication services are already covered under the existing IT Act and presumably will continue to be so under the proposed Digital India Act. Whether it is encryption, data storage, interception or cooperation with law enforcement, OTTs can be and are regulated – but not licensed or pre-authorized.
4. The proposed Bill and the current Telegraph Act are based on the principle that provision of telecommunication services is the sole privilege of the government except to the extent that private entities are permitted – read licensed or authorized. On the other hand, the IT Act, which regulates technology usage, is based on the exact opposite premise: everything is permitted except that which is specifically and explicitly barred and subject to any mandatory requirements that must be met. A similar principle operates in respect of content, which the I&B ministry, Prasar Bharti and the Censor Board, regulate. It is precisely this wide latitude that is afforded in technology/ applications and content that enables and encourages creativity, innovation, new products and venture capital funding.
5. Telecom provision uses a scarce public resource - frequency spectrums. For various reasons including rationalization and optimization, avoiding and solving interference spectrum management requires coordination among the various players. This is, across the globe, done centrally by a regulator. Over time there have been innovations in spectrum management and it has become more flexible. An example is the introduction of a secondary market. But spectrum management is very much a regulatory domain. And given that the assignment of the spectrum is exclusive this grants the assignee market power in the telecom sector. As already stated OTT communication services use the telecom infrastructure for carriage.
6. The technological and physical features of the telecom sector mean that there are *economies of scale* in telecom provision. That is, the cost of providing telecom services falls over the entire range of operations. The more users the telecom company services, the more users it can spread the initial costs of operation over. And once the infrastructure is installed the cost of servicing a new user is negligible.

These features mean that for efficient operation telecom companies need to have scale - there cannot be too much competition in the telecom market. There can be and is competition in the OTT market.

7. Since there will be natural monopolies in telecom provision, market competition cannot always be relied upon for investments in improving quality. The government thus uses licensing requirements to control entry into the telecom sector. The reason for licensing is to maintain a certain quality of provision by specifying, among other things, technological and quality control requirements. Licensing creates entry barriers into the market and becomes another source of cementing the market power of incumbents.
8. The governance of the OTT services, provided using the telecom infrastructure, is driven by non-economic reasons, like consumer protection and safety or a broader goal like national security. But these services do not require centralized coordination, there is no scarce socially valued resource being used (it is used to provide the means but not the service that sits on top), their market structures tend to be fairly competitive, and licensing will not only raise entry barriers where there are none currently, but it will also kill innovation and entrench incumbents.
9. It is well-nigh impossible to distinguish an OTT communication service from any other OTT platform because every OTT platform such as Flipkart, Ola, MakeMyTrip does incorporate an element of messaging. How does one distinguish between an OTT communication service provider and any other OTT platform or service that includes communication services? This is an impossible task. Only lawyers would celebrate the legal quagmire that would ensue from any such attempt.
10. What if only the communications component of OTTs were to be regulated? That would be equally problematic since requiring a license or authorization for an element that is an inherent part of a platform's activity would be tantamount to control of the entire activity. Licensing innovation is a contradiction in terms.
11. The Bill will only impact India-based OTT players. Those operating from overseas would not be impacted. This would seriously handicap Indian service providers vis-a-vis their foreign competitors. Do we want this? It is not accidental that the exclusive privilege of government is confined to carriage which is confined to geographical boundaries.
12. Even from a security perspective the logic behind introducing KYC requirements for all telecom services is unclear. KYC is already a requirement for obtaining a phone line – fixed or mobile. This has been done under existing law using existing powers.

When this proposed provision is read with the revised definition of telecom services to include OTT players, it would appear that the intention is to go beyond existing rules and introduce KYC even for things like email, etc. This is unwarranted, because existing KYC requirements enable Law Enforcement Agencies (LEA)s to trace the source of any message to a communication device which has already been subject to KYC. Phone number, IMEI number and IP address should be sufficient for LEAs to do their job. KYC in the rest of the digital world for services such as email is antithetical to the way the Internet operates. Besides, it would eliminate legitimate service providers operating out of India and leave only foreign or illegitimate operators in the field. This would be extremely harmful to Indian companies, including startups building innovative services.

**Based on these considerations we submit that including OTT communication service providers within the ambit of the Telecom Bill is a deeply flawed idea that could seriously compromise the energy, innovation and funding that characterizes India's startup ecosystem today.**

**Hardly any other country, with the possible exception of Singapore (China is in a class by itself) has equated OTT communication services with foundational telecommunication services. Instead, the Government would be well-advised to include whatever controls are deemed necessary in the soon-to-be unveiled Digital India Act which is expected to lead India into an enticing digital future.**