Trilegal Update | The draft Indian Telecommunication Bill 2022: A step in the right direction?

21 October 2022

Partners: *Rahul Matthan, Nikhil Narendran and Jyotsna Jayaram,* ***Counsel****: Jishnu Sanyal,* ***Senior Associates****: Puja Saha, Thomas J. Vallianeth,* ***Associates****: Krati Hashwani, Kuruvila Jacob and Sanjeev Jothi*

This update covers:

1 Introduction

On 21 September 2022, the Department of Telecommunications (**DoT**) published the draft Indian Telecommunication Bill, 2022 (**Draft Bill**) to replace the archaic and dated regulatory framework governing telecommunication in India, including the Indian Telegraph Act, 1885 (**Telegraph Act**), the Wireless Telegraphy Act, 1933 and the Telegraph Wires (Unlawful Possession) Act, 1950. The Draft Bill aims to consolidate and amend the existing laws governing the provision, development, expansion, and operation of telecommunication services, telecommunication networks and telecommunication infrastructure, and the assignment of spectrum. The Draft Bill has been formulated pursuant to the consultation paper issued by the DoT on the *'Need for a new legal framework governing Telecommunication in India'* in July 2022. It also aligns with the National Digital Communications Policy, 2018, which sought to amend the dated telegraph-centric laws to facilitate convergence between information technology (**IT**), telecommunication, and broadcasting. The Draft Bill is open for public consultation and feedback till 30 October 2022.

The Indian Government, through this proposed framework, intends to implement reforms in the telecommunication sector that will introduce a new framework for (among others):

The Department of Telecommunications has issued the long overdue draft Indian Telecommunication Bill, 2022 to replace the Indian Telegraph Act, 1885, the Indian Wireless Telegraphy Act, 1933 and the Telegraph Wires (Unlawful Possession) Act, 1950. While the bill is a step in the right direction as it proposes a graded regulatory regime for services, infrastructure, equipment, and spectrum, aligned with the global approach, it inadvertently causes confusion with its expansive scope, which is likely to have implications on technologies.

a. licenses for providing telecommunication services and establishing telecommunication networks;

b. mergers and acquisitions in the sector;

c. allocation of spectrum; and

d. insolvency and bankruptcy of licensees.

2 Exclusive privilege and applicability

The Draft Bill recognises the exclusive privilege of the central government in relation to telecommunication services, telecommunication network, telecommunication infrastructure and spectrum. It broadens the scope of the privilege that currently exists under Section 4 of the Telegraph Act, which is limited to establishing, maintaining, and working telegraphs.

The proposed framework intends to set up a new licensing regime for:

a. providing telecommunication services;

b. establishing, operating, maintaining, and expanding telecommunication network;

c. providing telecommunication infrastructure;

d. the possession of wireless equipment; and

e. using, allocating and assigning the spectrum.

This update provides a brief overview of the provisions introduced by the Draft Bill, the key issues, and the impact on the telecommunications sector if the Draft Bill is notified in its current form.

3 New definitions and their impact

Some of the key definitions and their impact are discussed below.

3.1 'Telecommunication' and 'message'

The Draft Bill intends to replace the outdated concept of colonial-era *'telegraph'*[1] by introducing a new definition for *'telecommunication'*. A closer look at the definition of *'telecommunication'*[2] and *'message'*[3] read together expands the scope of the ambit of *'telecommunication'* as it now includes the transmission, emission, and reception of any *'data stream'* or *'information'* intended for communication, by wired or other prescribed systems.

Given that the Draft Bill intends to regulate the provision of any services made available to users by *'telecommunication'*, the wide definitions could potentially lead to a number of new technologies provided over the cloud and using open protocol networks, falling within the meaning of *'telecommunication services'*.

3.2 'Telecommunication service' and 'broadcasting service'

The term *'telecommunication services'*[4] has been broadly defined as *'services of any description'* made available to users by *'telecommunication'*. While a similar definition of *'telecommunication service'* is provided under the Telecom Regulatory Authority of India Act, 1997 (**TRAI Act**), the proposed definition specifically includes services such as broadcasting services[5], internet-based communication services, and over-the-top (**OTT**) communication services.

Unlike the current framework, which only regulates the telegraph, the Draft Bill proposes regulation of telecommunication services. This would mean that all entities providing services to users through telecommunication (including OTT communication service providers, broadcasters, etc.) will be required to obtain a license from the central government in order to be able to provide these services in India.

---

1 Section 3(1AA) of the Telegraph Act defines "*telegraph*" as "*any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electro-magnetic emissions, Radio waves or Hertzian waves, galvanic, electric or magnetic means*."

2 Clause 2(17) of the Draft Bill defines "*Telecommunication*" as "*a transmission, emission or reception of any messages, by wire, radio, optical or other electro-magnetic systems, whether or not such messages have been subjected to rearrangement, computation or other processes by any means in the course of their transmission, emission or reception*."

3 Clause 2(9) of the Draft Bill defines "*Message*" as "*any sign, signal, writing, image, sound, video, data stream or intelligence or information intended for telecommunication*".

4 Clause 2(21) of the Draft Bill defines "*Telecommunication service*" as "*service of any description... which is made available to users by telecommunication*" and includes within its scope (amongst other things) e-mail, interpersonal communications services, broadcasting services, internet based communication services, machine to machine communication services and OTT communication services and *includes any other service that the central government may notify to be telecommunication services*.

5 Clause 2(4) of the Draft Bill defines "*Broadcasting services*" as "*a telecommunication service intended to be received by the general public either directly or indirectly*." Schedule 2 of the Draft Bill specifically lists the broadcasting services it intends to cover: (i) Direct to Home (**DTH**) Services; (ii) Community Radio Stations; (iii) FM Radio Broadcasting Services through Private Agencies; (iv) Internet Protocol Television (**IPTV**) Services; (v) Downlinking of Television Channels; and (vi) Uplinking of Television Channels.

a. *OTT and internet-based communication services*

The expanded definition of *'telecommunication services'* now, among others, includes OTT and internet-based communication services. This could result in a number of consumer-facing services like e-mail, messaging, bulletin board services, community platforms and the like, being brought under the licensing regime. It fails to consider the technical distinction between the *'service'* and the *'network'* layer and seeks to regulate these services in the same manner as core telecommunication services. Such a broad definition may hinder technological developments and innovations in the telecom/technology sector.

Further, since all internet-based communication service providers do not install or operate the network, imposing the same obligations on them as are imposed on network providers will impede their ease of doing business. Hence, the DoT must frame a form of light touch registration or approval process for service providers who do not operate in the network or carrier layer, if OTT communication services are retained within the purview of the definition.

b. *Broadcasting services*

The Ministry of Information and Broadcasting (**MIB**) regulates the cable services, DTH providers or broadcasters uplinking or downlinking channels in India. Currently, broadcasting service providers are required to obtain:

i. a license or permission from the MIB;

ii. the clearance of the Standing Advisory Committee on Radio Frequency Allocation (**SACFA**); and

iii. a wireless operating license from the Wireless Planning and Coordination Wing (**WPC**).[6]

The Draft Bill does not clarify whether DoT will only be regulating the frequency allocation or equipment (as we expect they would), or if a new set of licenses will now govern the provision of broadcasting services. If the latter is the case it would result in regulatory overlap and the duplicity of licenses, requiring the current licensing framework under the MIB to be revisited.

3.3 'Telecommunication network' and 'telecommunication equipment'

Telecommunication network[7] has been defined to include both telecommunication infrastructure[8] and telecommunication equipment[9]. Clause 3(2) of the Draft Bill empowers the central government to prescribe a licensing regime for establishing, operating, maintaining or expanding the telecommunication network.

---

6 WPC is a wing of the DoT and SACFA is a division of the WPC

7 Clause 2(20) of the Draft Bill defines "*Telecommunication network" as a "system or series of systems of telecommunication equipment, or telecommunication infrastructure, or both, including terrestrial or satellite networks or submarine networks, or a combination of such networks, used or intended to be used for providing telecommunication services, but shall not include customer equipment*

8 Clause 2(19) of the Draft Bill defines "*Telecommunication infrastructure*" as *"infrastructure used or capable of being used for the purpose of telecommunication, as listed in Schedule 5 of the Draft Bill."* Schedule 5 lists: (i) Telecommunication lines, including wire or wires used for the purpose of telecommunication, including copper cables, optical fibre cables and submarine cables, with any casing, coating, tube, or pipe enclosing the same, any appliances and equipment connected therewith for the purpose of fixing or insulating the same; (ii) Posts; (iii) Telecommunication towers by whatever name called (including mobile towers). (iv) Ducts; (v) Conduits; (vi) Cable corridors; and (vii) Any civil, electrical, or mechanical infrastructure used or capable for use for telecommunication as may be notified by the central government from time to time.

9 Clause 2(18) of the Draft Bill defines "*Telecommunication equipment*" *as "any equipment, appliance, instrument, device, material or apparatus, including customer equipment, that can be or is being used for telecommunication, and includes software integral to such telecommunication equipment."*

a. Telecommunication infrastructure

Currently, an infrastructure provider (**IP**) is only required to obtain an IP-1 registration to establish and maintain passive infrastructure. The active infrastructure can only be owned by a licensed Telecom Service Provider (**TSP**). In line with the current regime, the Draft Bill proposes a registration framework for providing telecommunication infrastructure. The inclusion of telecommunication infrastructure within the definition of telecommunication network has the effect of bringing telecommunication infrastructure under the licensing/authorisation regime that will be prescribed by the central government.

b. *Telecommunication equipment*

The definition of telecommunication network also includes telecommunication equipment, which in turn includes software integral to the equipment. Unless narrowly construed, this can have significant implications considering that all software used in telecom equipment/devices could potentially fall within the purview of operating the telecommunication network. That said, this will not include mobile operating systems as mobile phones are customer equipment that has been specifically excluded from the ambit of telecommunication network.

The fact that a license is now needed to operate telecommunication networks coupled with the expansive definition of telecommunication equipment could end up giving the DoT wide powers to impose licensing requirements on all entities who use or import equipment that do not currently fall within the definition of telegraph. That being the case, all the consequences of operating a telecommunication network will apply to telecommunication infrastructure service providers. This would mean that cloud service providers (**CSPs**) and data centre providers could fall within the scope of the Draft Bill as they would be seen to be the operators of a telecommunication network.

4 Key provisions

The Draft Bill attempts to streamline the existing telecommunication framework by consolidating the laws governing the telecom sector under one umbrella legislation. However, given the wide definition of message, telecommunication services, telecommunication network, and telecommunication equipment, these provisions may have wider implications, and in some cases, more than initially intended consequences.

4.1 Identity verification requirement

The Draft Bill seeks to impose an obligation on any entity granted a license under Clause 3(2) to unequivocally identify a person through a verifiable mode of identification, as may be prescribed.[10] Currently, the TSPs who are issued a license under the Telegraph Act are also required to conduct subscriber verification before service activation.[11] The compliance obligations could now lie on entities (i) providing telecommunication services such as OTT communication service platforms; (ii) providing telecom infrastructure to the users such as data centre providers or CSPs; (iii) operating telecommunication networks; and (iv) possessing wireless equipment.

4.2 Identify the sender of a message

The licensed TSPs, under the proposed framework, are required to identify the person sending a message using telecommunication services available to the user receiving such message.[12] The regulatory intent behind

10 Clause 4(7) of the Draft Bill

11 Section 4(3) of the Telegraph Act

12 Clause 4(8) of the Draft Bill

this provision is likely to enable a caller-id (CLI) like feature thereby preventing CLI masking or spam. However, given the broad definition of *'message'* and *'telecommunication services'*, this obligation could also apply to entities providing services such as email, OTT communication, etc.

4.3 Prohibition on possession of equipment that blocks telecommunication

No person will be allowed to possess or use any equipment that blocks telecommunication unless authorised by the central government.[13] While the intent seems to prohibit the use of jammers, given that the scope of telecommunication now stands enlarged to include other application-based services, this clause could also end up prohibiting the use of spam filters as they effectively block telecommunication. Anyone who possesses or uses any equipment that blocks telecommunication without an authorisation will be liable to imprisonment of up to three years and/or a fine of INR 50 lakhs and/or suspension of telecommunication service.

4.4 Spectrum reforms

Currently, the spectrum assignment in India is done through auctions and administrative process. The use and allocation of frequency is done per the National Frequency Allocation Plan 2018. To enable optimal spectrum utilisation, the Draft Bill proposes to codify the law for undertaking spectrum assignment by the central government. In line with global practice, the following reforms have been proposed.

a. There shall be three modes of spectrum assignment for telecommunication - auction, administrative process, and any other mode that may be prescribed. The Supreme Court has held[14] that spectrum is a natural resource and national asset belonging to the public at large and the auction method is the only rational transparent method of distribution of national resources. The Draft Bill provides the Government with the power to allocate spectrum administratively and in any other manner. In light of the Supreme Court's decision, the allocation of scarce national asset through administrative process or *any other manner* must be done in a transparent and clear manner.

b. A spectrum assignee may deploy new technology within its spectrum. This means a holder of 5G spectrum can deploy satellite-based communication services if the frequency used in 5G band can be allowed for satcom services.[15]

c. Sharing, leasing and trading of spectrum has been permitted. Unused spectrum can be returned.[16]

In line with the report of the Comptroller and Auditor General of India on *'Management of Spectrum',*[17] the Draft Bill contemplates a monitoring mechanism to track compliance of spectrum utilisation terms.

4.5 Right of Way

Typically, infrastructure projects such as telecommunication and power are faced with bureaucratic delay across multiple departments, resulting in serious delay in obtaining Right of Way (RoW) permissions despite efforts, hindering infrastructure rollouts. The Right of Way Rules, 2016 have failed to effectively address such bottlenecks and caused further hurdles in the rapid expansion of telecommunication infrastructure in India. To overcome this, the Draft Bill provides a clear regulatory framework through which RoW can be obtained in a uniform, non-discriminatory manner, for the purpose of establishing telecommunication infrastructure on

13 Clause 4(6) of the Draft Bill

14 Centre for Public Interest Litigation & Ors. v Union of India & Ors., Writ Petition (Civil) No 423 of 2010

15 Clause 5(7) of the Draft Bill

16 Clause 6 of the Draft Bill

17 PR-Press-Brief-Spectrum-Management-English-1-062d551d5565803-51431093.pdf (cag.gov.in)

public property and to facilitate access through private property.[18] It proposes that an application can be made by a facility provider that includes a licensee or its contractor, sub-contractor or agent (**Facility Provider**).[19] In the case of private property, if the occupier does not provide access to the private property, the central government can acquire the RoW from such persons to enable the Facility Provider to establish, operate and maintain such telecommunication infrastructure.[20]

The proposed reforms will greatly ease the obstacles that TSPs have to face while rolling out their infrastructure. This in turn will potentially result in a faster roll out of telecom services. However, the procedure or guidelines must be prescribed for instances where multiple entities exercise authority over a property such as public roads. While the Draft Bill requires public entities to grant permission expeditiously and only reject an application on limited substantive grounds,[21] what these grounds can be has not been clarified in the Draft Bill.

4.6 Liberalised framework for merger, de-merger and acquisitions

Under the existing framework, in case of a merger, de-merger or acquisition of a licensee under the unified license (**UL**) or the UL virtual network operator (**VNO**) license and the guidelines for transfer/merger,[22] prior written approval from the DoT is required for a transfer of the license(s). The Draft Bill does take away this requirement, merely stating that such restructuring must be as per applicable law.[23] The Explanatory Note to the Draft Bill clarifies that licensed entities under Clause 3(2) will only be required to inform the DoT subsequently. The transferee or the surviving entity will have to comply with all the terms and conditions applicable to the initial licensee or registered entity.

This is a welcome step as it takes away the requirement to obtain prior written permission each time. However, the broad applicability and scope of the Draft Bill could extend these requirements to all licensed entities under Clause 3(2) including OTT communication services providers to whom such regulatory reporting requirements were not previously applicable.

4.7 Conditions for insolvency and bankruptcy of licensees and assignees

The Draft Bill seeks to prescribe specific conditions for the insolvency of licensees or assignees. Clause 20(2) provides that a licensee or assignee undergoing insolvency proceedings can continue to operate if:

a. it continues to provide telecom services or operate the telecom network or utilise the assigned spectrum, as the case may be;

b. it does not default on the payment of dues payable under such license or assignment; and

c. it complies with additional or modified terms, as prescribed.

Similar provision exists under the Insolvency and Bankruptcy Code, 2016 (**IBC**), which was specifically amended in 2020 to provide that no license or permit granted by the central government will be suspended or

18 Clauses 13, 14 and 15 of the Draft Bill
19 Clause 12(1) of the Draft Bill
20 Clause 14(3) of the Draft Bill
21 Clause 13(2) of the Draft Bill
22 https://dot.gov.in/sites/default/files/DOC200214_0.pdf
23 Clause 19 of the Draft Bill

terminated on the grounds of insolvency, if there is no default in payment of current dues arising from the use of the license or grant during the moratorium period.[24]

There could be an overlap with the existing provisions under the IBC, which could be relied upon even for the telecommunication sector. Further, the Draft Bill also provides that if an entity cannot comply with the above conditions, then the assigned spectrum will revert to the control of the government.

4.8 Power to prescribe standards

Given the broad definition of *'telecommunication services'*, the fact that the central government can prescribe standards concerning how licensed entities can provide services to their customers could extend to OTT applications as well.[25] It is also currently unclear what kind of obligations may be prescribed under such standards.

4.9 Enhanced scope of interception and monitoring

While surveillance under the existing regulatory framework extends to messages transmitted through *'telegraph'*, the Draft Bill[26] expands the scope of the surveillance to all telecommunication services or telecommunication networks. The Draft Bill, as it stands currently, does not provide any safeguards for the exercise of this power. This would imply that Rule 419A of the Indian Telegraph Rules, 1951 (**Telegraph Rules**) would continue to apply and would also extend to services such as OTT services and all modes of online communications. Since the government could call for the identification of any message or class of messages, platforms deploying end-to-end encryption will be required to redesign their systems to comply with these provisions.

4.10 A modern and proportional penalty framework

Schedule 3 lists out the various offences, along with the penalty and the nature of such offences. Further, Schedule 4 also provides for a graded approach for the breach of terms and conditions of any license granted under Clause 3(2). This is a welcome change as it ensures that penalties are proportionate to the offence/violations committed providing much-required certainty in operating in this sector. The Draft Bill also proposes a new scheme of voluntary undertaking for breach of any terms and conditions of a license granted under the Draft Bill.[27] If the government accepts the voluntary undertaking, proceedings cannot be initiated by the government. However, any failure to comply with any such voluntary undertaking accepted by the central government will result in penalties as specified. This is akin to the concept of *'compounding'* and is a step in the right direction. It provides an opportunity for licensed entities under Clause 3(2) to remedy the default instead of directly initiating action for non-compliance. Such schemes help reduce defaults and burden on judiciary, encourage investment, and ensure sustainability for the telecommunication sector.

That said, the Draft Bill also penalises a person if they use a telecommunication service, network or infrastructure knowing or having reason to believe that such service, network or infrastructure does not have the requisite license or registration.[28] End-users are not commonly penalised in a regulatory regime such as

---

24 Explanation to Section 14(1)(d) of the IBC.

25 Clause 23 of the Draft Bill

26 Clause 24(2) of the Draft Bill

27 Clause 8 of the Draft Bill

28 Item 8, Schedule 3 of the Draft Bill

this, and this is likely to disadvantage entities using the services of licensed entities under Clause 3(2), resulting in an increase in their own due diligence, legal and compliance costs.

4.11 Miscellaneous

a. **Re-purposing existing funds:** The Telecommunication Development Fund (**TDF**) is proposed to replace the existing universal service obligations fund (**USOF**).[29] Apart from utilising the fund for ensuring access to quality information and communications technology services at affordable prices in rural and remote areas, the TDF will be used for research, development and introduction of new telecommunication services and technologies; and products, skill development and training in telecommunication.[30] Given the broad scope of *'telecommunication services'*, this would obligate all licensed entities to contribute towards the TDF as well.

b. **Dilution of the powers of the Telecom Regulatory Authority of India (TRAI):** The Draft Bill seeks to eliminate the requirement of seeking recommendations and back referencing recommendations from TRAI for (i) introduction of new service providers; and (ii) terms and conditions of a license to the service provider.[31] Removal of these provisions will dilute the current oversight mechanism exercised by TRAI and provide the DoT with increased power to arbitrarily control and shape policy.

c. **Introduction of a regulatory sandbox:** The telecommunication sector may have its own regulatory sandbox that will facilitate innovation and technological development in the sector.[32] A special framework with provisions for testing and collection of evidence is likely to emerge.

d. **Power of the central government to grant exemptions:** The central government has the power to provide an exemption from obtaining a license in public interest.[33] Given that telecommunication services include technological services provided over the infrastructure layer, it will be interesting to see if the central government will either amend the definitions or grant an exemption to such entities.

e. **Exemption for private telegraph to continue:** The existing telecom regulatory framework provides an exemption for establishing, maintaining or working of telegraph within the limits of a single building, compound or estate i.e., private telegraph.[34] Since the Draft Bill stipulates that all rules or guidelines under the current framework will continue unless inconsistent with the proposed law or until new rules supersede them, the exemption for private telegraph will continue till the rules are repealed.

f. **Power to take temporary possession:** Clause 24(1) of the Draft Bill provides the central or state government with the power to take temporary possession of any telecommunication services or network or infrastructure from a licensee or registered entity in the interest of public safety or in case of a public emergency. Given the enhanced scope of telecommunication services and telecommunication network, this could give the government the power to take possession of the software of majority of technology services like OTT platforms, cloud services etc., which in turn could have a widespread impact on the IT industry.

29 Clause 27 of the Draft Bill
30 Clause 29 of the Draft Bill
31 Clause 46(e)-(i) of the Draft Bill
32 Clause 32 of the Draft Bill
33 Clause 3(3) of the Draft Bill
34 Rule 472 of the Telegraph Rules

g. Internet shutdowns: In the event of a public emergency or in the interest of public safety, Clause 24(2) of the Draft Bill lets the central or state governments suspend communication via any telecommunication network. This introduces a *'clear internet suspension power'* for the first time. The existing legislation only provides for *'temporary possession*' of the licensed telegraphs, even though the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 (Suspension Rules), notified under the Telegraph Act govern the framework for internet shutdowns. Since the rules enacted under the current telecom regime will not be repealed, the Draft Bill indicates that the Suspension Rules will continue to exist as the framework for internet shutdowns in India.

5 Conclusion

The Draft Bill aims to keep pace with technological advancement and digitisation worldwide. It is a part of the larger reforms that the Indian Government has been actively introducing to embrace and adopt modern technologies that complement India's 5G ambitions and enable *'Industry 4.0'* use cases.

While the Draft Bill attempts to streamline the regulatory framework for an otherwise heavily regulated sector, it may have created some unintended consequences with its expansive scope. For instance, services that are otherwise not regulated have now been brought within the scope of telecommunication. The proposed framework also provides the government with extensive power regarding internet shutdowns as well as interception and monitoring of any telecommunication.

The Draft Bill requires many policy considerations to eliminate inherent ambiguities, simplify circular definitions, and avoid transgression to fields occupied by other laws and regulators. Further, with several provisions from the current license agreement being brought into the statute, it will now be important to see how the corresponding license conditions are overhauled. Hopefully, through stakeholder consultations, the final version of the law will serve its intended purpose of liberalising the telecommunication sector and catapulting India towards its digital ambitions of Industry 4.0 and a 1 trillion USD digital economy.