



DIGITAL TRANSFORMATION

Indian Telecommunications Bill

How the new bill could reshape the country's telecom regulations?

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Bill Analysis

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OVERVIEW

What is the Indian Telecommunication Bill, 2022?

A draft of the Indian Telecommunication Bill, 2022 was released for public comment by the Ministry of Communications late last month. The new bill seeks to replace the existing regulatory framework – the Telegraph Act, 1885, the Wireless Telegraphy Act, 1933, and the Telegraph Wires (Unlawful Possession) Act, 1950 – and provide a framework for regulating all aspects of the telecom industry, including service provision, networks, infrastructure, and spectrum, which is defined in the bill as the range of frequencies of radio waves. In short, this is a broad overhaul and modernization of India's telecom regulations to include new technology and communication platforms.

Why is this bill being introduced now?

This is a wide-ranging and long-needed update to the regulation of the telecom industry which had its latest revisions more than seventy years ago. The massive technological advances that have taken place since have introduced gaps into the regulatory frameworks that needed new legislation in order to be filled, particularly regarding internet infrastructure and digital communication options such as over-the-top (OTT) messaging services, which allow users to send messages and make video or audio calls using internet or cellular data to make video or audio calls.

The timing of this bill is also notable as it follows the withdrawal in August of the latest draft Personal Data Protection Bill, 2021 which had caused significant debate around the issues of the right to privacy in regard to online communication and personal data. These issues are being brought back to the public discussion table with the draft Telecom Bill; a deeper look at this issue and the surrounding criticism comes later in this paper.

KEY ASPECTS OF THE BILL

Focus on OTT messaging platforms

Much of the debate around this bill, if not necessarily much of the bill itself, has been focused on the expanded definition of telecom services. Under the new definition, electronic communications including email, video chat, and all other internet-and satellite-based communications have been brought under the umbrella of telecom services. Importantly, this includes OTT voice and messaging services. This means that platforms such as WhatsApp, Signal, Telegram, FaceTime, and others will be required to meet the same standards of compliance as traditional telephone companies.

This change had been pushed for a number of years by traditional TSPs. Industry leaders from companies like Vodafone, Jio, and Airtel have regularly argued that OTT platforms – which are providing the same communication services as TSPs – have cut into their revenue while using their networks and infrastructure and are allowed to do so without the burden of ensuring compliance with legal and policy requirements.

Under the new bill, OTT platforms would be required to follow the same licensing processes and additional regulations that TSPs have in the past, a move that industry leaders have hailed as an important step towards fairer competition.

New regulations and extension of government oversight

The draft Telecom Bill also lays out new regulations and expands the scope of government oversight of the telecom industry in several important and potentially impactful ways.

First, Section 24 of the bill states that any communications can be monitored, intercepted, and retained by the government as long as the appointed Central or State government officer deems it necessary “in the interest of the sovereignty, integrity or security of India, friendly relations with foreign states, public order, or preventing incitement to an offence.” Furthermore, under this same section, the government is granted the power to suspend communications between “any person or class of persons, or relating to any particular subject” sent over any network. The bill states that accredited journalists will not have their messages intercepted or detained, but that statement is immediately negated by the same qualification: unless the appointed officer deems it necessary.

Second, the bill would give the government the power to shutdown internet access or suspend any and all telecom operations at its discretion if it deems those actions necessary for the protection of public safety or national security. Finally, the bill takes much of the authority of the Telecom Regulatory Authority of India (TRAI) – the independent regulatory body responsible for ensuring fairness for companies and protections for consumers – and gives it to the Central government instead.

Consumer protections & infrastructure development

The proposed bill does have a number of positive consumer protection measures. It would introduce the option of a do-not-call list allowing users to opt-out of certain types of marketing calls and messages. Likewise, it would provide new regulations to combat spam and fraud calls and messages in part by requiring that the identity of the individual or company making calls or sending messages be available to the receiver; as such, a name would be displayed along with the number for all incoming telephonic and OTT communications.

Telecoms infrastructure is also a substantial part of the proposed bill along with providing the government the ability to incentivise and subsidise certain telecom companies.

These provisions should streamline the process of constructing new infrastructure on government-owned land and could speed up the process of technological development like 5G services.

CRITICISMS & CONCERNS BEING RAISED

Privacy and data protection

There have been two areas of the proposed bill which have come under criticism. The first of these is around personal privacy and data protection. Because the bill would bring OTT communications under the same umbrella of government oversight including, as mentioned above, the ability for the government to intercept and retain communications in the interest of national security, public safety, and other circumstances.

However, many of the most popular OTT platforms like WhatsApp and Signal use end-to-end encryption on all communications. As such, Section 24 of the proposed bill would require these platforms to break their encryption systems by government order. This is true despite the fact that "the minister in charge has stated that decryption will not be forced;" in reality, there is no way for the government to be able to read OTT communications without the creation of a backdoor in the encryption system.

When this issue was raised during deliberations over the IT Rules, 2021, officials from WhatsApp challenged the decryption requirement by arguing that that would force them to fundamentally alter or "break" the technology behind their platform, would infringe on users' right to privacy, and would harm their perception and user numbers as a result. Government officials responded by stating that the focus on encryption was misplaced, as privacy is protected by law rather than technology. This is an ongoing debate that will likely see legal challenges to the Telecom Bill from OTT platforms similar to those issued towards the IT Rules and proposed Personal Data Protection Bill.

Additionally, placing all internet communications under the same regulations as traditional telecoms would require companies like WhatsApp (Meta), Google, Apple (FaceTime), and others to go through the same licensing process. As such, they would be required to “unequivocally identify” all users; the Internet Freedom Foundation has argued this will “essentially strip away the user’s right to stay anonymous,” another part of the debate that surrounded the Personal Data Protection Bill.

Further criticism has focused on some of the wording used in the bill, particularly where the bill states that the government can intercept and retain communications “if satisfied that it is necessary or expedient to do so.” The issue is that “the Supreme Court in *Rangarajan v Jagjivan Ram* (1989) explicitly drew the contrast between the two and went on to describe how fundamental rights cannot be restricted on ‘the quicksand of expediency.’” As such, this particular aspect of the proposed bill appears to be in direct contradiction to established legal precedent. Other experts have argued that the proposed bill further ignores precedent on privacy protections established by the Supreme Court in *Justice K.S. Puttaswamy v Union of India* (2017).

Internet shutdowns and government oversight

The second aspect of the Telecom Bill that has garnered some criticism is also related to concerns or perceptions of government overreach, this time in regard to the government’s ability to control access to the internet. This provision, in Section 24 along with the regulations outlined above, would be the first time the government’s ability to control and restrict access to the internet – along with all other telecom services – would be codified into law.

Even without such a policy in place, internet access has already been shut down in various parts of the country more than 660 times since 2012; this practice could become more common should the bill pass into law.

Formalizing such powers would place India alone among major democracies around the world, and some critics have compared the resulting regulatory environment more closely with that in China. Along with potentially restricting personal communications and access to information, such an environment could hamper the ongoing growth of the technology sector necessary for the continued growth of a digital-first economy.

Drawing additional criticism is the proposed transfer of oversight and regulatory powers from the TRAI to the government itself. This would effectively change the TRAI from a regulator to a source of recommendations only by request of the government, potentially leading to a weaker regulatory system, poorer telecom services, and a loss of consumer protections. As with the potential for internet shutdowns, taken regulatory powers away from TRAI “would not be keeping with the international practice where telecom regulators are endowed with a greater degree of independence to ensure that investor confidence and consumer protection is maintained.” That said, the effectiveness of TRAI in protecting consumers has been on the receiving end of its own criticism and the real effects of these changes will remain to be seen.

CONCLUSION

Overall, the proposed new Telecom Bill is a necessary step towards updating and moderising the rules and regulations for a sector that is even more critical when including internet and OTT communication services. There are a number of positive aspects to the bill including the consumer protection measures meant to combat spam calls and messages, scams, and fraud. Likewise, the bill’s approach to infrastructure and assignment of spectrum including radio, 4G, and 5G networks should ideally lead to more expansive and reliable coverage, especially in rural areas.

At the same time, the criticisms that have been raised are indeed concerning, particularly given the comparisons to regulations made in Beijing. Without a comprehensive bill on personal data protection and digital privacy, the broad powers that the Telecom Bill would give to the government may put it directly at odds with the International Covenant on Civil and Political Rights, which explicitly notes privacy of correspondence and to which India has an “inviolable international law obligation.” While the bill is still open for comment for the time being, whatever form it ultimately takes will no doubt raise substantial debate, bring important questions to the forefront, and shape India’s digital-first society for years to come.

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