
GEN Z OTT'S BLEAK FUTURE AND DEFUNCT TRAI IN AMRITKAAL: DRAFT TELECOMMUNICATION BILL, 2022

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ABSTRACT

Telecommunications are at the center of the global world. India has taken a major step towards the development of telecom sector with the introduction of “Draft Telecommunication Bill, 2022”. The bill expands the definition of ‘telecommunication services’ to include the OTT communication services even when they don’t operate a telecom network, as a response to the demand for ‘same service, same rules’. The bill divests the Telecom Regulatory Authority of India (TRAI) of its major powers to manage tariffs, quality regulation standards, and dispute resolution mechanism and confers exclusive and arbitrary powers in the hands of the government. The licensing provisions and user identification mandates for OTT service providers will have detrimental consequences on the user base and finances which are already being regulated by IT Rules issued in 2021. Without a data protection mechanism in place and a fully autonomous body for close supervision, the provision for interception of messages is concerning. The government should recognize the distinctive operative mechanisms for OTT, thus, exclude them from the definition. Also, TRAI’s important status should be maintained to ensure the growth of the telecom market.

Introduction

Telecommunication network is at the heart of developing global information society. In an attempt to leapfrog the pace of development in the telecom sector, India is all set to introduce a consolidated legislation for the regulation of telecommunication services, the draft for which has been prepared titled “Draft Telecommunication Bill, 2022”¹. The bill seeks to replace outdated existing legislations governing telecommunication in India- which have been amended many times- The Indian Telegraph Act of 1885, The Wireless Telegraphy Act of 1933, and Telegraph Wires (Unlawful Position) Act of 1950. The 40-page bill proposes a landmark change by including Over The Top or OTT communication services under the definition of Telecommunication Services. The definition was amended as a response to the demand of traditional telecom service providers such as Airtel and Reliance Jio, for a level-playing field as OTT communications offer the same services without paying for license or spectrum. This argument, popularly known as ‘same service, same rules’², puts more stress on the end product rather than the means.

The bill’s all-embracing definition of telecom services is unhelpfully generic as it puts network and OTT services under the same umbrella. It brushes aside the essential difference between network and OTT services that, unlike other network services, OTT communications do not operate a telecommunication network but require internet access and subscription. Also, OTT services operate in the application layer used for message exchange by software applications as opposed to the network layer which is involved in sending data between different networks. The bill, in its current form, seeks the requirement of license for internet calling facilities like WhatsApp, Zoom, Google platforms, and OTT apps to operate in India.

Stopover for Blooming OTTs

Even though clarity on who owns the spectrum is provided by making the government the custodian of spectrum assets which will certainly reduce the disputes like the ones involving the dissolution of RCOM³, the bill retains the top-down approach of the ‘colonial’ legislation reinforcing the control and command of the government while pointing to the return of the ‘License Raj’⁴. In an attempt to provide for cyber frauds,

¹ Draft Indian Telecommunication Bill, 2022, Department of Telecommunications, Ministry of Communications, Government of India, accessed September 5, 2023, <https://dot.gov.in/sites/default/files/Draft%20Indian%20Telecommunication%20Bill%2C%202022.pdf>.

² "Regulating OTT Apps: Same Rules for Same Service or Not?" Economic Times Telecom, August 24, 2021, accessed September 5, 2023, <https://telecom.economictimes.indiatimes.com/news/regulating-ott-apps-same-rules-for-same-service-or-not/96016576>.

³ Reliance Communication Limited v. State Bank of India, (2019) 2 SCC 384.

⁴ Maj Gen PK Mallick, "Draft Telecom Bill 2022: A Step in the Right Direction, but Concerns Remain," Vivekananda International Foundation, November 25, 2022, 12, accessed September 7, 2023,

the bill demands that the licensed service providers must “unequivocally identify” all of their users, or Know-Your-Customer (KYC), and let the recipient know the identity of the user sending messages via telecom services. The need to prevent cyber fraud is important, but with a base of more than 70 million subscribers⁵, identification of each user would be a long and resource-draining process for the OTT service providers causing excessive economic losses and erosion of users’ trust. The bill also allows the interception of messages by the government which unnecessarily interferes with the privacy of the users without fulfilling the necessity and proportionality mandates laid down in the Supreme Court verdict in *Puttaswamy Vs Union of India*⁶, 2017. This will provide loopholes for crimes, like blackmailing, to creep in if people’s identity is easily accessible. Also, more clarity is required about the ability of the users to have their data erased and forgotten. The bill has adverse impacts on the user base of end-to-end encryption messaging platforms like WhatsApp and Signal as it allows the government to block or intercept the transmission of or disclose certain messages in the interests of public safety and national security⁷. This would mean that the companies would be required to make significant changes in their security infrastructure adding to the overhead costs. At the national level, trespassing on the anonymity of users and excessive data collection and retention by several entities or by the government itself in the absence of a data protection framework in the country is concerning.

In developing from an era of one monopoly telecom service provider viz. the government to an era of a highly competitive telecom sector, the laws ought to change accordingly. The tremendous growth of India’s digital economy in the previous decade can be attributed to the compartmentalization of legislations regulating content and carriage which augmented the growth of both traditional as well as OTT service providers. However, the rationale behind bringing OTT communication services under telecom regulation is not clear. This bill wrongly assumes that network and OTT services are peers to each other when both demand special treatment. The OTT platforms offer services directly through the Internet, bypassing cable or satellite systems and the need for spectrum.

The IT intermediary Rules⁸ issued in 2021 already regulate the OTT services with appropriate safeguards for consumers and accountability on the part of the platforms. Another set of regulations for OTTs would

<https://www.vifindia.org/brief/2022/november/25/Draft-Telecom-Bill-2022-A-Step-in-the-Right-Direction-but-Concerns-Remain>.

⁵ Boston Consulting Group, "Shaping the Future of Indian M&E," accessed September 8, 2023, <https://web-assets.bcg.com/c8/2e/f9064b1644d9b4d5553a51a01200/shaping-the-future-of-indian-m-e.pdf>.

⁶ K.S. Puttaswamy and Anr. vs. Union of India (2017) 10 SCC 1.

⁷ Mallick, *supra* note 4, at 11.

⁸ Ministry of Information and Broadcasting, "IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021,"

certainly prove to be detrimental to the revenues and the telecom market by conferring the government exclusive rights and privileges to decide, develop, and operate apps. With 7-9% market share⁹, tightening the grip on OTT would grossly impact the entire app ecosystem and deter the growth of the economy and small-scale businesses. The licensed telecom service providers enjoy exclusive rights such as the right to acquire spectrum and the right of way, all of which are not enjoyed by Internet-based services which is a neutral, general purpose space over the Internet encouraging innovations with minimal barriers to entry. The burdensome licensing along with sharing of revenues would certainly discourage startups and innovation in the OTT field, making the expected rise of the digital economy to \$800 billion by 2030¹⁰, unrealistic.

Shift in Power Dynamics of DoT and TRAI

Countries like the United States and the United Kingdom have a full-fledged autonomous body to regulate the telecom market; however, the dilution of the powers of the Telecom Regulatory Authority of India (TRAI) in the bill seems totally out of sync. TRAI is of prime importance in regulating the telecom sector while ensuring quality services along with helping the sector bloom. Once the bill becomes an Act, the government will have the authority to waive off penalties and fees of telecom service providers while it is the task of TRAI to manage the tariffs. The bill empowers the government to allocate the spectrum and prescribe quality standards for services which TRAI has to comply with. Also, any dispute can be referred to ADR mechanisms if the government is of such opinion, which surpasses the dispute resolution mechanism by TRAI. The bill mandates TRAI to abide by the policies of the government but the government will not be under an obligation to provide for the demands of TRAI. Removing the back referencing and referencing between the Department of Telecom (DoT) and TRAI, leaves TRAI defunct and signals back to the monopolistic market by the government.

In the next 25 years or Amritkaal, the government claims to better the lives of citizens and minimize government interference in public life but the bill fulfills none. The provisions of the bill will have far-reaching consequences not only for the established OTT service providers but for the budding startups also which have not yet been able to recover from the losses caused by the pandemic. The bill confers exclusive

<https://mib.gov.in/sites/default/files/IT%28Intermediary%20Guidelines%20and%20Digital%20Media%20Ethics%20Code%29%20Rules%2C%202021%20English.pdf>.

⁹ Business Standard, "Indian OTT Industry Poised for Growth, But Are Low Prices Sustainable?" podcast audio, January 4, 2022, accessed September 6, 2023, https://www.business-standard.com/podcast/current-affairs/indian-ott-industry-poised-for-growth-but-are-low-prices-sustainable-122010400106_1.html.

¹⁰ Business Standard, "Digital Economy to See Exponential Growth to \$800 bn by 2030: FM," March 11, 2022, accessed September 8, 2023, https://www.business-standard.com/article/economy-policy/digital-economy-to-see-exponential-growth-to-800-bn-by-2030-fm-122031101141_1.html.

and arbitrary powers¹¹ to the government while overriding the fundamental rights of the users and jeopardizing the authority of TRAI. The government needs to address that OTT demands its unique conditions to operate and grow which are different from the traditional telecom service providers let alone the concerns over data confidentiality; encryption and protection. The KYC and licensing requirements, as envisaged in the bill will have a deleterious impact on the privacy and security of the OTT service providers as well as the users, both online and offline.

Conclusion

If the bill is to be made future-ready then it must take care of the needs of the present generation and lay down favorable laws to augment the growth of services like OTT while continuing with the light touch framework. India witnessed the delay in deploying 5G and 6G services, the latest versions of Wi-Fi, satellite broadband, and advanced cloud-based services, owing to the restrictive and burdensome licensing and regulations. Imposing more regulations for OTTs would encroach upon the light-touch regulatory framework that the DoT seeks to opt for OTT services. The licensing regime for OTT service providers would present an existential threat to foreign investment and limit the growth of budding startups as it makes the business harder by increasing compliance for stakeholders.

The overbroad definition of ‘telecommunication services’ should be limited to the service providers using the telecom network and thus, exclude OTT service providers which are already complying with the IT intermediary rules. Keeping in view the security and safety of the people, the KYC mandates and provisions for the interception of messages should be removed unless a proper mechanism for the protection of data is laid down. Without any such infrastructure, these provisions will only cause breach of trust in the people using OTT along with a high possibility of misuse of data. In such a situation, the government must delegate its powers to allow close supervision but lessening the powers of TRAI is highly concerning. The presence of TRAI as a specialized body ensures that every player in the field is checked so that productivity could be at its level best. However, the provisions of the bill grossly encroach upon the powers of TRAI to such an extent that its existence would only mean blind compliance of the government with no scrutiny which makes it obsolete. Hence, in the best interest of the present and future generations, recognition should be

¹¹ Manu Sebastian, "Department of Telecommunication Draft Indian Telecommunication Bill: Telecom Regulatory Authority of India (TRAI)," Live Law (blog), February 23, 2022, accessed September 5, 2023, <https://www.livelaw.in/columns/departement-of-telecommunication-draft-indian-telecommunication-bill-telecom-regulatory-authority-of-india-trai-212576>.

given to the distinctive operative mechanisms of OTT communication services and the essential role of TRAI.