

**Comments on the Draft Telecommunications Bill, 2022 ("Telecom Bill")**

**By email**

On September 21, 2022, the Indian Ministry of Communications' Department of Telecommunications ("DoT") released a draft Telecommunications Bill, 2022 ("Draft Bill"). As part of the pre-legislative consultation process, the DoT has invited comments on the Draft Bill from stakeholders.

We welcome the opportunity to provide our views on the Draft Bill and participate in the legislation building process for the telecom sector in the digital age. In this regard, we have consolidated the responses of our industry connects along with our views on the Draft Bill. The comments are set out in the table below.

Section No.	Subject Matter	Comments
Section 2 (21) - Definitions	Definition of "Telecommunication services", to mean service of any description including <i>broadcasting services, electronic mail, voice mail, voice, video and data communication services, audiotex services, videotex services, fixed and mobile services, internet and broadband services, satellite based communication services, internet based communication services, in-flight and maritime connectivity services, interpersonal communications services, machine to machine communication services, over-the-top (OTT) communication services</i> which is made available to users by telecommunication, and includes any other service that the Central Government may notify to be telecommunication services;	<p><b>In summary, the proposed definition of 'Telecommunications Service' is generic, especially for a 'public utility' regulation. It may engender regulatory confusion, overlap, and unintended consequences that impede digital businesses.</b></p> <p>a. <b>Carriage vs. Content</b> Presently, the definition of telecommunication services does not extend to services that are offered <i>via</i> telecom resources. The proposed definition would (in-effect) encompass any form of communication channels / platforms (or even individuals) operating on or through the Internet. There is lack of clarity on what is intended to be regulated – only "<i>access</i>" to telecom resources, or even on "<i>content</i>" over them? In our view, what should be regulated is the channel/pipeline that carries content, not the content itself or any business activity that uses such channel for its lawful activities.</p> <p>One way to interpret the wide definition is that even parties relying on telecom resources provided by telecom service providers can be required to undertake a licensing process. This may lead to innovative startups such as M2M / IoT businesses, etc., being required to register as telecom players; where the intent of the law is surely not to radically expand the licensing and regulation field.</p>

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<b>Section 3 – Licensing of Telecommunication Services</b>	<p>The Central Government may exercise its privilege under sub-section (1) by granting to any entity, in the manner as may be prescribed:</p> <p><i>(a) license for providing telecommunication services or establishing, operating, maintaining and expanding telecommunication networks;</i></p>	<p>b. <b>Licensing vs. Authorisation:</b> While we note that the intent behind such a wide umbrella may be to develop a regulatory framework for Internet platforms operating without any oversight, a licensing regime on Over-the-top Services ("OTT") would impede innovation in this sector<sup>1</sup>. Going back to the licensing regime may be detrimental to Indian startups who wish to contribute in this field. A general authorisation, contingent on certain security conditions, etc., may be more appropriate<sup>2</sup>. This is also more suitable to a space that is likely to harbor a number of competing service providers, which will increase customer choice.</p> <p>A licensing mechanism should be applied only for 'intrusive' activities (e.g., acquiring property for right of way, installing equipment, handling spectrum, etc.) instead of a blanket mandate for all entities in the ecosystem. Alternatively, a simplified framework could be devised which classifies the telecommunication services basis the nature of activities and accordingly stipulate licensing / authorization requirements (if required)<sup>3</sup>; this mechanism may be built-in to the 'voluntary undertaking' provision of the Draft Bill i.e., to require entities to submit voluntary undertaking detailing basic information about the entity, its country of origin, and nature of operations, etc.</p>

<sup>1</sup> For e.g., the United States of America issued an executive order dated July 09, 2021, which directed regulators (including telecom) to (inter alia) *promulgate rules that promote competition, including the market entry of new competitors* (Section 2(d)(ii) - <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>). Similarly, the Australian Competition and Consumer Commission also recommended (from a market competition perspective) continuing with the 'ex-post intervention' (only when necessary) as opposed to pre-emptive regulation for OTT services (6.2.2, Section 6 - Issues requiring monitoring and potential future action, Communications Sector Market Study - <https://apo.org.au/node/139446>).

<sup>2</sup> Multiple jurisdictions have opted for a 'general authorisation' regime instead of licensing requirements. For reference: (i) the Australian Communications and Media Authority requires 'carriers' to obtain a license whereas carriage service providers are exempt from licensing requirements ([https://www.acma.gov.au/about-carriers-and-carriage-service-providers#:~:text=CSPs%20do%20not%20need%20a, and%20Service%20Standards\)%20Act%201999](https://www.acma.gov.au/about-carriers-and-carriage-service-providers#:~:text=CSPs%20do%20not%20need%20a, and%20Service%20Standards)%20Act%201999)); (ii) New Zealand's telecom legislation only requires telecommunication service providers to submit undertaking disclosing certain information (<https://www.legislation.govt.nz/act/public/2001/0103/latest/DLM3877893.html>); and (iii) Regulated Service Providers are only subject to disclosing certain information prior to commencement of business under United Kingdom's telecom regulatory regime ([https://www.ofcom.org.uk/data/assets/pdf\\_file/0030/238962/unofficial-consolidated-general-conditions-june-2022.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0030/238962/unofficial-consolidated-general-conditions-june-2022.pdf)).

<sup>3</sup> To draw a parallel, the Consumer Protection (E-commerce) Rules, 2020 issued by the Ministry of Consumer Affairs, Food and Public Distribution only requires entities to demonstrate on-soil presence but does not require them to obtain any approval prior to offering the platform to consumers in India. Similarly, the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 issued by the MIB, requires publishers of news and current affairs and publishers of online curated content does not require prior registration with the MIB and only submit certain information relating to the publisher (Para 3 of Public Notice issued by the MIB dated May 26, 2021 - <https://mib.gov.in/sites/default/files/Furnishing%20of%20Information%20by%20Digital%20Media%20Publishers.pdf>).

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		<p>c. <b>Jurisdictional overlap:</b> Publishers of Online Curated Content are presently regulated under Part 2 of the Information Technology (Intermediary Guidelines and Digital Media Code of Ethics) Rules, 2021 ("<b>Digital Media Rules / 2021 Intermediary Protection Rules</b>"), governed by the Ministry of Information and Broadcasting ("<b>MIB</b>"); these include audio-visual streaming platforms, which are also construed to mean OTT Platforms. Separately, Ministry of Electronics and Information Technology governs information technology and the Internet<sup>4</sup>. As such, the final form of the Draft Bill should ideally clarify the nature of OTT services covered under the law, to prevent inconsistencies with other regulations. Please consider that, where a sector is already regulated by another regulation, it should not have to comply again with requirements under telecom laws (e.g., broadcasting, etc.). 'Double regulation' would be an unconscionable burden on the industry.</p> <p>d. <b>De-regulation:</b> Over the past few years, the DoT has successfully steered towards deregulation of activities which do not require the entity to operate and/or maintain telecom networks. The removal of registration requirements for 'Other Service Providers' denoted an evolution of the regulations per the developments in the telecom industry. However, mandatory licenses could disincentivize Indian and global players whose role is limited to ancillary activities and/or only to act as a link between businesses, from participating in India's digital ecosystem.</p> <p>e. <b>Unintended Consequences:</b> The overbroad nature of the definition does not clarify the nature of entities that may be subject to licensing requirements. For instance, various entities offer technological products to facilitate transmission of communication over the Internet (e.g., providing software kits to implement a peer-to-peer messaging customer support feature); it is unclear if the licensing requirements would be limited to the entity offering such messaging features, or if these would trail down to the</p>

<sup>4</sup> Government of India (Allocation of Business Rules) 1961 (as amended up to 14 August 2020), <https://cabsec.gov.in/writereaddata/allocationbusinessrule/completeaobrules/english/1 Upload 2391.pdf> (Point 1, Page 55).

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		<p>technology service provider as well<sup>5</sup>. In our view, licensing and regulation should primarily apply to entities offering access or carriage services.</p> <p><b>f. Increasing costs of compliance:</b> Globally, jurisdictions have opted to not impose extensive regulations on OTT services and have only prescribed limited compliances<sup>6</sup>. The same is true of India, when one considers the self-regulatory bent of the 2021 Intermediary Protection Rules<sup>7</sup>. Given the potential of developing technologies in this market, it would be prudent to keep compliances at the minimal. Any regulation that increases the cost of doing business by having to appoint additional officers, open local offices, etc., will lead to an operational disincentive for Indian startups and global businesses alike.</p> <p><b>g. Multiplicity of Regulations:</b> Entities that offer activities which fall under the scope of multiple regulations may in particular elect to limit their level of involvement in the Indian market. For instance, a peer-to-peer messaging network subject to the licensing requirements under the Draft Bill would simultaneously have to observe due diligences under the 2021 Intermediary Protection Rules to avail the safe harbor protection. In comparison to the prevailing global de-regulation inclination, the mandate to comply with regulations under different domains prior to offering platforms in India may potentially be seen as market entry hurdles instead of a conducive environment for business.</p>

<sup>5</sup> Contrary to the proposed telecom regulatory regime, the framework for other sectors does not extend to pure technology service providers and is limited to those with 'skin in the game'. For instance, the Reserve Bank of India's Guidelines on Payment Aggregators and Payment Gateways impose prior authorization requirements on payment aggregators, but do not such on payment gateways (entities that only provide technological infrastructure) - <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11822&>.

<sup>6</sup> The United Kingdom does not stipulate prior authorization requirements for OTT platforms - Department for Digital, Culture, Media and Sport, Audience Protection Standards on VoD services, April 28, 2022 [https://www.gov.uk/government/consultations/audience-protection-standards-on-video-on-demand-services/audience-protection-standards-on-video-on-demand-services#ensuring-vod-services-are-regulated](https://www.gov.uk/government/consultations/audience-protection-standards-on-video-on-demand-services/audience-protection-standards-on-video-on-demand-services#ensuring-vod-services-are-regulated;); the European Union's European Electronics Communications Code (EECC) does not subject "number independent interpersonal communications services" ("NIICS") to any licensing/authorization requirements (NIICS is analogous to OTT Services, peer to peer messaging platforms, etc.); Israel's government passed amendments to the telecommunication law to reduce licensing requirements and omit OTT Services from the scope of licensing - The Communications (Telecommunications and Broadcasting) Law (Amendment No. 76), 5722-2022, as published [here](#) (in Hebrew).

<sup>7</sup> Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021

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		To water down the burden of sectoral regulations, MIB and MEITY may consider (collectively) developing a cross-sectional comprehensive mechanism to regulate pervasive technologies whose functionality can be deployed for diverse use-cases. This may also have relevance in future technologies depending on AI or blockchain technology, that may benefit from a finite set of regulations rather than being forced to pick and choose compliance with one or more regulator.
<b>Emergency Powers</b> - Sections 24 and 25	Lists the powers of the central government in situations of Public Emergency or Public Safety and National Security, External Relations or War	<p><b>Any expansion of the Government's surveillance powers should not negate current statutory and juridical protections available to persons. The impact of this law on data privacy should be studied and established.</b></p> <p>a. <b>Surveillance Powers:</b> In accordance with the existing framework, the Draft Bill accords the central government surveillance and Internet shut down powers. However, in our view, the reasonability of these powers is determined by the rules and procedures that permit exercising these powers. The final form of the Draft Bill should include language which affirms that such powers will be within contours of the fundamental rights of individuals and regulations issued in this regard should reflect such principles, to ensure that one's fundamental rights are not diluted.</p> <p>Considering OTT Services may be brought under the Draft Bill's ambit, the central government's power to <i>taking over the control and management of, or suspending the operation of, or entrusting any authority of the Government to manage any or all of any telecommunication services, or any telecommunication network or telecommunication infrastructure connected with such telecommunication services</i><sup>8</sup> warrants stipulating legal justifications for exercising this broad power, and also defined limitations to prevent its arbitrary use.</p> <p>b. <b>Privacy and Adequacy:</b> Any law that provides for access to and disclosure of personal data should square with the judgment of the Hon'ble Supreme Court of India in</p>

<sup>8</sup> Section 25(1)(f) of the Draft Bill.

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		<p><i>Puttusamy</i><sup>9</sup> ("<b>Privacy Ruling</b>"), as well as the intent of the erstwhile draft personal data protection bill. The final telecom law should be in consonance with the protections accorded to Indian citizens in current and proposed laws, to avoid any discrepancy and conflict. In particular, the rights of data subjects should be enshrined and protected. The Privacy Ruling confirmed that Article 21<sup>10</sup> of the Constitution of India, 1950 ("<b>Indian Constitution</b>") guarantees each individual the fundamental right to privacy. However, it clarified that the right to privacy may be curtailed by a government action, provided it meets the three-fold requirement of: (a) legality, i.e., the action must be sanctioned by law; (b) need, i.e., the proposed action must be necessary in democratic society for a legitimate aim; and (c) <u>proportionality, i.e., the extent of such interference must be proportionate to the need for interference</u>. As noted earlier under point 'a', some of the measures listed under the surveillance provisions<sup>11</sup> of the Draft Bill may not qualify the test of proportionality. For instance, the right to take over the management of a private entity<sup>12</sup> for public safety concerns may be construed as an excessive measure. As such, the sub-ordinate legislation in this regard should (<i>inter alia</i>) describe the nature of instances which would merit exercise of powers under these provisions, the procedure to be adhered, oversight mechanism to monitor use of such powers, limitations, rights of entities affected, and validity of such measures.</p> <p>India has also emerged as a global IT hub and resource over the past decade. It acts as a processing conduit for the data of numerous foreign entities, which includes personal data of foreign individuals. For instance, the Europe Union has prescribed assessment requirements to determine the extent of the surveillance powers of the countries to which personal data of their individuals is transferred to and restricts transfers to</p>

<sup>9</sup> Justice K.S. Puttaswamy (Retd.) & Anr. Vs. Union of India & Ors. (AIR 2017 SC 4161)

<sup>10</sup> Right to life and personal liberty.

<sup>11</sup> Section 24 and 25 of the Draft Bill.

<sup>12</sup> Section 24(1) of the Draft Bill.

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		countries which excessive powers <sup>13</sup> . The European Data Protection Board ("EDPB") <sup>14</sup> has already described India's surveillance laws as overreaching. While the EDPB's view is largely derived from indirect inferences and review of certain non-relevant laws, the widened scope of surveillance powers under the Draft Bill may deter data transfers to India, thereby harming the Indian IT industry.
<b>Regulating Span Messages - Section 33</b>	Classifies commercial communication as "specified messages".	<p><b>The proposed definition of <i>telecommunication services</i> read with the concept of <i>specified messages</i> brings internet-based communication under regulation. Any regulation in this regard should protect an entity's ability to capitalize on its existing relations with customers and not stifle means of generating business in the future<sup>15</sup>.</b></p> <p><b>a. Existing regime should continue:</b> Under the Telecom Regulatory Authority of India's Telecom Commercial Communications Customer Preference Regulations, 2018 ("CCCPR 2018"), monitoring obtaining prior consent of recipient rests with the telecom service provider<sup>16</sup>. No commercial communication can be made except as per customer preferences and per telecom subscriber consent registered under the 2018 regulations. This regime is quite new, with a number of provisions of these laws that have come into force only in 2019 or later. In view of the recency of such laws, it may not be beneficial to the telecom industry to issue a replacement set of regulations that does away with the mandates of the current regime. Frequent changes in the regulatory framework may cause confusion in interpretation and non-compliance as a result; especially when Indian and overseas players have just got used to the current system.</p>

<sup>13</sup> On July 16, 2020, the Court of Justice of the European Union ("EU") issued its judgment in *Data Protection Commissioner v. Facebook Ireland Limited, Maximillian Schrems* (C-311/18) ("Schrems II"). That decision invalidated the EU-US Privacy Shield on the basis that the national security laws of the United States of America ("U.S.A") (namely, Foreign Intelligence Surveillance Act Section 702 ("FISA") and Executive Order 12333 ("Executive Order")) interfered with the fundamental rights of EU data subjects and prevented the U.S.A from offering an equivalent level of protection to EU data subjects as that offered in the EU - <https://curia.europa.eu/juris/document/document.jsf?sessionid=9534CCE77670DB36750F5CC25A3AC28A?text=&docid=228677&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1416320>.

<sup>14</sup> EDPB's report titled Government access to data in third countries (November, 2021 edition) - [https://edpb.europa.eu/system/files/2022-01/legalstudy\\_on\\_government\\_access\\_0.pdf](https://edpb.europa.eu/system/files/2022-01/legalstudy_on_government_access_0.pdf).

<sup>15</sup> Consequences of these regulations merit analyzing under in context with the central government's commitment to [support local businesses, ease of doing business norms, promoting entrepreneurial culture in rural India](#) and the [digital India movement \(to improve digital literacy, developing collaborative digital platforms and connecting rural India\)](#).

<sup>16</sup> Para 6(2)(b) of the CCCPR 2018.

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		<p><b>b. Consent:</b> The CCCPR and spam message regulation provisions under the Draft Bill require obtaining prior consent of the recipient to receive commercial communications. Simultaneously, there are consent requirements for collections and processing of personal information of individuals in India under the IT SPDI 2011 Rules<sup>17</sup> (and proposed data protection bill)<sup>18</sup>. While the prior consent under these laws serve separate purposes, it may be worth considering allowing implementation of a unified mechanism to regulate such consents uniformly, especially for telecommunication services that facilitate commercial communications and use personal data for such purposes.</p> <p><b>c. Exempt B2B communications:</b> If the regulatory scope of commercial communications were to be extended to Internet-based communications, it should contain corresponding benefits for the industry when it comes to business communications. This restriction should not be extended to entities enabling its customers (viz., businesses) utilize their services to in-turn communicate with their customers (viz., end recipients).</p> <p><b>d. No email licensing:</b> Email is a ubiquitous way of communications that is utilized by all sections for business and personal use. If email is regulated in the same way as telecom resources, it should be by the means of general authorisation and not licensing. The latter may mean that even private individuals are required to register to send emails to their clients, further putting a damper on economic activity.</p>

<sup>17</sup> Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011.

<sup>18</sup> Personal Data Protection Bill, 2019 issued by the Ministry of Electronics and Information Technology.



The boundaries separating the scope of software services, internet-based businesses and communications are fine. As such, nuanced laws would enable to identify their place and responsibilities in the digital ecosystem. In parallel, regulations should complement the fluid nature of the emerging technologies.

We hope these recommendations are helpful. Please feel free to reach out to us for any assistance required in respect of the formulating the future legal framework of the telecommunications industry in India.

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