Monday, November 08, 2022

BSA'S SUBMISSION ON THE DRAFT INDIAN TELECOMMUNCIATIONS BILL, 2022

BSA | The Software Alliance (**BSA**)[1] appreciates the opportunity to provide comments to The Department of Telecommunications (**DoT**) on the draft Indian Telecommunications Bill, 2022 (**Bill**)[2].

At the outset, we commend DoT's efforts to revamp the Indian telecommunication's regulatory and legal framework, with the objective of promoting innovation and allowing for regulatory flexibility given the rapid technological development in the telecom sector.

For DoT to achieve its objective of boosting growth within the telecommunication sector and providing adequate safeguards for users in this evolving digital landscape, it is important that DoT focus on liberalizing the existing regulatory framework, as opposed to extending its application to IT and Digital services and products, and other non-telecom service providers. In its current form, the Bill will effectively make DoT the licensor for IT and Digital services and products, based on broad definitions for "telecommunications" and "telecommunication services" as provided in the Bill. Rather than having its intended impact of enhancing growth in the telecom sector, this proposal may have a negative impact on India's digital ecosystem.

Here is a summary of our key concerns with the Bill which we elaborate below in our submission:

1. An overbroad definition of "telecommunication services" covers a wide range of IT and Digital services and products within a licensing requirement.
2. The Bill is not aligned to the policy approach followed in other jurisdictions; and
3. There are regulatory overlaps with existing laws and policies.
4. Any standards issued under the Bill should be based on internationally recognized standards.
5. The power to temporarily take control of telecommunication services and infrastructure should be appropriately limited.

We **recommend** the following to DoT:

a) **Recommendation 1:** The Bill should clarify that the definition of "telecommunication service" does not include IT and digital services and products. Specifically, the Bill should exclude

---

[1] BSA is the leading advocate for the global software industry before governments and in the international marketplace. Our members are among the world's most innovative companies, creating software solutions that help businesses of all sizes in every part of the economy to modernize and grow. With headquarters in Washington, DC, and operations in more than 30 countries, BSA pioneers compliance programs that promote legal software use and advocates for public policies that foster technology innovation and drive growth in the digital economy.

BSA's members include: Adobe, Alteryx, Altium, Amazon Web Services, Atlassian, Autodesk, Bentley Systems, Box, Cisco, CNC/Mastercam, CrowdStrike, Dassault, Databricks, DocuSign, Dropbox, Graphisoft, IBM, Informatica, Intel, Kyndryl, MathWorks, Microsoft, Nikon, Okta, Oracle, Prokon, PTC, Rockwell, Salesforce, SAP, ServiceNow, Shopify Inc., Siemens Industry Software Inc., Splunk, Trend Micro, Trimble Solutions Corporation, TriNet, Twilio, Unity Technologies, Inc., Workday, Zendesk, and Zoom Video Communications, Inc.

[2] Indian Telecom Bill, 2022 accessible at: https://dot.gov.in/sites/default/files/Draft%20Indian%20Telecommunication%20Bill%2C%202022.pdf

services that are delivered over the internet or the application layer (such as but not limited to electronic mail, video and data communication services, and other internet-based communication services) from the definition of "telecommunication services".

b) **Recommendation 2:** The notification of additional types of telecommunication services should be subject to defined guardrails – including the establishment of a clear criteria for notification of services within the Bill, regulatory impact assessments, the holding of public consultations and inter-ministerial deliberation prior to notification.

Under the Bill, telecommunications service is defined broadly to cover "services of any description", made available by telecommunication.[3] Telecommunication, is in turn is defined as the transmission or reception of any messages, including all information through wired or wireless electro-magnetic means.[4] Notably, the definition of telecommunications services expressly includes broadcasting services, electronic mail, video and data communication services, internet-based communication services, interpersonal communications services, machine to machine communication services, OTT services, in addition to telecom services like fixed and mobile services, internet and broadband services, satellite based communication services.[5] In addition, the central government can notify any other service to be a telecommunication service.[6]

Here are BSA's concerns with these proposals:

1. **Overbroad scope of "telecommunication services":** The definition of "telecommunication services" covers a broad range of IT and Digital services and products including OTT and internet-based communication services. The Bill further increases the scope of "telecommunication services", by empowering the government to notify additional categories of telecommunication services. The definition of "telecommunications" is also wide-ranging and can be interpreted broadly to cover a wide range of data transmission or reception activities. As a result, the exact nature of entities impacted by the definition of telecommunications services is overbroad.

   A wide range of services, expressly mentioned in the definition of telecommunication service to other non-communication digital services, and even IT enterprise and B2B service providers, such as Infrastructure-as-a-Service (IaaS) and Software-as-a-Service (SaaS) providers, can qualify as telecommunication services. As a result, it could impose mandatory licensing requirements and related obligations (such as know-your-customer (KYC) obligations, legal interception requirements and adherence to specific standards, amongst others) upon various entities even when they are not TSPs.

   Such an overbroad definition might also impact enterprise service providers and business-to-business service providers. There is a risk that such entities, and potentially any service offered over the Internet, would become subject to the rules and obligations meant for telecom service providers (**TSP**) which would be a disproportionate and unintended consequence.

2. **Unaligned with global regulatory frameworks:** The position taken in the Bill is an outlier, compared to other jurisdictions. A licensing requirement for IT and Digital services and products, specifically OTT and internet-based services – as set out in the Bill – is uncommon. Governments of other countries are typically unwilling to extend the scope of what constitutes a telecom service to cover IT and Digital services and products. Rather, most jurisdictions clearly differentiate between entities that set up the telecom networks; provide communications intermediation, connectivity, or internet/mobile

[3] Clause 2 (21), The Bill.
[4] Clause 2 (17), The Bill.
[5] Clause 2 (21), The Bill.
[6] Clause 2 (21), The Bill.

access through telecom networks; and entities that provide content and facilities over telecom networks and services. The latter are not subject to stringent telecommunication requirements or licenses, as explained below:

a. The European Union's European Electronics Communications Code (**EECC**) recognizes the fundamental differences between "number-based interpersonal communications services" (**NB-ICS**), such as those interconnected with the public telephone network,[7] and "number independent interpersonal communications services" (**NI-ICS**), which includes non-interconnected OTT communications apps that ride over the network.[8] The latter, i.e., NI-ICS is not subject to a licensing or authorisation requirement.[9]

b. The Australian federal telecommunications law regulates 'carriers' – entities that set up telecom networks – and carriage service providers, who provide internet and connectivity services based on the infrastructure of the carrier.[10] Carriers require a license from the government,[11] while carriage service providers must only follow the applicable law.[12] Content service providers, who use carriage services to provide content to the public, do not require a license and are subject to lighter rules than both carriers and carriage service providers.[13] Moreover, the Australian Competition and Consumer Commission also recommended against the equal regulatory treatment of traditional telecom services and OTT communication services.[14]

c. In South Korea, value-added communication services – including OTT services – are excluded from the definition of telecom services,[15] and consequently, a licensing requirement.[16]

d. In the United Kingdom, while both electronic communication networks and electronic communication services are subject to a general authorization regime[17] – content services are excluded from this requirement.[18] The UK's communications regulator – the Ofcom – also determined that OTT communication services are different and not substitutable to traditional telecom services.[19]

3. **Regulatory overlaps with existing policies:** By extending the definition of telecommunication services to cover IT and Digital services and products, the Bill might regulate technology services which are under the purview of Ministry of Electronics of Information Technology (**MeitY)** and which are structurally different from telecommunication services

    a) IT and Digital services and products are already subject to extensive regulation under the extant legal framework. These services and the entities are already regulated under various

---

[7] Article 2 (6), EECC.
[8] Article 2 (7), EECC.
[9] Para. 44, EECC.
[10] Section 41, Telecommunications Act (Australia).
[11] Section 41, Telecommunications Act (Australia).
[12] About carriers and carriage service providers, Australian communications and media authority, https://www.acma.gov.au/about-carriers-and-carriage-service-providers#:~:text=CSPs%20do%20not%20need%20a,and%20Service%20Standards)%20Act%201999
[13] Section 97, Division 4, Telecommunications Act (Australia). Except in the case of content service providers which provide gambling promotional content require a license to operate, *see* Rule 4, Broadcasting services (Online content service providers Rules), 2018.
[14] https://apo.org.au/node/139446
[15] Article 2 (13), Telecommunications Business Act (South Korea).
[16] Article 6 (1), Telecommunications Business Act (South Korea).
[17] General conditions of entitlement, Ofcom, https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/telecoms-competition-regulation/general-conditions-of-entitlement
[18] Department for Digital, Culture, Media and Sport, Audience Protection Standards on VoD services, 28 April 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
[19] Department for Digital, Culture, Media and Sport, Audience Protection Standards on VoD services, 28 April 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

laws by MeitY. According to the Allocation of Business Rules[20], the MeitY is responsible for developing policies for information technology and the internet. These services qualify as an 'intermediary' under the Information Technology Act, 2000 (**IT Act**), and must comply with various provisions under the IT Act including obligations for data protection[21], cooperation with government authorities[22], due diligence requirements and cyber-incident reporting.[23]

b) Additionally, there are distinct structural differences between IT/Digital services and telecom services which require that they be differently regulated. For example, Telecom networks/services and IT or Digital service providers operate in different layers, i.e., network layer and application layer. They provide services and functionalities on different devices and compete for different users. Typically, each layer is regulated differently based on its functionality and its unique considerations. The Indian government, through the National Digital Communications Policy 2018 (NDCP), itself has proposed an unbundling of the application and network layers – indicating that they should be subject to differential regulations.[24]

4. **Simplify the licensing and regulatory framework:** While the consultation paper issued by the DoT on 'the need for a new legal framework governing telecommunication in India' called out the simplification of the regulatory framework as a key objective, the provisions set out in the Bill do not advance that objective.[25] The Bill instead leaves important details to be issued through subordinate legislation in the future and extends licensing requirements to IT and digital services and products, and other non-telecom service providers. This is unlike global trends, in which other governments are moving towards deregulating the telecom sector.[26] In a letter to the EC, the governments of 10 countries stated that telecom deregulation would reduce the financial and regulatory burden on the telecom industry and promote infrastructure and investment.[27] The International Telecommunication Union also recommends that regulators reduce unnecessary regulatory burdens and minimise regulatory hurdles in the telecom sector for similar reasons.[28] Moreover, to achieve the Bill's objective of simplifying the regulatory framework, the DoT should ensure that business models which do not provide core telecom services are not subject to licensing or authorization requirements. For instance, data centre operators should be allowed to construct, operate, and manage their own captive fiber networks – without being subject to licensing requirements themselves or the existing restrictions on infrastructure providers. We urge the government to move towards simplifying the existing licensing framework and ease the burden of licensing compliances.

5. **Prescription of standards:** The Bill proposes that the government may issue standards for telecom equipment, services, network, and infrastructure, manufacturers, importers, and distributors of telecom equipment. The government can also issue standards on the "reliability of the provision" of telecom services which is new under the Bill. This expands the scope of the government's powers to

---

[20] 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
[20] Section 43A, Information Technology Act, 2000 ("IT Act").
[21] Section 43A, Information Technology Act, 2000 ("IT Act").
[22] Section 69, IT Act.
[23] Section 79, IT Act; Rule 3, Information Technology (Intermediaries Guidelines) Rules, 2011.
[24] National Digital Communications Policy 2018, https://dot.gov.in/sites/default/files/EnglishPolicy-NDCP.pdf, page 13.
[25] Consultation Paper on, 'Need for a new legal framework governing telecommunication in India, DoT, page 2 https://dot.gov.in/sites/default/files/Consultation%20Paper%20final%2023072022-1.pdf?download=1
[26] General conditions of entitlement, Ofcom, https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/telecoms-competition-regulation/general-conditions-of-entitlement; Article 2 (22), EECC; About carriers and carriage service providers, Australian communications and media authority, https://www.acma.gov.au/about-carriers-and-carriage-service-providers#:~:text=CSPs%20do%20not%20need%20a,and%20Service%20Standards)%20Act%201999; Register as a telecommunications provider – Who needs to register?, CRTC, https://crtc.gc.ca/eng/comm/telecom/registr2.htm
[27] Joint letter from Belgium, Czech Republic, Denmark, Estonia, Ireland, Finland, Lithuania, Poland, Sweden and United Kingdom, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/496221/Joint_letter_to_the_Commission_270116_Electronic_Communications_Framework_Review.pdf, page 2.
[28] International Telecommunications Union, Report of the Chairperson on the ITU Global Symposium for Regulators, 2004, page 20, https://www.itu.int/ITU-D/treg/Events/Seminars/GSR/GSR04/documents/ChairpersonReport.pdf.

issue standards – especially when contextualized within the broad definitions of telecom services and telecom infrastructure. To ensure that India continues to have access to leading edge technology and innovations from around the world, such standards, when issued, should be based on internationally recognized standards and not on bespoke domestic standards. Testing and certification from internationally accredited laboratories should similarly be accepted as evidence of conformance to such standards without the need for duplicative testing and certification in India. Such measures should not amount to market access barriers for international providers and vendors. This will also enable telecom service providers to deploy global standard products in time and factor for network differentiation which will promote competitiveness, thereby making access to the Internet affordable. The government's policy should also encourage and enable India's participation in global standard initiatives, where multi-stakeholder consultations drive developments. This will facilitate interoperability and allow India to ensure country specific concerns and requirements are recognized and included.

6. **Provision for public emergency or public safety:** The Bill provides the government with broad powers to take temporary possession of telecom services, network, or infrastructure during public emergencies. It can also suspend Internet services during a public emergency. As is the case in many jurisdictions around the world, such broad powers are usually applicable only to licensed telecommunications infrastructure provider within a country and are not meant to be applicable to general IT and digital service providers.

   The overbroad definition of telecommunication services will extend licensing and authorization requirements over the wide range of IT and digital services. In case of non-compliance, the Bill also sets a significant and disproportionate penalty (includes both imprisonment and hefty fines) on these service providers. This will pose significant risk for IT and Digital businesses in India and will likely throttle the Internet-based innovation as well as the nascent Indian start-up ecosystem. It can also discourage or reduce global investments in India's growing digital economy.

   We urge DoT to consider the recommendations and concerns discussed above.

   We thank you for the opportunity to provide recommendations to the consultation process. If you require further information in respect of this submission, please contact Mr. Venkatesh Krishnamoorthy at venkateshk@bsa.org.

   Sincerely,

   BSA | The Software Alliance