The Telecommunications Act, 2023 – A step towards Digital India

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1. Introduction

- On 24 December 2023, the Telecommunications Act, 2023 (Telecom Act) was enacted into law upon receiving Presidential assent. It was introduced as a Financial Bill and passed by the Lower House of the Indian Parliament (i.e., the Lok Sabha) and the Upper House of the Indian Parliament (i.e., the Rajya Sabha) on 20 December and 21 December 2023, respectively. The Telecom Act grants the Central Government (Government) the discretion to notify the commencement of different provisions at different times.
- Once brought into force, the Telecom Act will replace and repeal the erstwhile regulatory framework governing telecommunications in India, i.e., the Indian Telegraph Act, 1885 (Telegraph Act) and the Indian Wireless Telegraphy Act, 1933 (WTA).
- The Telecom Act provides a consolidated regulatory framework for provision of telecommunication services; establishment, operation, maintenance, or expansion of telecommunication network; possession of radio equipment; and assignment of spectrum, in India.
- This update covers the key provisions of the Telecom Act and their implications.

2. Key definitions and their impact

2.1 Telecommunication, message and telecommunication service.

- The term '*telecommunication*' is defined to mean the transmission, emission or reception of any '*message*' by wire, radio, optical or other electro-magnetic systems. The term message has been defined broadly to include '*text*', '*image*', '*video*', '*sound*', '*data stream*', '*intelligence*' or '*information*' sent through telecommunication.
- The term '*telecommunication service*' has been broadly defined to mean *any service* for telecommunication. This could be read generally to include a wider variety of services wherein messages (as defined above) are sent through telecommunication.

2.2. Telecommunication network and telecommunication equipment.

- '*Telecommunication network*' is defined to include both telecommunication equipment and infrastructure, including terrestrial or satellite networks, and submarine networks. The definition of '*telecommunication equipment*' has been widened to include new elements such as '*radio station*', '*radio equipment*', '*user equipment*' as well as any '*software*' and '*intelligence*' integral to such telecommunication equipment. The Telecom Act does not define infrastructure or draw any distinction between active or passive telecommunication infrastructure.
- The broad definition of telecommunication equipment, read along with the definition of telecommunication network and telecommunication, is likely to cover telecommunication equipment with software services or virtual network elements within the ambit of the Telecom Act.

2.3. Telecommunication identifier

- A '*telecommunication identifier*' is defined as a series of digits, characters and symbols, which can uniquely identify a user, a tele-communication service, telecommunication network, telecommunication equipment or even an authorised entity. The Government can allot telecommunication identifiers for use by authorised entities and also allow for the use of identifiers allotted by international bodies.
- The Telecom Act presently does not specify what identifiers will be covered within the definition. However, considering its broad scope, conventional identifiers such as internet protocol addresses or headers numbering resources issued by the telecommunication service providers for sending commercial communications are also likely to fall within its ambit.

3. Key provisions

3.1. Scope of the Telecom Act

- Unlike the Telegraph Act and WTA, which governed physical '*telegraphs*' and provision of services using the telegraphs, the Telecom Act deals with regulation of telecommunication services. This is a marked differentiator from the Telegraph Act and is potentially a step towards an un-bundled telecom regulatory regime that could regulate infrastructure, networks, and services under different authorisations similar to other regulatory regimes such as in Singapore.
- It could be interpreted widely to include the delivery of any messages through any means of telecommunications, including through Voice over Internet Protocol (VoIP).

3.2. Extraterritorial applicability

- The Telecom Act will have extraterritorial applicability in respect of any offence or contravention provided under the statute that is committed outside India by any person involving (a) telecommunication service *provided in India*; or (b) telecommunication equipment or telecommunication network *located in India*. For instance, the offences and penalties under the Telecom Act will extend to any act of remote tampering or unauthorized access/interception of the telecommunication equipment or network from outside India.

3.3. Shift from a licensing regime to an authorization-based regime

- Currently, the DoT issues different type of licenses with specific authorizations. These licenses provide for the substantive terms and conditions that the telecommunication service provider needs to comply with. In seeking to simplify this process and promote ease of doing business, the Telecom Act omits the language in the Telegraph Act which vested the '*exclusive privilege*' to establish, maintain and work a telegraph upon the Government, and to grant '*licenses*' for this purpose. Instead, the Telecom Act uses the term '*authorisation*', which is a permission (by whatever name called) provided by the Government under the Telecom Act.
- Any person who intends to: (a) provide telecommunication services; (b) establish, operate, maintain or expand telecommunication network; or (c) possess radio equipment, will be required to obtain an *authorisation* from the Government based on such terms and conditions, and fees and charges, as will be prescribed by the Government. The Government can also issue such authorisation in the Continental Shelf and the Exclusive Economic Zone of India, subject to the maritime laws and international laws accepted and ratified by India.

3.4. Existing licenses

- Licenses, registrations or permissions previously granted for the provision of telecommunication services or telecommunication network will continue to remain valid for: (a) the specified duration, where a validity period is specified in the license; or (b) for a period of five years from the appointed day, where a validity period is not provided. Such license, registration or permission holder will have to eventually migrate to the relevant authorisations to be issued under the Telecom Act. Any exemption from licensing granted under these erstwhile laws will continue under the Telecom Act, unless otherwise notified by the Government.

3.5 Assignment of spectrum

- The Telecom Act recognises spectrum as a national asset owned by the Government on behalf of the people. Accordingly, any person who intends to use spectrum will require an assignment from the Government, and such assignment of spectrum will be in accordance with the Telecom Act and the National Frequency Allocation Plan (NFAP) notified by the Government from time to time. Currently, the NFAP 2022 provides for the use and allocation of frequencies for telecommunication services.
- The Telecom Act primarily:

a. streamlines the process of spectrum allocation and prescribes for two modes for spectrum allocation: (i) auction; or (ii) administrative process for certain purposes as identified in the First Schedule of the Telecom Act. The First Schedule specifically lists global mobile personal communication satellites, radio backhaul for telecommunication services, in-flight and maritime connectivity, and ground station for satellite control within its ambit. This provides much-needed clarity on the mode of spectrum allocation for satellite services, which will now be administratively allocated;

b. allows the Government to 'harmonise' or 're-farm' any assigned frequency range to enable more efficient use of the spectrum;

c. provides for flexible and technologically neutral use of the spectrum and allows the Government to assign a particular part of spectrum already assigned to other entities to promote optimal use. This will aid the rapid expansion of 5G and 6G connectivity in India;

d. permits sharing, trading, leasing and surrender of spectrum, subject to the terms and conditions to be prescribed;

e. provides for a monitoring mechanism to track compliance of spectrum utilisation terms, which is in line with the report of the Comptroller and Auditor General of India on the management of spectrum.

- Notably, the Government can amend the First Schedule by notification, if administrative assignment of spectrum serves public interest, for the performance of government functions, or where auction is not the preferred mode of assignment of spectrum due to technical or economic reasons. Any such Government notification must be laid before each House of the Parliament for consideration.
- In the Centre for Public Interest & Ors. v Union of India & Ors., the Supreme Court deemed the first-come- first-serve basis for spectrum and license allocation to be arbitrary and against public interest and advocated for an equitable approach such as publicised auctions. Since then, spectrum for telecommunication access service has been allocated through auctions. Administrative allotment has been carried out, among other things, for VSAT operators, captive users and network licenses requiring use of spectrum. This practice of provisional allotment has caused uncertainty among users, leaving a regulatory lacuna for future challenges. The Telecom Act bridges this gap by providing statutory backing to spectrum assignment either through auction or administrative process.

3.6. Notification of standards

- The Telecom Act allows the Government to prescribe standards and conformity assessment measures in respect of (a) telecommunication services; (b) telecommunication network; (c) manufacture, import, distribution and sale of telecommunication equipment; (d) cybersecurity for telecommunication services and network; and (e) encryption and data processing in telecommunication. Given that the definition of telecommunication equipment includes user equipment and software and intelligence integral to the telecommunication equipment, device manufacturers or software providers will potentially be required to comply with the prescribed measures.

3.7. Prescription of security measures

- The Government can, through rules, prescribe measures to protect and ensure cybersecurity of telecommunication network and services. Such measures may include collection, analysis and dissemination of traffic data that is generated, transmitted, received or stored in telecommunication networks in India. Given that the broad definition of traffic data encompasses data generated, transmitted or stored in telecommunication networks including data relating to type, routing etc., entities such as cloud contact center service providers are also likely to be subject to compliance with measures that may be prescribed in this regard.

3.8. Identity verification requirement

- Authorised entities providing telecommunication services notified by the Government will be required to identify persons to whom telecommunication services are provided using prescribed verifiable biometric- based identification tools. The Telecom Act does not specifically mention the form this biometric-based identification would take.

3.9. Right of way

- The Telecom Act introduces measures to address bottlenecks in obtaining Right of Way (RoW) permissions in India. It provides a clear statutory framework through which RoW for establishing, maintaining or expanding telecommunication network can be obtained in a uniform, non-discriminatory manner by the authorised entities or their contractors/agents (i.e., the facility provider). Apart from seeking RoW from public entities, the Telecom Act also allows authorised entities to apply for RoW with private persons. If the occupier of the private property does not accept the application, then in public interest, the Government may determine that such facility provider be permitted the RoW, subject to terms and conditions, and compensation as may be prescribed.
- The Telecom Act provides that telecommunication network installed on any property will not be considered part of such property and will not be subject to any claims, liquidation, or any encumbrances. Further, any person while exercising their right to deal with their property in a manner that is likely to cause damage or interrupt or interfere with the telecommunication network or services will be required to provide prior notice to the facility provider, Government, or any notified authority. Any dispute in relation to RoW will be dealt with by the district magistrate or any other authority (as notified by the Government), within whose jurisdiction the property is located.
- Given that the provisions related to RoW are now accounted for in the Telecom Act, the existing Indian Telegraph Right of Way Rules, 2016 will be applicable to the extent they are not inconsistent with the provisions provided in the Telecom Act or superseded by new rules issued under the Telecom Act.

3.10. Interception and monitoring

- Largely, the Government's power to intercept or take possession of telecommunication network during occurrence of any public emergency or in the interest of public safety is retained. In addition to this, the Telecom Act allows the Government to:
  a. intercept, detain or require disclosure of any messages from '*any person*' or '*any telecommunication equipment*' in an intelligible format; and
  b. prescribe measures for national security, friendly relations with foreign States, or in the event of war by way of notification in relation to *inter alia* (i) taking over the control and management of telecommunication services or network; (ii) standards to be adopted by the authorised entities and manufacturer, importer or distributor of telecommunication equipment.
- The Telecom Act gives wide discretion to the Government to specify the duration of such measures and does not provide any safeguards for the exercise of this power by the Government. This would imply that Rule 419A of the Indian Telegraph Rules, 1951 (Telegraph Rules), pertaining to Government's power to issue directions for interception of messages, and the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 would continue to apply to the extent they are not inconsistent with the provisions of the Telecom Act or superseded by new rules.

3.11 Adjudicatory mechanism

- The Telecom Act introduces a three-tiered adjudicatory regime for civil contraventions.
  a. *Tier I*: An Adjudicating Officer (AO) is empowered to conduct an inquiry, impose civil penalties (i) in respect of breach of any terms and conditions of an authorisation or assignment of spectrum; or (ii) violation of certain provisions provided in the Telecom Act upon receipt of complaint or *suo motu*.
  b. *Tier II*: An appeal against the AO's order will lie before the Designated Appeals Committee (DAC). The DAC will comprise of members from the executive branch of the Government.
  c. *Tier III*: An appeal from the DAC's decision will lie before (i) the Telecom Disputes Settlement and Appellate Tribunal (TDSAT) for matters regarding breach of terms or suspension/revocation of an authorisation/assignment; or (ii) a civil court in case of orders regarding contraventions of certain provisions which are outlined in the Third Schedule of the Telecom Act such as possessing radio equipment without authorisation or contravention of certain provisions for which no penalty or punishment is provided.
- The Telecom Act provides that the AO and DAC shall be digital by design and function as digital offices, as far as possible. It also provides for a scheme of voluntary undertaking for breach by the authorised entity or an assignee of the spectrum (a) of terms and conditions of an authorisation or assignment; or (b) for contravention of certain provisions for which no penalty or punishment is provided. The acceptance of voluntary undertaking will result in a bar on proceedings, or be considered a mitigatory measure in determining civil penalties depending on the stage of determination at which it is provided.
- Under the Telecom Act, the TDSAT will only have appellate jurisdiction over disputes on breach of terms or suspension/revocation of an authorisation/assignment, as discussed in para 3.11 c., above.

3.12. Civil penalties

- Civil penalties can be imposed under the Telecom Act for (a) breach of the terms and conditions under which the authorisation/assignment have been granted, as detailed under the Second Schedule of the Telecom Act; or (b) certain specified contraventions, for example, violation of any measures for protection of users, or violations for which no penalty or punishment is provided, as detailed under the Third Schedule of the Telecom Act. Based on the recommendations of the AO, the Government may also suspend, curtail or revoke an authorisation or assignment unless the substantial violation is remedied to the satisfaction of the Government.

- The Second Schedule of the Telecom Act provides for a graded approach in determining penalties on the basis of severity of the breach of terms and conditions by any authorised entity or assignee. Penalties for such breach range from a written warning to a monetary penalty of up to INR 5 crore (~USD 600,000) depending on the severity. Factors that may be considered by the AO in determining the penalty include the nature, gravity and duration of the contravention, number of persons affected and level of harm suffered, and mitigating measures undertaken by the contravening party. The Government can increase the civil penalties by way of an amendment, although such elevated sum cannot surpass INR 10 crore (~USD 1.2 million).

3.13. Offences

- The Telecom Act adopts a relatively stringent approach in respect of offences. All offences are cognizable and non-bailable, and depending on the nature of the offence, the offender may face imprisonment of up to three years, a fine of up to INR 2 crore (~USD 240,000), or both. The Telecom Act penalises actions such as unauthorised provision of telecommunication service or establishment of telecommunication network, causing damage to critical telecommunication infrastructure or telecommunication networks other than critical telecommunication infrastructure, possession of unauthorised telecommunication blocking equipment, tampering with telecommunication identifiers, and violation of measures under any notification issued by the Government for national security.

4. Miscellaneous

4.1. Exemptions

- The Government can prescribe different terms and conditions of authorisation for different types of telecommunication services, telecommunication network or radio equipment, or grant an exemption from authorisation altogether, if such an exemption is necessary in public interest.

4.2. Savings and exemption for private telegraph to continue

- In addition to the validity of existing licenses, registrations and permissions, the Telecom Act clarifies that all rules, and orders made under the current framework will continue to operate, so far as they are not inconsistent with provisions of the Telecom Act or superseded by new rules. Given this, the existing exemptions provided for the establishment, maintenance, or working of private telegraph will also continue until the Telegraph Rules are repealed. The requirement in relation to mandatory testing and certification of telecommunication equipment (MTCTE), as introduced in 2017 under the Telegraph Rules, will also continue to operate until the Telegraph Rules are repealed.

4.3. Restructuring of authorised entities

- Currently, prior written approval of the DoT is required for merger, demerger, acquisition and other forms of restructuring which involves transferring of the license to a new entity. However, the Telecom Act simplifies this regime in enabling authorised entities to undertake any merger, demerger or restructuring, subject to laws in force without requiring prior approval of the Government. The emerging new entity that holds the authorisation post such corporate actions will be required to comply with the terms and conditions applicable to the original authorised entity, as well as any additional terms and conditions prescribed by the Government. The Guidelines for Transfer/Merger of various categories of Telecommunication service licenses/authorisation under Unified License, which were issued by the DoT in this respect in 2014, will continue to operate to the extent that they are not inconsistent with provisions of the Telecom Act. The Telecom Act, however, does not prescribe conditions for instances when an authorised entity becomes insolvent. Given this, the provisions of the Insolvency and Bankruptcy Code, 2016 will continue to apply to such entities as well.

4.4. Critical telecommunication infrastructure

- Notably, the Government has the power to declare any telecommunication network, or any part thereof, as a critical telecom infrastructure, where any disruption in the said network may have a debilitating impact on national security, economy, public health or safety. The Government can prescribe standards, security practices, upgradation requirements, and procedures for critical telecommunication infrastructure.

4.5. Re-purposing existing funds

- The Universal Service Obligation Fund (USOF) created under the Telegraph Act will be repurposed as the Digital Bharat Nidhi under the control of the Government. Apart from utilising the fund for ensuring affordable, widespread access to telecommunication services, the Digital Bharat Nidhi will be used for research, development and introduction of new telecommunication services and technologies.

4.6. Introduction of regulatory sandboxes

- The Telecom Act provides for the creation of regulatory sandboxes by the Government in order to encourage and facilitate innovation and technological development in the sector. The Telecom Act specifies that spectrum for creation of one or more regulatory sandboxes will be administratively allocated.

4.7. Protection of users

- The Government may notify rules providing for measures for user protection. Such measures may include obtaining prior consent of users for receiving '*specified messages*', maintaining '*Do Not Disturb*' registers, reporting mechanisms to enable users to report malware or specified messages received without consent, and establishment of an online grievance redressal mechanism for redressing user grievances. Such rules will be framed in consonance with the regulations framed by the Telecom Regulatory Authority of India such as the Telecom Commercial Communication Customer Preference Regulation, 2018. The Government may set up or approve online dispute resolution mechanisms for resolving disputes between users and authorised entities, and authorised entities providing telecommunication service would be required to participate in such processes.

4.8. Duties of users

- The Telecom Act also imposes certain duties on users, such as the duty to not furnish false particulars, suppress material information, or impersonate another person; and to share information required under the Telecom Act. A user is defined as a legal or natural person using or requesting telecommunication service.

4.9. Power to search and call for information

- An officer authorised by the Government under the Telecom Act will have the power to search any building, vehicle, vessel, aircraft or place where there is reason to believe unauthorised telecommunication network or telecommunication equipment or radio equipment, related to an offence under the Telecom Act, is kept or concealed and take such network or equipment in its possession. The Telecom Act does not prescribe any procedures or safeguards to be followed while exercising the power to carry out search and seizure. Additionally, authorised officers of the Government can also issue directions requiring an authorised entity or

- assignee to provide information, document or record relating to a telecommunication service, telecommunication network or spectrum usage under their control, which the Government considers necessary in relation to any pending or apprehended civil or criminal proceedings.

5. Conclusion

- India is one of the fastest growing economies in the world, with a huge potential for telecom driven innovation and value creation. With the proliferation of 5G network and associated networking technologies, India is poised to unlock new opportunities in the telecom and digital space. The Telecom Act is in line with the National Digital Communications Policy, 2018 and aims to put India at the forefront of global technological advancements by replacing the dated telegraph-centric laws. It aims to embrace digitisation by utilising the full potential of the country's telecom networks. It also forms an integral part of the larger reform initiatives by the Indian Government, such as the Digital Personal Data Protection Act, 2023, the Digital India initiative, and the proposed Digital India Bill.

- To this end, the Telecom Act has introduced several changes. An authorisation model has been introduced for the provision of telecommunication services and for operating telecommunication equipment and networks, as against the earlier licensing regime for establishment, maintenance or operation of telegraph. It also attempts to streamline aspects essential to the growth of the industry by introducing a tiered structure for dispute resolution with an emphasis on digital offices and providing clearer conditions for spectrum allocation and RoW permissions. It has also introduced statutory basis for undertaking cybersecurity measures by authorised entities for protection and ensuring cybersecurity of telecommunication networks and telecommunication equipment.

- At the same time, until the regulations under the Telecom Act are released, there will be uncertainty for existing players as well as new entrants as to the manner in which the new law covers their operations. Concerns have been expressed as to whether over-the-top (OTT) services, which were thought to be covered under other laws such as the proposed Digital India Bill, would also be covered within the scope of the Telecom Act. Original equipment manufacturers will have to assess the impact that new standards and norms notified for telecommunication equipment will have on their products. Further, the transition from the current license-based regime to the proposed authorisation model is not yet clear.

- While the full impact of the proposed changes can only be assessed once the necessary rules and regulations are prescribed, there is little doubt that this is a substantive reform of a critical sector of the economy.

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