



# THE TELECOMMUNICATIONS ACT 2023

## INTRODUCTION

The Telecommunications Act, 2023 ("**Act**") aims to amend and consolidate the law relating to development, expansion and operation of **telecommunication services, telecommunication networks, assignment of spectrum** and for matters connected therewith or incidental thereto. The Act received presidential assent on December 24, 2023 and will come into force on a date which the Central Government will notify in the Official Gazette and has enabling provisions for graded implementation.

The Act will repeal The Indian Telegraph Act, 1885 ("**Telegraph Act**") (except Part III that will still apply for laying of transmission lines under Section 164 of the Electricity Act, 2003), and the Indian Wireless Telegraphy Act, 1933 ("**Wireless Telegraphy Act**") and make amendments to the Telecom Regulatory Authority of India (TRAI) Act, 1997 ("**TRAI Act**"). Further, the Telegraph Wires (Unlawful Possession) Act, 1950 which aims to regulate the possession of telegraph wires has not been repealed and therefore still in effect, hence unauthorized possession of copper wires of specified diameter will continue to remain an offence.

The Act extends existing rules and orders made under the Telegraph Act and Wireless Telegraphy Act (so long as they are not inconsistent with the Act or superseded by new rules), thereby, maintaining status-quo on the existing framework for areas like right of way, legal interception and exemptions applicable to certain devices.

Further, the Act also contains grandfathering provisions to avoid disruption of services in the industry and to maintain continuity of the licenses, spectrums, and exemptions already granted under the previous regime. This also includes any rules, orders and executive actions taken under the previous regime, unless the same is inconsistent with or superseded by the Act. It is also relevant to mention that a transition period of five years or the validity period of the existing license (in case of licenses with limited validity) has been provided to the entities which already had licenses under the previous regime. Such entities will have to conduct a cost-risk-benefit analysis to check whether they should transition to the new regime immediately or shift post expiry of the maximum transition time provided under the Act.

Although the Act is designed as a measure of consolidating the legal regulatory framework governing the telecommunications sector, we note that significant reliance has been placed on delegated legislation by empowering the Central Government to make rules at many instances. This includes rule making powers for creating exceptions to the requirement of obtaining authorization, terms and conditions of migration of existing licenses to authorizations under the Act, terms and conditions for optimal utilization of the spectrum and more.



## SALIENT FEATURES

### 1. Applicability

The Act apart from being applicable to India also applies to offences committed or contraventions made outside India. While this move protects the telecommunication infrastructure in India from illegitimate interference from both within and outside India, it will elicit a discussion on the mechanism and enforcement of such provisions. This is coupled with practical cross-jurisdictional issues and the methodologies for identifying the contravener/offender outside the domestic jurisdiction.

Further, previous iterations of the telecommunications bill made an explicit inclusion of Over-The-Top (“**OTT**”) communication services, Machine to Machine (M2M) communication services, internet-based communication services, etc. within the definition of “telecommunication services”. However, the current iteration does not make a mention of the above. It is also relevant to note that the scope of “telecommunication services” as defined under the Act has been kept broad to include services relating to transmission, emission, reception of ‘any’ message, by wire, radio, optical or other electromagnetic systems, which creates an ambiguity. Moreover, the use of protean term(s) like ‘any messages’ also raises questions about applicability of the Act to businesses having messaging or communication as a secondary service. Although it is being clarified through various press releases that communication under OTT services will continue to be regulated by the Ministry of Electronics and Information Technology, absence of any formal clarification in this regard will still leave a scope for legal debate.

### 2. Authorization replaces license regime

Under the Telegraph Act, exclusive privilege to establish, maintain and work telegraphs was granted to the Central Government, which the Central Government could license to any other person. The Act replaces the concept of *licensing* with that of *authorization*, which will be required by a person for providing telecommunication services, telecommunications network and possessing radio equipment in India. The terms and conditions for different types of *authorizations* may vary. The Central Government can also grant an exemption from *authorization* in the ‘public interest.’ The implications of this shift from the *licensing* regime to *authorization* regime could impact the industry stakeholders depending on how (efficiently) these *authorizations* are issued and how the terms and conditions under different *licenses* undergo structural changes in the new regime.

The Act also liberalizes the existing regime by *prima facie* allowing any merger/demerger, acquisition or any other forms of restructuring (subject to certain terms) which were earlier subject to an approval by the Department of Telecommunications (“**DoT**”). This development will ease mergers and acquisitions among industry players.

The Act seeks all notified telecommunication service providers to verify users through ‘verifiable biometric based identification’ such as Aadhaar. Ensuing privacy and data



protection aspects would be key in this context. It also imposes duties on users such as prohibiting the furnishing of false particulars, suppressing material information, or impersonating another person. The Act also allows the Central Government to take over, manage, or suspend any or all telecommunication services or networks in the interest of national security.

### **3. Introduction of administrative assignment of spectrum**

The Act envisages the assignment of spectrum basis a National Frequency Allocation Plan, which shall be amended from time to time. The Central Government can also assign spectrum on an administrative basis (i.e., without holding an auction) for specified purposes. This includes purposes such as satellite based services, radio backhaul for communication services, in-flight and maritime connectivity and for safety and operations of air, water and land transport among others as mentioned in the First Schedule of the Act. It is, however, yet to be seen how this power to assign spectrum through administrative means harmonizes with previous observations and findings of the judiciary. This is a positive move for the SatCom industry which had long been supporting such administrative allocation of spectrum.

The Central Government can also re-purpose or re-assign any frequency through harmonization or re-farming including reassignment of the available spectrum to primary and secondary assignees.

Any assignment of spectrum made prior to the Act coming into force shall have continued validity under the Act.

### **4. Common Cable Corridors**

The Act envisages granting of right of way permission on public and private property on a non-discriminatory and non-exclusive basis. For right of way, a facility provider/infrastructure provider must apply to a public entity under whose ownership, control, or management the public property is vested, to seek permission. The entity granting permission is required to do so in an expeditious manner and any rejections must be accompanied by substantiated grounds in writing. Right of way on private property is however based on an agreement between the owner of the property and the facility provider with certain added thresholds for care and caution to be exercised by facility providers. At this stage, the process of right of way is governed in accordance with the Right of Way Rules, 2016 as amended, and the same will continue to apply so long as they are not inconsistent with the Act or are superseded by other rules made under the Act.

Lastly, the Act determines that any disputes regarding the right of way shall be exclusively adjudicated by the district magistrate or any other notified entity within whose jurisdiction the concerned property is located with few exceptions.

The Act also enables the creation of common ducts and cable corridors either by a public entity, through a public-private partnership or by any other person. This is a



welcome measure and will ensure establishment of open access passages to establish telecommunication networks.

## 5. Public Safety, National Security and Protection of Telecommunication Networks

The Act empowers the Central Government to issue standards and conformity assessment measures to ensure the cybersecurity of telecommunication networks and services. It can issue directions about the use of telecommunication equipment, services, networks, equipment and telecommunication identifiers in the interest of national security, friendly relations with foreign states, or in the event of war. Violations can lead to a jail term of up to three years and/or a fine, along with potential termination of telecom services.

Additionally, the Central Government can declare any telecommunication network as Critical Telecommunication Infrastructure (“**CTI**”). CTIs are key telecommunication networks essential for national security, economy, public health, or safety. A parallel between CTIs and Critical Information Infrastructure (“**CIIs**”) under Section 70 (1) of the Information Technology Act, 2000 can be drawn to understand CTIs better. CIIs are subject to additional information and security practices that are prescribed and monitored by the National Critical Information Infrastructure Protection Centre through the Information Technology (Information Security Practices and Procedures for Protected System) Rules, 2018 which lay down the roles and responsibilities of protected systems and also state the information security practices and procedures for protected systems. Similarly, we can expect the creation of specific standards, rules and procedures to be followed for regulating CTIs.

Further, the Central Government has reserved powers to take actions during public emergency or for public safety including, taking possession of the telecommunication service or network, intercept or detain any message or suspend any telecommunication service. Further, it will be interesting to see how this power synchronizes with other laws pertaining to protection of information including the Digital Personal Data Protection Act, 2023, and other laws relating to official secrets and intellectual property.

## 6. Innovation and technological development

The Central Government is empowered to create, for the purpose of encouraging innovation and technological development, a ‘regulatory sandbox’. This is a framework of special terms and conditions of a license, registration, authorization, or assignment that allows persons to conduct live testing of products and services in a controlled environment under government supervision. This is particularly a welcome measure to promote innovative technologies in the telecommunications sector which will also be in line with global practices.

For instance, The Infocomm Media Development Authority (IMDA) in Singapore, the Financial Conduct Authority (FCA) in the United Kingdom, Bahrain's Telecommunications Regulatory Authority (TRA), and Colombia's Ministry of Information and Communication Technologies (MinTIC) have all implemented



sandboxes covering issues such as cybersecurity, artificial intelligence, the Internet of Things (IoT), 5G technology, e-commerce, mobile applications, cloud computing, and consumer protection.

## 7. Protection of users and their duties

The Act enables the Central Government to establish rules regarding protection of users against promotional messages, advertising by categorizing them as 'specified messages' and creating a framework for regulation of specified messages based on parameters such as prior consent of the recipients, maintenance of a DND register, mechanisms for dispute resolution and reporting malware or other specified messages.

The Act extends to cover the users by casting a duty on them not to furnish any false particulars, suppress material information or impersonating another person to avail telecommunication services. Furthermore, users shall also be obligated to share information as may be required under the Act. While there is no direct penalty prescribed in case a user defaults on his/her obligations, the residuary penalty in the Third Schedule of the Act, may apply in such cases where the first offence amounts to penalty of twenty-five thousand rupees, and for subsequent offences up to fifty thousand rupees may be imposed for every day after the first offence, during which the contravention continues.

It is also relevant to mention that the rights of the user as a consumer under the Consumer Protection Act, 2019 shall not be affected by the Act and separate redressal can be claimed under both forums. This ensures that there is a mechanism for consumers to seek compensation for any loss they suffer.

## 8. Adjudication process

The Central Government will appoint an officer not below the rank of a Joint Secretary as an Adjudicating Officer to conduct inquiries and pass orders against breach of terms and conditions of authorizations and other contraventions under the Act. Orders of the Adjudicating Officer may be appealed before the Designated Appeals Committee ("DAC") within 30 days. The DAC shall also be constituted by the Central Government and will have members of the rank of at least an Additional Secretary. Appeals against the orders of the DAC, in connection with breach of terms and conditions of authorizations, may be filed before the Telecom Disputes Settlement and Appellate Tribunal ("TDSAT") within 30 days. For appeals in relation to other contraventions under the Act, an aggrieved party is allowed to approach a civil court having jurisdiction over the matter.

## 9. Powers of Telecom Regulatory Authority of India ("TRAI")

The Act proposes certain amendments to the TRAI Act. It has provided further qualifications for the appointment of a chairperson or a member of TRAI including appointment of members other than from the government services. Further, TRAI still has advisory powers to aid and advise the Central Government on policy issues.



There are two notable developments in the TRAI Act; (a) *firstly*, an added layer of appellate authority which is the DAC has been added in the dispute resolution mechanism and corresponding amendments for the same have been made to the TRAI Act and (b) *secondly*, the Act further expands TRAI's powers to include issuing directions vis-à-vis predatory pricing that is harmful to competition, long term development and overall health of the telecommunication sector.

## 10. Offences and Penalties

The Act has a provision for voluntary undertaking by authorized entities or their assignees in case of breach of any of the terms and conditions of authorization/assignment or contravention of any provisions of the Act or rules. Such an undertaking can be submitted prior to any notice or initiation of contravention determination process or at the time of hearing before Adjudicating Officer and needs to specify mitigation measures taken or to be taken. Acceptance of voluntary undertaking constitutes a bar on the proceedings and/or considered for the purpose of determination of civil penalties.

The Act has adopted a graded penalty scheme for breach of terms and conditions of authorizations or in case of voluntary undertaking provided under the Act. This means that a penalty on the authorized entity or assignees will be determined on the basis of severity of the contravention. For instance, for a non-severe breach, a written warning is sufficient, but if a contravention is categorized as severe, penalty of up to INR 5 crores can be imposed by the Adjudicating Officer.

The Act specifies various criminal and civil offences and penalties for violation of the terms and conditions under the Act. This includes penalties for providing telecom services without authorization or gaining unauthorized access to data or to a telecom network, all of which are punishable with an imprisonment of up to three years, or with a fine of up to two crore rupees, or both.

Moreover, the Third Schedule of the Act provides for civil penalties for contraventions like possessing unauthorized equipment, or using unauthorized network or service, which is punishable with a penalty of up to ten lakh rupees. Lastly, any levy of penalty under the Act shall be considered in addition to any other penalty that might have been imposed under any other law.



## **WAY FORWARD:**

The relevant industry stakeholders will have to:

- a. Assess the applicability of the Act on their service offerings, especially for entities providing OTT based communication services, internet-based communication services and M2M based connectivity services.
- b. Conduct a cost-risk-benefit analysis to decide when should they transition to the new regime, in case the same is more beneficial for the respective stakeholder.
- c. Renew and revisit their service authorizations post the expiry of their current authorized period after the Act comes into effect to ensure that they abide by the revised set of requirements for each authorization and for smooth transition. In case a period for such existing authorization is not prescribed, the same can be extended to a maximum period of five years.
- d. Ensure payment of revised fees and charges as may be prescribed.
- e. Align organization in accordance with the requirements of the Act including obtaining verifiable biometric based identification of users, monitoring and enforcement mechanisms, standards and conformity assessment measures and any other rules and regulations as may be prescribed by the Central Government.
- f. Enable consent mechanisms for users to receive certain marketing messages, maintain DND registers and establish mechanisms for grievance redressal of users. This should ideally interface with other regulatory laws including the Digital Personal Data Protection Act, 2023.
- g. Monitor the rules and regulations that are introduced under the new legislation and target compliance with the same within stipulated timelines.



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