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TUSSLE BETWEEN DOT AND TRAI; **COURTESY OF THE DRAFT** **TELECOMMUNICATION BILL 2022**

AUTHORED BY - ANURAG KRISHNA TIWARI

INTRODUCTION

The Draft Telecommunication Bill 2022, is one of the most recent bills to be presented before the legislature of the country. It was released by the Ministry of Communication for public comment. The bill has tried to update the existing regulatory framework while making provisions to tackle the challenges in the telecommunication sector due to its increasing vastness and the advent of new technologies. The bill consolidates the Indian Telegraph Act of 1885, the Indian Wireless Telegraph Act of 1933, and the Telegraph Wires (unlawful possession) Act of 1950. The new bill repeals these acts and attempts to restructure the legal and regulatory framework for the telecom sector. Carriage and content are the two most important terms to reach the gist of the issues of the bill. Carriage is like the highway that allows us to go from one place to another. In the context of telecom, it is the telecommunication network that carries bytes from one on the system to another whereas content is what rides on the carriage. Whatsapp, Netflix, etc. create content and bring it to you via carriage that is network providers. The developer needs not to seek permission from the network providers or the government. However, in the draft telecom bill 2022, the government discussing digital India is putting a hurdle in its path. The bill is giving exclusive services of providing telecom services. Any service made available via the Internet is under the center's purview. The government justifies this licensing on the grounds of national security. A licensed telecom service provider will have to compulsorily provide a network to law enforcement agencies so that they can intercept messages during the investigation. However, if the lawful interception is the issue, Sec 69 of the IT act already provides that central or state government may issue directions to do so to preserve, among other things, national security and public order. Due to these issues, ambiguity remains behind the intention of the government.

CONCERNS OVER LICENSING

The licensing framework has been a crucial part of India's telecommunication law. Section 4 of the Indian Telegraph Act, of 1885 gives the government the power to grant a license to any person for establishing, maintaining, or using a telegraph. Before DOT came into existence in 1985, telecommunication services were solely provided by the Indian Post and telecommunication department. In November 2003 the government introduced the unified access service license (UASL) regime. This gave service providers access to fixed and/or mobile services under the same license. There were efforts by the government in 2012 to simplify licensing framework by introducing the National Telecom Policy, 2012 which aimed towards the creation of One Nation-One License. This regime was implemented through two phases, the first phase, the UL regime was brought into the arena in 2013, and in the second phase, there was a delinking of licensing for networks from delivery of service and a new category called Unified License (virtual network operator) came into existence in 2016.¹

In 2013, a uniform licensing scheme was established. The spectrum allocation was separated from the license and must now be acquired through a competitive bidding process by the rules. For all telecom services offered in the nation, a single Unified License is needed. The service provider may choose the services to be provided, known as Service Authorizations.

In 2016, India approved the use of virtual network operators (VNOs). VNOs are considered extensions of network service operators (NSOs), who do not own the underlying core network(s); as a result, VNOs are not permitted to install equipment linking with the network of other NSOs. The VNOs are not given any spectrum. Access Services allows parenting with a single NSO. Any telecom services offered by the current telecom service providers may be offered by VNOs. A regime analogous to UL is UL (VNO). It provides all authorizations as listed in the UL.

¹ 'Consultation Paper on Enabling Unbundling of Different Layers through Differential Licensing' (*Telecom Regulatory Authority of India* 20 August 2020) <<https://www.trai.gov.in/consultation-paper-enabling-unbundling-different-layers-through-differential-licensing>> accessed 15 May 2023

The notion of an independent network service provider or operator, who will set up the network and offer the services to the service delivery operator on a wholesale basis for retailing purposes, is present when the network layer and service layer are unbundled. Such freestanding network operators, who will only offer network layer services on a non-discriminatory basis, might have some incentive built in to encourage such a regime.

One theory is that if the network service layer and service delivery layer are separated by introducing a specific license for the network layer alone, the network layer operator would willingly share its network with service delivery operators, resulting in cost savings and increased utilization of resources, including spectrum. According to research into worldwide norms, network operators are also permitted to offer services to end users either under the same license or by obtaining a separate service delivery license. The question of whether the network operator can provide services to end users emerges. To provide mobile services, a network operator must purchase spectrum at a price set by the market and adhere to minimum roll-out requirements. It may not have control over the commercialization of network and spectrum resources if it is not permitted to provide services to end users directly. Additionally, there may be ineffective spectrum use as a result of this. The investment may not be fully exploited in the absence of SDOs/VNOs throughout the network, making Return on Investment (RoI) more difficult to achieve. If a network operator is permitted to offer services on their own, just separating the license from the network owner may not get the intended effects since they are not permitted to collaborate with other service delivery operators. There appears to be a need for a framework to be imposed on network operators to provide wholesale services to service delivery providers to make the unbundling effective.

The telecom regulatory authority of India and the government had concerns over the rejection of recommendations of TRAI for creating a separate category of license to provide network services on a wholesale basis. In TRAI's recommendation, a separate license for access network providers (ANPs) would help in bringing more investments and would also strengthen the service delivery segment. As the deployment of 5G technology is already at the door, this would help in making it more economically viable. Through a consultation paper in 2021, "Enabling unbundling of different layers through differential licensing", TRAI recommended the creation of ANPs.²

² Archit Tandon, "TRAI, DoT Tussle over Licence to Access Network Providers" (*Communications Today*, September 7, 2022) <<https://www.communicationstoday.co.in/trai-dot-tussle-over-licence-to-access-network->

The recommendations of TRAI were not accepted by DOT claiming that there may not be adequate demand for separate ANPs in the market which would fail its purpose. But the same was again opposed by TRAI as DOT did not give any reasonable justification with supporting shreds of evidence for the same which made DOT's claim weak.

According to the regulator, if a distinct category of ANP is established, the network provider might construct a core network, radio access network (RAN), and collaborate with virtual network operators to offer services. "It may provide a situation where everyone benefits, allowing the VNO licensee to sustain the regime by financing RAN. Accordingly, the regulator stated that the implementation of separate licenses for access network providers might draw in investment and boost the service delivery sector.

According to Trai's plan, the ANP licensee would create and manage a telecom network, including wireless and wireline, and buy spectrum through auctions. However, the ANP licensee won't be able to provide services directly to retail consumers; instead, they'll have to share the network infrastructure for service delivery on a wholesale basis with other parties, such as telecom operators or VNOs. "The authority is of the view that the development of a distinct network-only layer (in the form of an ANP license) might lead to improved network resource sharing, cost reduction, and higher investment in the sector. Additionally, it may serve as a localized accelerator for the spread of 5G services for business customers, industrial users, etc.", Trai stated.³

THE NEW POSITION OF TRAI

As an impartial and specialist regulator for the telecom industry, the TRAI was founded in 1997. Given that the government plays a significant role in the telecom sector through a variety of functions, including the provision of services, licensing, and spectrum allocation, it was deemed necessary to establish a regulator independent of the government to ensure fairness for private TSPs, level playing fields, and the protection of consumer interests. However, following the draft Bill's release on September 21, the proposed rules regarding OTT communication services, ministry partnerships, and the definition of "telecommunications" have drawn much attention and

providers/#:~:text=TRAI%2C%20DoT%20tussle%20over%20licence%20to%20access%20network,without%20gi ving%20any%20rationale%20to%20support%20the%20decision> accessed January 6, 2023

3 PTI, "Trai, DoT Tussle over Licence to Access Network Providers" Economic Times (September 6, 2022) <<https://economictimes.indiatimes.com/industry/telecom/telecom-news/dots-rejection-of-recommendations-on-differential-licence-without-any-rationale-trai/articleshow/94035376.cms>> accessed January 6, 2023

criticism.⁴

The current draft telecommunication bill 2022, however, significantly **weakens** TRAI's standing in several ways, changing its role from one of regulation to one of recommendation. First, before awarding licenses, the government would no longer be compelled to get recommendations from the TRAI. Additionally, it takes away the TRAI's ability to request from the government any information or papers required to make such recommendations. Additionally, as opposed to before, the Department of Telecommunications (DoT) will no longer be obligated to refer back to TRAI for reconsideration of any suggestions that it disagrees with. The elimination of such authority would be inconsistent with international practice, which gives telecom authorities more autonomy to maintain investor trust and consumer safety in the market.⁵ The Draft imposes no obligation on the Central Government to issue reasoned orders or seek judicial approval before taking any action, no matter how far-reaching. The Central Government has been given the authority to issue intercepting and monitoring orders in the event of a breach of terms and conditions, without the need for legislative approval. In the absence of transparency and accountability, arbitrary powers can flourish. Restricting the Telecom Regulatory Authority of India's (TRAI) powers to recommend institutions to the Government for spectrum assignment is just one of the many ways the Draft encourages the centralization of power in the hands of the Central Government. The absence of a robust system to hold the Central Government accountable for its actions is a clear gap that the Draft not only fails to address but also advances in.⁶

TRAI cannot currently impose sanctions on telecom corporations and has no authority to execute its orders. According to the TRAI Act, the recommendations of TRAI were not required, but the government was required to seek their advice regarding the necessity, timeliness, and terms of the licensing of a service provider. Additionally, TRAI had the authority to ask the government for the records and data it needed to make these recommendations. By depriving TRAI of any

⁴ Chatterjee A, 'Modi Govt Again Extends Feedback Deadline for Telecom Bill, List of Concerns Grow' (*ThePrint* 11 November 2022) <<https://theprint.in/tech/deadline-for-feedback-on-telecom-bill-ends-now-modi-govt-has-to-address-these-key-concerns/1209062/>> accessed 30 December 2022

⁵ Goyal T, 'Explained | the Draft Telecommunication Bill, 2022' (*Thehindu.com* 29 September 2022) <<https://www.thehindu.com/business/Industry/explained-the-draft-telecommunication-bill-2022/article65952169.ece>> accessed 30 December 2022

⁶ Dhawan A, 'The Paranoid Panopticon: Draft Indian Telecommunication Bill' (*Livelaw.in* 27 October 2022) <<https://www.livelaw.in/columns/departement-of-telecommunication-draft-indian-telecommunication-bill-telecom-regulatory-authority-of-india-trai-212576?infinitescroll=1>> accessed 30 December 2022

recommendatory powers, the Bill weakens TRAI's position as an independent regulatory agency rather than enhancing it. ⁷The proposed Indian Telecommunications Bill 2022, according to the Broadband India Forum (BIF), has to be critically and fairly reviewed because it attempts to remove the legal independence of the (TRAI) and turn it into the government's puppet. The industry group asserted that the current regulations cover regulatory safeguards, maker and checker balance, and other elements that have helped bring the industry to where it is now.⁸

However, Section 46 of the Draft Bill 2022 repeals requirements that the DoT consult with TRAI before making certain decisions. By doing this, the Central Government gains the authority to decide on licensing without consulting TRAI, effectively nullifying that regulatory body's power of recommendation. The Draft Bill, 2022 also suggests that if the DoT disagrees with suggestions made by TRAI, it may not send them back for reconsideration. In addition, it is suggested that DoT may elect not to submit any information or documents requested by TRAI for TRAI to provide its recommendations. Section 11 of the TRAI Act highlights four primary categories of TRAI functions: recommendatory functions, regulatory functions, tariff fixing, and other functions as prescribed by the Central Government. Furthermore, Section 11(2) of the TRAI Act entrusts TRAI with the responsibility of determining tariffs to be levied by establishing the rates at which telecom services will be provided within India as well as abroad, including the rates at which messages shall be transmitted to any country outside India. In section 11(2) of the TRAI Act, the Draft Bill, 2022 also suggests changing the words "Notwithstanding anything contained in the Telegraph Act" to "in consonance with the Indian Telecommunication Act, 2022." The current legal framework gives TRAI complete authority to set telecommunications pricing. The word "Notwithstanding" at the beginning of section 11 of the TRAI Act gives TRAI the exclusive authority to make decisions about tariffs, prohibiting the DoT from interfering with those decisions. This overriding impact will be eliminated by the Draft Bill 2022, essentially stripping TRAI of its authority.

⁷ K.K. Prahald, 'There Are Valid Concerns over the Draft Indian Telecommunication Bill, 2022 – the Leaflet' (*The Leaflet – An independent platform for cutting-edge, progressive, legal, and political opinion.* 13 October 2022) <<https://theleaflet.in/there-are-valid-concerns-over-the-draft-indian-telecommunication-bill-2022/>> accessed 30 December 2022

⁸ 'Draft Telecom Bill Will Curtail TRAI's Power, Needs Critical Review: BIF' (*Moneylife NEWS & VIEWS* 2022) <<https://www.moneylife.in/article/draft-telecom-bill-will-curtail-trais-power-needs-critical-review-bif/68438.html>> accessed 30 December 2022

WAY AHEAD

The Draft Bill, 2022 proposes to significantly limit TRAI's existing powers and functions. Diluting TRAI's existing powers will render it irrelevant and toothless, potentially disrupting the sector's equilibrium. In formulating regulations, an independent and autonomous regulator brings predictability and certainty, and these decisions are based on economic principles rather than political expediency. A strong regulator must be in place in addition to cleaning up and organizing a disorganized legislative landscape into a clear and understandable framework, which is unquestionably the need of the hour. It is possible to repeal outdated, antiquated laws and create a unified regulatory framework for the telecom industry without further weakening or reducing the authority of the TRAI. When imagining an effective regulator, it is helpful to understand which powers should be delegated to the government and which to the regulatory body. However, policymaking can be tainted by political bias because the beliefs of the ruling regime inevitably seep into policy language and ethos. A strong regulatory body is a solution. A body that is not subject to political whims or pressures, but rather makes telecommunications-related decisions based on hard facts, economic metrics, and empirical data. If we want the Indian telecommunications sector to encourage healthy and free competition, we need a strong regulator with independent power over sector entities.

In light of the aforesaid, we propose that, for the benefit of India's overall telecom infrastructure, TRAI should continue to function as an efficient and effective regulator. The Indian Telecommunications Act, 2022 must be a law that enhances TRAI as a regulator, not one that lessens its current function, and the legislature must bear this objective in mind as it consolidates the updated legal framework for the Indian telecom sector. We believe that doing this will keep things in balance and benefit the country.⁹

⁹ Abbas A, 'Telecom Regulatory Authority of India: The Present, the Proposed, the Future' (*Mondaq.com* 23 November 2022) <<https://www.mondaq.com/india/telecoms-mobile--cable-communications/1253450/telecom-regulatory-authority-of-india-the-present-the-proposed-the-future>> accessed 5 January 2023