

## RINGING IN THE CHANGES: INDIAN GOVERNMENT ANSWERS CALL TO MODERNISE THE TELECOM REGIME

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The Telecommunications Act, 2023 (the “**2023 Act**”), which is yet to be notified, is set to amend and consolidate laws pertaining to the development, expansion and operation of telecommunication services and networks in India.

The 2023 Act entails a long overdue repeal of the Indian Telegraph Act, 1885 (the “**1885 Act**”), the Indian Wireless Telegraphy Act, 1933, and the Telegraph Wires (Unlawful Protection) Act, 1950. It also amends the Telecom Regulatory Authority of India (“**TRAI**”) Act, 1997.

### Key new provisions

The 2023 Act has introduced several new provisions to address the challenges that have arisen from the rapid development of the telecommunications sector in the past couple of decades, including:

- (i) Allocation of spectrums: Unlike the 1885 Act, the 2023 Act provides a clear definition of the term "spectrum." The 2023 Act identifies the Indian government as the owner of the spectrum on behalf of the people, and states that the government will assign spectrums in accordance with the 2023 Act and the National Frequency Allocation Plan. Further, it establishes spectrum auctioning as the default route for spectrum allotment, except in certain cases such as satellite spectrums, which will be granted through administrative allocation. The main reason for keeping satellite spectrums out of the auction process is because this process is globally considered to be suboptimal due to the inherent scarcity of satellite spectrums as a resource. Further, satellite spectrums are non-rivalrous by nature and allow multiple users to share a spectrum band without significant reductions in quality. However, in an auction-based scenario, satellite spectrums become exclusive or, at the very least, limit the government’s flexibility in framing a policy for optimization. Administrative allocation of satellite spectrums will also allow satellite players to benefit from lower costs to avail themselves of the spectrum. This approach is, therefore, anticipated to promote greater participation and innovation in the space sector while reducing satellite bandwidth costs and enhancing India’s global competitiveness.
- (ii) Management and monitoring of assigned spectrums: The government is empowered to authorize the sharing, trading, leasing, and surrender of assigned spectrums. Interestingly, the government can also: (a) further assign (to a secondary assignee) a spectrum that has already been assigned (to a primary assignee) subject to non-interference with the use of the spectrum by the primary assignee; and/or (b) repurpose or rearrange the frequencies of a spectrum through re-farming or harmonization, in each case for optimizing the utilization of the spectrum. Lastly, the

government may also terminate assignments where the spectrum or a portion thereof remains underutilized for insufficient reasons. The foregoing provisions will ensure the judicious utilization of spectrum resources and guarantee their availability and accessibility to all.

- (iii) Right of way: The 2023 Act introduces a non-discriminatory, non-exclusive and uniform mechanism for exercising the right of way when installing telecom infrastructure on public and private property. In case of public property, the 2023 Act requires the public entity to grant permission for the installation within a prescribed timeline. In case of private property, the 2023 Act requires the property owner and telecom facility provider to come to a mutual agreement in respect of the terms for installation of telecom infrastructure. At the same time, the Department of Telecommunications retains the discretion to enforce the right of way on a private property in public interest even if an installation is not agreed to by the property owner. The 2023 Act also clarifies that any installed infrastructure will not be considered a part of the property, including for the purpose of calculating property tax, and will not vest any right, title or interest in the property to the facility provider. The 2023 Act standardizes the right of way laws across states and facilitates the deployment and management of telecom infrastructure throughout India (especially on private properties). These provisions will likely reduce litigation and delays in respect of telecom infrastructure projects; however, they also take away individual landowners' rights to some extent.
- (iv) Biometric-based identification: The 2023 Act requires providers of telecom services to identify the persons to whom the services are being provided by using biometric-based identification. The government intends to prescribe the identifications that can be used by the telecom service providers as part of the rules to be issued under the 2023 Act. The intent behind implementation of biometric-based user identification is laudable as the measure is intended to combat rising cybercrime and the fraudulent use of SIM cards. At the same time, it gives rise to privacy and cybersecurity concerns. The new requirement has created an apprehension that Indian users will mandatorily have to furnish their Aadhar to obtain telecommunication services. Mandatory Aadhaar usage, if prescribed, will conflict with the Indian Supreme Court's ruling in *Puttaswamy v. Union of India* (W.P.(Civil) No 494 of 2012), which deemed such compulsion impermissible. Notably, the 1885 Act and the draft version of the Telecommunications Bill issued in 2022 explicitly permitted alternatives to Aadhaar. If Aadhaar is prescribed as the mandatory form of identification with no other permitted alternatives, and if appropriate safeguards are not incorporated to protect the user, the measure may give rise to more issues than it solves.
- (v) User protection: The Central Government may implement user protection measures, including obtaining prior consent for specified messages (such as advertising or promotional messages), establishing Do Not Disturb registers, and creating a mechanism for users to report malware or specified messages. Telecom service providers are also required to set up an online system for grievance redressal. The

introduction of these measures is essential in today's world of increasing digital proliferation. At the same time, telecom service providers will have to ensure compliance with all applicable laws in parallel, including the Telecom Commercial Communications Customer Preference Regulations, 2018 and India's data protection laws. This measure will, therefore, increase the compliance burden for entities operating in the telecom sector.

- (vi) TRAI chairperson: In a notable change, the 2023 Act permits private sector executives to be appointed as the TRAI chairperson. This change is significant in light of the fact that the TRAI chairperson's seat was vacant since October 2023 (a new chairperson has just been appointed), which created roadblocks in TRAI's decision-making process. We hope that opening the sector to a certain degree of privatized administration is also likely to be beneficial for the sector in the long run.

## Key amendments to existing provisions

In addition to the new provisions, the 2023 Act also introduces several changes to finetune the existing regulatory provisions so as to adapt to the new developments in the sector, including:

- (i) Authorization framework: The 2023 Act proposes a shift from the extant fragmented licensing system administered by TRAI (which is notoriously difficult to navigate) to a more streamlined process requiring entities engaged in providing telecommunication services, establishing, operating, maintaining or expanding telecommunications networks, or possessing radio equipment to obtain an authorization from the Central Government. The 2023 Act represents a departure from the multi-license approach and provides for a single license regime. This will significantly increase the ease of doing business in the telecom sector.
- (ii) National security and protection of telecommunication networks: The 2023 Act grants the Central Government the authority to notify encryption standards in telecommunications. It enables the Central and State governments to intercept, monitor, and prevent for transmission, messages in the case of public emergencies and in the interest of public safety. The 2023 Act also allows the suspension of telecom services for similar reasons. Lastly, the 2023 Act empowers the Central Government to take control of telecom services in the interest of national security or friendly relations, or during a public emergency or war. The ability of the government to intercept telecom transmissions, suspend the internet, and conduct surveillance have been retained from the 1885 Act. While the rules which will govern the manner of exercise of these powers are awaited, it is hoped that they incorporate adequate safeguards to protect against the arbitrary exercise of these powers.
- (iii) Offences: The 2023 Act provides for both, criminal and civil penalties. Given that the 1885 Act was enacted prior to India's independence, several penalties prescribed under the 1885 Act were extremely low. These penal implications have now

undergone significant changes. For instance, the penalty for users utilizing unauthorized telecommunication services has been significantly increased from INR50 (Indian Rupees Fifty) under the 1885 Act to INR1,000,000 (Indian Rupees One Million) under the 2023 Act. The increased penalties will act as a significant deterrent and, in our view, will incentivize greater compliance with the 2023 Act.

## Conclusion

A secure and robust telecommunications sector is central to India's economic, infrastructural, and social development, as well as its safety from criminal and terrorist activities. In light of this and given that the 1885 Act was not equipped to keep pace with the rapidly developing technologies (such as digital and space-oriented technologies), the 2023 Act is a welcome change.

Despite its highlights, certain omissions from the 2023 Act are surprising. For instance, the 2023 Act does not explicitly exclude over-the-top (“**OTT**”) communication services from the broad definition of “telecommunication service,” which are also regulated under the Information Technology Act, 2000. Although the Indian government has verbally clarified that OTT communication services will not be regulated under the 2023 Act, the lack of an explicit exclusion in the legislation may indicate the government's desire to remain flexible on this issue. Additionally, the 2023 Act has also omitted the inclusion of previously proposed provisions offering waivers of outstanding license fees, penalties, and other charges, which may be a dampener for financially struggling telecom operators, such as Vodafone Idea.

The 2023 Act leaves several sensitive aspects, including, the terms and conditions for authorization, the use of biometric-based identification, and the duration and manner of interception and suspension of telecom services, to rules to be framed under the 2023 Act. Therefore, the impact of the changes proposed under the Act will be clearer once read in consonance with the underlying rules.