

# A WORD OF ADVICE ON OTT AND THE DRAFT TELECOM BILL

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The draft Indian Telecommunication Bill, 2022 | Photo Credit: KAMAL NARANG

The [inclusion of Over The Top or OTT \(Communication Services\)](#) within the ambit of the [draft Indian Telecommunication Bill, 2022](#) that was unveiled recently for public comments, is a feature that has drawn much attention and comment. What does this mean? And why is it a big deal? Is it a concern only for telcos and technology companies? Or are there larger implications that concern the average citizen? Besides, how will this affect the digital ecosystem in India?

The main argument behind its inclusion is the principle of “same service, same rules”. Superficially, it seems logical that communication services, whether provided by telcos or OTTs, should be treated similarly. However, this is completely erroneous. Same service means that as a user, I should be able to substitute one for the other at my own volition. But no OTT provider including those providing communication services such as WhatsApp, Zoom, email, etc. can reach a customer without the intermediation and services of a telecom service provider. But the converse is not true. The absence of OTT is no impediment for a telco to provide its services. OTT communication services are applications or value-added communication services that ride on the basic communication services that telcos provide. The latter is in the domain of carriage and the former is in the domain of applications such as group and video communication, encryption, etc.

So why are telcos rooting for inclusion of OTT communication services within the new Telecom Bill? Quite simply, it is the desire to preserve the arbitrage that exists between voice and data tariffs. In OTT services, the telco gets lower data and not a higher voice/SMS tariff. That arbitrage is anyway doomed and will be extinguished sooner rather than later. Biting the bullet now makes more sense than bringing in a convoluted interpretation in the law.

Conversely, there are compelling arguments as to why OTT communication services should be kept out of the ambit of Telecom law which regulates terrestrial carriage. OTT communication services are already covered under the existing IT Act and, presumably, will continue to be so under the proposed Digital India Act. Whether it is encryption, data storage, interception or cooperation with law enforcement, OTTs can be and are regulated — but not licensed or pre-authorised.

So why should there be such a hue and cry if OTT communication services are moved from the

purview of the IT Act to the Telecom Law? Simply put, the proposed Telecom Bill and the current Telegraph Act are based on the principle that provision of telecommunication services is the sole privilege of the government except to the extent that private entities are permitted — read licensed or authorised. On the other hand, the IT Act, which regulates technology usage, is based on the exact opposite premise: everything is permitted except that which is specifically and explicitly barred and subject to any mandatory requirements that must be met. A similar principle operates in respect of content, which the Information and Broadcasting Ministry, Prasar Bharti and the Censor Board, regulate. It is precisely this wide latitude that is afforded in technology/applications and content that enables and encourages creativity, innovation, new products and venture capital funding.

More worrisome is that the inflow of venture capital funding to OTTs would be severely discouraged. It is well nigh impossible to distinguish an OTT communication service from any other OTT platform because every OTT platform such as Flipkart, Ola, MakeMyTrip does incorporate an element of messaging. How does one make a distinction between an OTT communication service provider and any other OTT platform or service that includes communication services? This is an impossible task. Only lawyers would celebrate the legal quagmire that would ensue from any such attempt.

What if only the communications component of OTTs were to be regulated? That would be equally problematic since requiring a license or authorisation for an element that is an inherent part of a platform's activity would be tantamount to control of the entire activity. Licensing innovation is a contradiction in terms.

Yet another factor is that the Telecom Bill will impact only India-based OTT players. Those operating from overseas would not be impacted. This would seriously handicap Indian service providers vis a vis their foreign competitors. Do we want this? It is not accidental that the exclusive privilege of government is confined to carriage which is confined to geographical boundaries.

The bottomline is that including OTT communication service providers within the ambit of the Telecom Bill is a deeply flawed idea that could seriously compromise the energy, innovation and funding that characterises India's startup ecosystem today. Hardly any other country has equated OTT communication services with foundational telecommunication services. Instead, the Government would be well-advised to include whatever controls are deemed necessary in the soon-to-be unveiled Digital India Act.

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