



Comments on Consultation Paper on ‘Need for a new Legal Framework governing Telecommunication in India’

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1. Introduction

At the outset, we would like to congratulate the Department of Communications, Government of India, on the consultation paper on ‘**Need for a new legal framework governing Telecommunication in India**’. The paper adopts a forward-looking approach with a key focus on simplifying the regulatory framework and reforming right of way and spectrum management. Further, the reforms suggested for the Universal Service Obligations Fund are also commendable. Previously, The Dialogue authored a paper in collaboration with the Associated Chambers of Commerce and Industry of India (ASSOCHAM) in 2021, titled [“Enabling a Trillion Dollar Digital Economy: Interdependent, Interconnected and Digital”](#). The report delved into the issues and challenges in the telecom sector and recommended the following:

A) Alleviate the financial stress: Due to the burgeoning debt on this sector, the paper recommends regulatory intervention to uplift ARPU, reduce the regulatory levies on the sector, address issues relating to GST such as accumulation of credit and review the definition of Adjusted Gross Revenue (AGR).

B) Addressing the digital infrastructure challenges: Investments in infrastructure need to be enhanced, and universal last-mile connectivity needs to be promoted. The government must proactively intervene to reduce the barriers to investments in the telecom sector, ensuring the sector gets ample support to drive future investments

C) Adopt a balanced and sustainable approach for data privacy and security: A principled based approach to privacy in line with the test of proportionality, equity and consent.

D) Light-touch approach to regulation: A light-touch approach that focuses on the main principles and leaves specific compliance to ex-post measures and general laws relevant to the sector. Digital technologies are changing constantly, and a responsive approach instead of an ex-ante rigid approach can better protect the interests of all stakeholders, including citizens, businesses and the government, while also ensuring flexibility to regulate such changing technologies in the future.

Taking inferences from the above-discussed study and other related work, in this document, we submit our comments to the consultation paper on the “Need for a new legal framework governing Telecommunication in India” floated by the Department of Telecommunications. Our comments in this document are mapped across the different sub-headings discussed in the consultation paper. Section 2 discusses some of the key recommendations that will help DoT in its objective of revamping regulations in the telecom sector. Section 3 discusses the aspects to be considered and addressed as part of the new regulation such that it is designed to ensure maximum growth. In section 4, we emphasise the importance of a single framework or a single window clearance approach for the industry to minimise the cost. Section 5 provides our recommendations to enhance the spectrum management system. In section 6, we discuss the

steps to be taken in addition to the RoW reform in order to enable growth and greater coverage across the country. Section 7 suggests the scope of USOF can be increased by incorporating some of our recommendations. Finally, in section 8, we take this opportunity to suggest an overhaul of the legal framework of surveillance to keep up with the pace of technological developments.

2. Key Recommendations

References from the Consultation Paper	Our Recommendations
What does the new law need to address?	
<p>Para 7. A new law on telecommunication needs to aim at establishing an enabling future-ready framework for the development of the telecommunication sector and deployment of new technologies. Such a law needs to consolidate the existing laws governing the telecommunication sector while keeping in view global best practices. For this, a careful review of laws and best practices in other jurisdictions will also be needed.</p>	<ul style="list-style-type: none"> ● A light touch regulatory approach is the need of the hour telecom market. Reducing compliance burden and regulatory certainty should be one of the key objectives of this law. ● A single window clearance system needs to be developed in order to reduce cost and compliance time for the entities. ● Enabling competition and democratising the telecom market sphere should be one of the key objectives of the new framework.
Simplification of New Framework	
<p>Para 10. There have been rapid advances in telecommunication technology and the corresponding proliferation of licences, registrations, authorisations, permissions etc., in the telecommunication sector. The exclusive privilege of the Government to do things necessary in the context of telecommunication to provide telecommunication services, and establish and maintain telecommunication networks and infrastructure, is well recognised under the laws of various jurisdictions. A new law needs to build upon this framework.</p>	<ul style="list-style-type: none"> ● Merge all the existing regulations into a single legislation to mitigate the burden on the telecom sector. ● Ensure minimal disruption and continuance of licences issued under the current regime. ● Reduce the licence fees from currently 8% to less than 3%, which can help the telecom sector alleviate the financial distress.

Spectrum Management	
<p>Para 15. At present, spectrum assignment is done through a combination of policies and court orders. A new law needs to bring in regulatory clarity and lay down a specific legal framework. The principle needs to be that spectrum will be assigned to best serve the common good and enable wide-spread access to telecommunication services.</p>	<ul style="list-style-type: none"> • The spectrum pricing formula needs to be revised in order to relax the pressure on telecom operators. • The government should consider having a comprehensive system of complaint redressal for the customers, possibly through the creation of an ombudsman post for this purpose. • Revisiting the definition of Adjusted Gross Revenue to exclude non-telecom related incomes.
Right of Way (RoW)	
<p>Para 19. A new law needs to provide a robust regulatory framework to obtain the Right of Way in a uniform, non-discriminatory manner for the establishment of telecommunication infrastructure. Such a law also needs provisions to create an effective dispute resolution framework relating to the Right of Way.</p>	<ul style="list-style-type: none"> • Focussed Fiberisation of Base transmitter Stations across the country to improve stability and speed of mobile networks. • Uniform application of RoW norms across states in order to reduce regulatory uncertainty.
<p>Para 20. In line with the vision of PM Gati Shakti initiative, the new framework needs to incorporate provisions for establishing common ducts and cable corridors in infrastructure projects to ensure integrated development of infrastructure.</p>	<ul style="list-style-type: none"> • A standardised 'Dig only once' policy to incorporate the designing of utility ducts with implied RoW permission for Telecommunications
Expanding the scope of the Universal Service Obligation Fund (USOF)	
<p>Para 24. The new framework also needs to consider ways in which to overhaul the current Universal Service Obligation Fund</p>	<p>The USOF currently holds more than 50% of all funds raised through its 5% levy on telecom companies since it came into force. This fund</p>

<p>with the wider concept of a “Telecommunication Development Fund”. This can address the larger public purpose of ensuring the delivery of universal telecommunication service to underserved rural and urban areas, research and development of new technologies and promoting employment and training activities. This can enable the growth of indigenous companies in the technology space.</p>	<p>can be used to house the wider concept of a “Telecommunication Development Fund” by incorporating the following recommendations:-</p> <ul style="list-style-type: none"> • Having a light touch regulation of the industry and potentially reducing the levy from 5% to under 2% • Using USOF has an Investment fund for incubating indigenous technology development • Decentralising the development of ICT infrastructure funded by the USOF
<p style="text-align: center;">Standards, Public Safety and National Security</p>	
<p>Para 26. A new law needs to have appropriate provisions for addressing situations of public emergency, public safety and for taking measures in the interests of national security.</p>	<p>Many jurisdictions have revamped/enacted surveillance legislation⁴ to cater to recent technological developments. Therefore, India must pick inferences from various jurisdictions and enact more comprehensive surveillance legislation. On that note, we believe the below-discussed levers and pointers may form a sturdy surveillance law to achieve an empowered citizenry for the country.</p> <ul style="list-style-type: none"> • Clearer definitions • Robust accountability & oversight • Having technical and administrative safeguards • Constituting a robust redressal mechanism

⁴ For instance, in the UK, the government enacted the Investigatory Powers Acts, 2016, which applies to intelligence agencies to ensure powers and principles fit the digital age.

3. What does the new law need to address?

The department of telecommunication's aim that the new law should enable a future-ready framework is very well appreciated. The importance of telecommunication infrastructure cannot be stressed enough, and for it to function effectively, the laws must take into account the burgeoning debt of telecom companies. It must be emphasised that telecommunication services enable a range of possibilities - digitising industries such as agriculture, health, education, startups, small & medium industry, digital payments and even online job portals. The role of telecom in keeping businesses and households running even in the wake of the COVID-19 pandemic underlines the importance of this sector as foundational to the use of digital and IT tools across a range of industry verticals.

There are 1166.30 million telecom subscribers, among which 1142.09 million are subscribed to wireless, and 24 million are connected through a wireline subscription by the quarter ending in March 2022. The average wireless data usage per subscriber in a month is at 15.80 GB – up from 330 million subscribers in the quarter ending June 2016, using 0.16 GB (GSM+CDMA) per subscriber per month. The value of the Indian internet economy was \$125 billion (Rs. 9 Lakh Crore) in April 2017 and is expected to hit \$800 billion in FY 2030. To achieve the goal of a trillion-dollar digital economy by 2025, India needs an unwavering focus on the telecom sector, especially wireless technologies, the cornerstone of the digital economy.

The telecommunication and digital sector became a critical asset for Indians in 2020 with a global pandemic severely disrupting business as usual. The COVID-19 outbreak revealed how global emergencies could create an explosive and unforeseen demand for data and digitisation of work. The pandemic forced more and more people to work remotely in order to flatten the growth curve of the epidemic. This resulted in a sharp growth in online traffic, both on account of the large adoption of work from home strategy by many companies, along with a sizable increase in online entertainment to make the most of the quarantine during lockdown periods.⁵

Streaming services and social media platforms have also contributed massively to the growth in data traffic, placing a huge demand on mobile networks. This pandemic accelerated the rate of digitisation which may have lasting impacts on our life and the economy, which prompted a transformation in work dynamics for most firms. Local businesses are swiftly reshaping their business plans to avoid being disproportionately hurt. Rising screen times raise the average monthly wireless data usage per consumer, and our telecom infrastructure needs to be enhanced in order to tackle this phenomenon. It is the commitment and urgent actions to promote the long-term growth of the telecommunications sector that are required to improve the health of the industry and the investments in the infrastructure.⁶

⁵ Ayush T, Maanya V, Trisha P, (2021) Enabling a Trillion Dollar Digital Economy: Interdependent, Interconnected and Digital, The Dialogue and ASSOCHAM, Available at: <https://thediologue.co/wp-content/uploads/2021/02/Enabling-a-Trillion-Dollar-Economy-The-Dialogue.pdf>

⁶ *Ibid*

Regulations form a crucial aspect of the smooth operations and running of a business. Good regulations are essential for creating an environment for businesses that reduces risk, promotes confidence, supports employment, and boosts manufacturing, exports, trade, and foreign direct investments.⁷

As mentioned earlier, due to the increased usage, the telecommunication sector, which is already struggling, has been under more pressure than ever. **The amount of compliance burden and regulatory uncertainty should be one the key concerns that the new law should address.** Mobile operators have to submit around 1500-2000 compliance requirements in a year⁸. A **light touch regulation with effective administration**, as envisaged by the Communications minister Ashwini Vaishnaw should be the objective of this law.

The telecom sector is already in cumulative debt of INR 6 Lakh Crores⁹, and there is a need for significant reforms in this sector in order to revive it. This level of indebtedness calls for a comprehensive review of the sector's regulatory environment, including the high regulatory levies, fees and taxes that are available in this sector. Therefore, it is important for the government to revisit their policy structure and make sure that it is designed to ensure maximum growth.

Another aspect that the law should take into account is the ease of doing business in the telecom sector. There are significant entry barriers in this sector which are hindering its growth. Apart from compliance, the concentration of the user base among a few players in this sector has also been one of the reasons for the lack of emerging players in the sector. There is a need to leverage the existing network to bring in new players in order to increase competition in the market.

Moreover, regulatory overlaps with the telecom regulatory authority of India are another crucial aspect that has to be looked into. Since TRAI is an independent statutory body, there are overlaps of jurisdictions with other regulators. There is a need to create an enabling framework which demarcates the jurisdiction of TRAI.

Recommendation:

1. A light touch regulatory approach is the need of the hour for the telecom market. Reducing compliance burden and enhancing regulatory certainty should be one of the key objectives of this law.

⁷ Consultation Paper on Ease of Doing Business in Telecom and Broadcasting Sector (2021), TRAI, Available at: https://www.trai.gov.in/sites/default/files/CP_08122021.pdf

⁸ Rathee K., Dept of Telecommunications panel to suggest reform measures in business-friendly move, Financial Express, March 22, 2022 Available at: <https://www.financialexpress.com/industry/dept-of-telecommunications-panel-to-suggest-reform-measures-in-business-friendly-move/2467274/>

⁹ Aulakh G., Telecom Debt to touch ₹6 Trillion, Live Mint, August 2, 2022, Available at: <https://www.livemint.com/industry/telecom/telecom-debt-to-touch-6-trillion-11659462460650.html>

2. A single window clearance system needs to be developed in order to reduce cost and compliance time for the entities.
3. Enabling competition and democratising the telecom market sphere should be one of the key objectives of the new framework.

4. Simplification of the Regulatory Framework

Broadly, the market for the telecom sector can be categorised under three broad heads, i.e. Wireless, Wireline and Internet services. As mentioned in the consultation paper¹⁰ as well, currently, the telecom sector is regulated through the Indian Telegraph Act, 1885, Wireless Telegraphy Act, 1933, Telecom Regulatory Authority of India Act, 1997, Information Technology Act, 2000 and other circulars and notifications issued by the Department of Telecommunications. Further, this sector is regulated by the Ministry of Communications, Department of Telecommunications, Telecom Regulatory Authority of India, and Ministry of Information and Broadcasting. We welcome the approach towards simplification of the regulatory framework as it is the need of the hour for the telecommunication industry.

The licensing regime in the telecom sector saw a massive shift with the introduction and implementation of the ‘unified licence regime’. The unified licence regime has been implemented primarily with the objective of ‘one nation, one licence’, as envisaged under the National Telecom Policy - 2012 (NTP 2012). It replaces the earlier regime where the players were required to obtain a separate licence for different telecom services in India, such as internet services, national long-distance (NLD) services, international long-distance (ILD) services, etc. This was a step in the right direction for creating a unified licensing regime. However, one of the key issues was the official fees that come with it. The charging heads have been defined separately under the unified licence with different limits for entry fees, net worth, paid-up capital, bank guarantees and processing fees. In addition to the prescribing minimum net worth of the companies availing the service and furnishing bank guarantee, the authorities also levy 8 per cent of the Adjusted Gross Revenue charged annually from the service provided, which includes a licence fee of 3 percent and Universal Service Obligation fee of 5% of AGR. In any country, the licence fee is not more than 3 per cent. There is a need to revisit the licence fee and amend it to make it more investment friendly.

As mentioned above, the sheer amount of regulation in the telecommunications sector is also a cause of concern. Every regulation brings with itself several compliance burdens, which increases the cost and time of the entities to comply with each law. A single framework or a single window clearance approach is important for the industry to minimise the cost.

The goal of the consultation paper to simplify the regulatory framework to achieve certainty and bring more investment is laudable. However, it will only be achieved by a light-touch approach

¹⁰ Consultation Paper on ‘Need for a new legal framework governing Telecommunication in India’, Department of Telecommunications, Available at: <https://dot.gov.in/sites/default/files/Extension%20of%20time%20-%20Consultation%20Paper%20and%20Notice.pdf?download=1>

to regulation. The regulatory framework should offer support to the business entities in coming out of the debts and ensuring new entities are entering the market.

Recommendation:

1. Merge all the existing regulations into a single legislation which is aimed at lifting the burden on the telecom sector.
2. Ensure minimal disruption and continuance of licences issued under the current regime when the new law is implemented.
3. Reduce the licence fees from currently 8% to less than 3%, which can help the telecom sector alleviate the financial distress.

5. Spectrum Management

The profitability of the telecom industry in India has declined over the past 4-5 years. Although tariffs (which are the revenue for the telecom industry) have been reduced, there is an increase in the cost to the mobile operators. Revenue has reduced, and expenditure has gone up, leading to a reduction in the margin of profits. This means that customers get better services at lower tariffs and lower rates, caused by market disruptions spearheaded by certain mobile operators.

About 30% of the revenue of telecom operators is paid towards spectrum charges - which include annual fees. The spectrum pricing formula needs to be revised in order to relax the pressure on telecom operators. With an expansive customer base in this decade, services provided to customers in current times are varied and require more data - and therefore, telecom operators require access to larger amounts of spectrum. The existing mechanism is based on per megahertz, which does not allow telecom operators to address the increased demands of customers. Other areas of focus include infrastructure creation (which includes laying of optic fibre) and quality of services. Tier II and Tier III cities still suffer from poor connectivity and unreliable internet connectivity. The government also needs to have a comprehensive system of complaint redressal for the customers, possibly through the creation of an ombudsman post for this purpose.

Spectrum auctions have been mandated by the Supreme Court to ensure transparency in allocation; however, the approach to determine the reserve prices of spectrum needs to be revisited, as is evident from the amount of spectrum left unsold in successive auctions. The government should look at raising revenues from the earnings of the telecom companies rather than from the input costs. High reserve prices have caused several auctions to fail, leaving valuable spectrum idle.¹¹

Besides the high spectrum auction costs, the government levies in the telecom sector, estimated to be 30 percent of their revenues, are among the highest in the world.¹² The Department of Telecommunications (DoT) levies three kinds of fees and charges: (i) initial entry fee, which is non-refundable, (ii) annual licence fee, which includes a contribution to universal service obligation; and (iii) spectrum usage charges.

The Universal Service Obligation Fund (USOF), set up to expand networks in rural and remote areas, needs to be reviewed as nearly \$ 6.7 Billion (₹50,000 Crore) of this fund lying unutilized, while a major improvement in access to telephony and internet across India is driven primarily by private investment. The level of indebtedness calls for a comprehensive review of the sector's regulatory environment, specifically including the high regulatory levies, fees and taxes and the

¹¹ Ayush T, Maanya V, Trisha P, (2021) Enabling a Trillion Dollar Digital Economy: Interdependent, Interconnected and Digital, The Dialogue and ASSOCHAM, Available at: <https://thediologue.co/wp-content/uploads/2021/02/Enabling-a-Trillion-Dollar-Economy-The-Dialogue.pdf>

¹² *Ibid.*

spectrum charges that are imposed on this sector. Therefore, it is important for the government to revisit their policy structure and make sure that it is designed to ensure maximum growth.

The Spectrum Usage Charge (SUC), a legacy of the old regime when spectrum was given administratively, is anomalous since the telecom operators have been buying access spectrum in auctions ever since 2010. The burgeoning debt of the telecom sector is a matter of great concern and needs to be dealt with expeditiously and effectively. TRAI financial reports have been showing a consistently declining general revenue of the industry as well as a falling AGR. The AGR judgement has exacerbated this problem further. There is a need to look into the definitional aspects of AGR again.¹³

Recommendation:

1. The spectrum pricing formula needs to be revised in order to relax the pressure on telecom operators
2. The government should consider having a comprehensive system of complaint redressal for the customers, possibly through the creation of an ombudsman post for this purpose.
3. Revisiting the definition of Adjusted Gross Revenue to exclude non-telecom related incomes

¹³ *Ibid.*

6. Right of Way (RoW)

Right of Way norms have currently held up 500 telecom/optical fibre projects as there is a lack of regulatory harmonisation and infrastructural interoperability in place that has caused such a magnitude of projects to be held up. While a bulk of these held-up projects are related to defence land, either in border areas or cantonments, RoW issues have continuously been impediments even in private lands.

An example of the regulatory disharmony in place can be seen in the levy of 10% of the land's market value being sought by the roads ministry from the telecom ministry or the other levies imposed by the ministry for railways, forest and the environment being imposed for a platitude of reasons, all culminating in the halting of telecom projects.¹⁴

However, amendments to the 2016 Right of way Rules passed in August 2022¹⁵ ease up multiple issues that have plagued the discourse between telcos and the DoT. The 2022 Amendment brings a host of changes that the telecom industry has been demanding for a long time, namely:-

1. ***Rationalisation of charges:*** The government has removed the administrative fee charged by the Central government for the establishment of poles on land owned/controlled by it. For State/UTs, the fee will be limited to ₹1,000 per pole. The fee for laying overground optical fibre shall be limited to ₹1,000/ Km. These are significant steps in the right direction as companies have argued that they have had to pay upwards of a 1000% over the ₹1,000/ Km to municipalities for their projects and have for long pleaded for uniform rates and standards.¹⁶
2. ***Faster clearance of applications:*** The government has proposed the Gati Shakti Sanchar Portal of the Ministry of Communications as the single window clearance system for RoW applications in the future. The Telecom Minister has also stated that the approval timelines have been reduced drastically from 100 days to just 22 after the portal was introduced.
3. ***Removing government approval for building infrastructure on Private properties:*** The 2022 amendment removed the need for taking consent from the government when building infrastructure on private properties.

¹⁴ Vishnoi, A. (2022 August 29) *Right of way rules on cards for public projects*, Economic Times. Retrieved on August 30, 2022, from <https://economictimes.indiatimes.com/news/india/right-of-way-rules-on-cards-for-public-projects/articleshow/93840036.cms>

¹⁵ Ministry of Communications (2022 August 17) *Indian Telegraph Right of Way (Amendment) Rules, 2022*. Retrieved on August 30, 2022, from https://dot.gov.in/sites/default/files/RoW2022_0.pdf?download=1

¹⁶ Abbas, M. (2021 February 20) *Trai to release recommendations for Right of Way permissions*, Economic Times. Retrieved on August 30, 2022, from https://m.economictimes.com/industry/telecom/telecom-news/trai-to-release-recommendations-for-right-of-way-permissions/amp_articleshow/81121302.cms

While the 2022 amendment aims to bring necessary reforms to RoW norms in the country, there are additional steps that can be taken in order to enable growth and greater coverage across the country.

1. ***Focussed Fiberisation of Base Transceiver Stations (BTS)*** - Currently, the government estimates that 35.11% of Telecom Towers/ BTSs have undergone fiberisation as of June 2022.¹⁷ This is up by 4.11% from 2020, however still relatively very low compared to global standards. The fiberisation of sites is integral to the goal of providing stable access to the internet as envisioned under the National Digital Communications Policy 2018 (NDCP).
2. ***Uniform application of RoW norms:*** The uniform application of RoW across states is a foundational hurdle that needs to be resolved as the RoW permission is granted by the state governments (e.g. via local authorities like municipalities) in return for a fee. In many cases, these charges have been argued to be disproportionate, and RoW permissions are, as a result, delayed as local authorities follow their own interpretations and processes while granting such permissions. Thus, a uniform application of norms is crucial to reduce delays.¹⁸
3. ***A standardised ‘Dig only once’ policy to incorporate designing of utility ducts with implied RoW permission for Telecommunications:*** Standardising utility ducts for telecommunication projects will perhaps reduce significant strain on RoW requests as ducts are already in place for the fiber to be laid. Such a policy will also enable the fiberisation of sites at a far more efficient pace. Such a policy lays the infrastructural foundation for future modernisation plans as well.

¹⁷ Minister of State for Communications (2022 July 22) *Progress of National Broadband Mission*, PIB. Retrieved on August 30, 2022, from <https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1843752>

¹⁸ GSMA (2020 September) *Rights of Way (RoW) in India: A submission from the GSMA relating to India Mobile Sector*. Retrieved on August 30, 2022, from <https://dipa.co.in/reports/GSMA%20Paper%20on%20RoW%20Sep'2020.pdf>

7. Expanding the scope of the USOF

The Universal Service Obligation Fund (USOF) was formed by an Act of Parliament and established in April 2002 under the Indian Telegraph (Amendment) Act 2003 (further amended in 2006), to provide financial support to telecom services in order to make them serve commercially unviable rural and remote areas of the country. USOF raises funds through the contentious Universal Service Levy (USL), which is 5 percent of the Adjusted Gross Revenue (AGR) of Telecom Service Providers. (TSP)

The funds collected by the levy are held in the Consolidated Fund of India (CFI) and are disbursed post-parliamentary approval. As of 30th June 2022, the fund held INR 59734.97 crore, which is above 50% of the funds collected by the USOF since coming into force. The fund and the objective being sought to be achieved are characteristic of the welfare state that India has presented itself being on multiple fronts; however, despite the multitude of projects being funded by the USOF, the disbursement of funds and the quality of work being outputted by the projects have been far behind the expertise curve that private telecoms have achieved in remote areas.

An example of this can be found in the work of BSNL in building infrastructure in LWE areas that currently only support 2G services that have become obsolete over time as internet usage and penetration in India have rapidly risen. They were granted INR 2,426 crores in April 2022 to modernise their infrastructure to support 4G services.¹⁹

There has also been criticism of the 5% USL applicable on TSPs as companies have stated that the levy is higher relative to other countries and the disbursement of the levy has been arbitrary. The argument is based on the disbursement of USOF funds disproportionately to public companies such as BSNL and MTNL in October 2019, when the Union Cabinet approved a Rs 70,000-crore revival package for the financially stressed public companies, which included a voluntary retirement scheme (VRS), asset monetisation and allocation of 4G airwaves.²⁰

TSPs argued that such disbursement of funds, especially when private companies are the largest contributor of levies to the fund, reduces trust between the government and private bodies. Critics of the levy further argued that the government must reconsider its levy and the collection of the same for a few years as they have surplus funds under the USOF, and a temporary halt on the levy would enable private TSPs to manage their AGR dues and even stay afloat after taking a

¹⁹ ET Bureau (2022 April 27) *Naxal- Hit areas cross 10 states to get 4G services now*, Economic Times. Retrieved on August 30, 2022, from <https://m.economictimes.com/news/economy/policy/cabinet-clears-rs-2426-crore-to-upgrade-2g-mobile-sites-in-naxal-hit-areas-to-4g/articleshow/91126554.cms>

²⁰ Minister of State for Communications (2022 July 22) *4G and 5G Licenses to BSNL and MTNL*, Press Release by the Ministry of Communications. Retrieved on August 30, 2022, from <https://pib.gov.in/PressReleasePage.aspx?PRID=1843751>

hit over the pandemic and the declining trend in revenue for certain businesses.²¹²² Contentions that such a move would better align DoT with National Digital Communications Policy 2018 (NDCP) of providing affordable and quality services to the masses have also been raised.

As has been envisioned by the consultation paper released by the DoT and the Additional Secretary of DoT²³, we believe the scope of USOF can be increased by incorporating the following suggestions

1. **USOF as an Investment Fund:** As has been envisioned by the present Additional Secretary V.L. Kantha of the DoT, the idle funds under USOF can be better utilised when a determined percentage can be redirected for indigenous technology development.²⁴ Funding for projects has already been introduced²⁵ but the same can and must be upscaled in order to increase our indigenous capabilities, especially when battery changes for tower sites are still dependent on Li-ion battery imports from China.²⁶

While a 5% allocation of the USOF was presented under the Union Budget 2022-23, perhaps a greater amount can be allocated in order to manufacture digital components locally and cater to our terrain. The usage of the 5% allocation from USOF in the status quo is being directed toward building ICT infrastructure, especially for the rollout of 5G services in the country.²⁷

2. **Light touch regulation and reduction of USL:** The DoT can perhaps reconsider the USL and cease its 5% levy on telcos either permanently or for a set duration of time till the

²¹Tejpal, R. (2020 August 13) *Why the government must suspend the USO levy, leave expansion of rural telephony to private telcos*, Economic Times. Retrieved on August 30, 2022, from <https://m.economictimes.com/prime/media-and-communications/why-the-government-must-suspend-the-uso-levy-leave-expansion-of-rural-telephony-to-private-telcos/primearticle/show/77514006.cms>

²²Phadnis, A. (2021 August 10) *Vodafone Idea files review petition in apex court on AGR dues*, Business Standard. Retrieved on August 30, 2022, from https://www.business-standard.com/article/companies/vodafone-idea-files-review-petition-in-apex-court-on-agr-dues-121081001965_1.html

²³ ET Bureau (2022 July 30) 'Govt wants to promote local cos in 5G rollout', Economic Times. Retrieved on August 30, 2022, from https://economictimes.indiatimes.com/news/india/govt-wants-to-promote-local-cos-in-5g-rollout/articleshow/93241269.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

²⁴Abbas, M. (2022 August 25) *BSNL draws flak from domestic vendors, extends 4G upgrade tender deadline for extremism hit areas*, Economic Times telecom. Retrieved on August 30, 2022, from <https://telecom.economictimes.indiatimes.com/news/bsnl-draws-flak-from-vendors-extends-tender-deadline-for-4g-upgrade-in-red-corridor-areas/93768076>

²⁵ Minister of Communications (2022 July 1) *Department of Telecommunications signs agreement with ITI Limited and BSNL to fund pilot projects under Universal Service Obligation Fund (USOF)*, Ministry of Communications. Retrieved on August 30, 2022, from <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1838558>

²⁶ *Supra Note 12*

²⁷Abbas, M. (2022 February 3) *USO fund support will drive design-led manufacturing in 5G, 6G: DoT Secretary*, Economic Times. Retrieved on August 30, 2022, from https://m.economictimes.com/industry/telecom/telecom-news/uso-fund-support-will-drive-design-led-manufacturing-in-5g-6g-dot-secretary/amp_articleshow/89307878.cms

collected funds are exhausted. Such a step would allow breathing room for telcos and also enable them to be better able to repay AGR dues.

3. ***Decentralising the building and maintenance of ICT infrastructure:*** The USOF can utilise its funds and make significantly more impact in its coverage of regions where internet services are currently unavailable or extremely slow. Allowing private companies to seek funds for projects under conditions set by the DoT will allow for parallel coverage across the country instead of a project-wise rollout as seen in the Left Wing Extremism (LWE) regions etc.

Currently, 25,067 inhabited villages still do not have mobile network coverage, and this presents a significant obstacle in India's push toward a digital future.²⁸ While BharatNet and other initiatives funded by USOF have shown great progress in increasing coverage, they are often providing unreliable and slow connections to these regions that do not benefit these regions in the long run as most sites are nonfunctional in 2G mobile network speeds. Allowing private companies to build and maintain infrastructure would significantly increase our network coverage timelines and help reduce costs.

A *second prong* towards decentralisation under this suggestion would be to enable infrastructure sharing of ICT infrastructure between companies to provide better network coverage to remote areas. Such a step reduces the turnaround times for providing stable mobile coverage to uncovered areas in the interim and formulates a foundational step in telecom policy that can benefit all stakeholders.²⁹

²⁸Minister of State for Communications (2021 August, 4) Lok Sabha Unstarred Question No. 2672, Lok Sabha. Retrieved on August 30, 2022 from <http://164.100.24.220/loksabhaquestions/annex/176/AU2672.pdf>

²⁹COAI (2017 May) *Responses to TRAI Consultation Paper on Definition of Revenue Base (AGR) for the Reckoning of Licence Fee and Spectrum Usage Charges*, Association of Unified Telecom Service Providers of India. Retrieved on August 30, 2022 from <https://cdn.coai.com/sites/default/files/2017-05/COAI%20Response%20-%20TRAI%20consultation%20Paper-%20AGR%20final.pdf>

8. Standards, Public Safety, and National Security

We welcome the department of telecommunication's intention to come up with a new law which has appropriate provisions for addressing situations of public emergency and public safety and for taking measures in the interests of national security. Targeted surveillance in the form of interception has a long-standing history predating any of the recent technological developments. Under legal grounds of section 5(2) of the Indian Telegraph Act 1885, the government can intercept, monitor, and decrypt any information for protecting sovereignty, national security, friendly relations with international governments, integrating public order etc.

We like to take this opportunity to suggest an overhaul of the legal framework of surveillance to keep up with the pace of technological developments. The Indian surveillance legal framework is archaic³⁰, since then the world has changed, technology has changed, and so have the techniques used for surveillance in India and the legal fabric (Puttaswamy judgement I³¹).

The Indian surveillance legal framework came into existence when bulk surveillance barely existed, and discourse around privacy and surveillance was not well developed. Over time, surveillance technologies, data processing, and analytics tools have evolved massively, which has paved the way for extensive interceptions (intentionally and unintentionally).³² This development calls for revamping our existing legal framework for surveillance which would consider the evolving technological developments.

The current legal framework of surveillance poses caveats that cause implications to the citizens.. The caveats also cause fall through the crack, where it provides room for state actors to perform surveillance at their discretion without appropriate checks and balances.

This is problematic because the data collected through disruptive surveillance technology are not safeguarded against misuse; who can access data and whether it is only used for the stipulated purpose is unknown, and measures to prevent and tackle breach and abuse are not specified. Also, in many cases, citizens never know about the data collected through these digital surveillance tools (in case of no conviction as well), which hampers their fundamental right to privacy.

³⁰ Historically, in India, surveillance has been a right of the state to deploy intrusive measures against citizens with minimal checks and balances. A slew of colonial laws that were passed in the 19th century by the British allowed the Raj to monitor communications, be it postal or telegraph. These laws continued to exist with impunity until the Supreme Court intervened in December 1996 (PUCL case), passing specific guidelines as safeguards against illegal or excessive surveillance by the State

³¹ Puttaswamy Judgement I, (2017) 10 SCC 1

³² Bhandari, V., Parsheera, S., Rahman, F., & Felman, J. (2018, May 18). *India's communication surveillance through the Puttaswamy lens*. The Leap Blog. Retrieved March 12, 2022, from <https://blog.theleapjournal.org/2018/05/indias-communication-surveillance.html>

Besides, the current legal framework doesn't have guidelines for the State to determine safe tools for surveillance purposes. For instance, when the state uses technologies for which the domain name used by a Command and Control (C&C) server resolves to cloud-based virtual private servers rented by a foreign company, it increases national security concerns as they are a registered private company in another country. Therefore, to set India's trajectory towards empowering citizens, we suggest having more precise, purposive, proportionate, and comprehensive surveillance legislation for the country.³³

Recommendation:

Many jurisdictions have revamped/enacted surveillance legislation³⁴ to cater to recent technological developments. Therefore, India must pick inferences from various jurisdictions and enact more comprehensive surveillance legislation or reform the existing surveillance regime. On that note, we believe the below-discussed levers and pointers may form a sturdy new law, or amend existing laws, to achieve an empowered citizenry for the country.

- **Clear definitions:** Through the new law, we suggest moving from the broad language used in the status-quo to defining various critical terminologies such as national security, public order etc. and principles like proportionality, necessity, suitability, and legality etc., in a tight fashion. The defined terminologies must find the right balance, where we strive to minimise falling through the cracks due to narrowness.³⁵
- **Robust accountability & oversight:** The new law must provide for setting up a Multi-Party Parliamentary Standing Committee to oversee the operations of law enforcement agencies and intelligence agencies. A mechanism followed by the UK should advise the model because India inherited and emulated the Westminster model of parliamentary government. The UK has the Intelligence and Security Committee of Parliament³⁶, formed under the Intelligence Services Act 1994 (reinforced by the Justice and Security Act, 2013³⁷) to oversee the policies, expenditure, administration and operations of various intelligence agencies subjected to secrecy.³⁸ In advanced

³³ Shekar, K. (2021, November 8). *Why Do We Need Surveillance Reform in India? – Recent Developments* | SCC Blog. SCC Online. Retrieved August 31, 2022, from <https://www.scconline.com/blog/post/2021/11/08/why-do-we-need-surveillance-reform-in-india-recent-developments/>

³⁴ For instance, in the UK, the government enacted the Investigatory Powers Acts, 2016, which applies to intelligence agencies to ensure powers and principles fit the digital age.

³⁵ Shekar, K., & Mehta, S. (2022, February 17). The state of surveillance in India: National security at the cost of privacy? ORF. Retrieved August 31, 2022, from <https://www.orfonline.org/expert-speak/the-state-of-surveillance-in-india/>

³⁶ *Intelligence and Security Committee of Parliament (ISC)*. (n.d.). Retrieved March 12, 2022, from <https://isc.independent.gov.uk/>

³⁷ Sections 2, 3, and Schedule I of the Justice and Security Act, 2013

³⁸ Section 1(1)(b) of the Official Secrets Act 1989

democracies such as the UK, the Prime Minister retains control over who will be part of the Committee, provided they are drawn from other parties besides his/her own. In addition to this, the parliamentarians must be granted access to information held by intelligence and law enforcement agencies without restricting any information under the ambit of preserving national security. A similar mechanism is followed by the United States, where the US Congress monitors law enforcement agencies and intelligence agencies, and there are no statutory restrictions on information access.³⁹

Moreover, the new law should have provisions for judicial authorisation for two reasons (a) prevention and investigation of criminal offences (warrant of interception from the concerned court, with expiry time duration and archiving of intercepted contents and submission to the court). The court warrant must assess the constitutional validity of the request for surveillance through four prerequisites, i.e., legality, legitimate goal, proportionality, procedural guarantees, and (b) a special authority (to be created) for intelligence purposes that can be on the lines of the UK Investigative Powers Commissioner.⁴⁰ This authorisation mechanism would bring about a separation of powers to check and oversee. The new legislation should ensure that State agencies (both intelligence and law enforcement agencies) must take a prior warrant from the court to intrude into the private communications between individuals. Various jurisdictions follow this mechanism⁴¹, and India must pick inferences from those to devise a more nuanced judicial authorisation system. The court warrant must assess the constitutional validity of the request for surveillance through four prerequisites (as follows) for infringing upon an individual's privacy and personal liberty discussed in Puttaswamy Judgement I.⁴²

In addition to the external oversight proposed above, the existing review committee model formed under Rule 419A of the Indian Telegraph Act must be revamped in the new legislation. The constituted authority should be answerable to the Parliamentary Committee and the Parliament in general. Also, it should be empowered to take complaints about unauthorised disclosure of classified or sensitive national security information, illegal surveillance activity, administrative misconduct etc.

³⁹ F Smist, Congress oversees the intelligence community, 2nd edition, University of Tennessee Press, Knoxville, 1994.

⁴⁰ Please see the UK's Office of the Investigatory Powers Commissioner <https://www.ipco.org.uk/>

⁴¹ Under the Canadian Security Intelligence Service Act, 1985, specially designated judges of the Federal Court provide the approval to the warrant of the intelligence agencies. In the United States, intelligence and law enforcement agencies must take warrants, court orders etc., for domestic surveillance activities under the Electronic Communication Privacy Act of 1986. In addition, in *Riley v. California*, the United States Supreme Court marked that search and seizure of digital data are considered to be unconstitutional.

⁴² Puttaswamy Judgement I, (2017) 10 SCC 1 [S.K. Kaul, J part]

These oversight mechanisms would therefore create a separation of powers to check and oversee executive actions, which could sometimes hamper democratic safeguards due to malicious motives.⁴³

- **Technical Safeguards:** Various technical safeguards must be established to protect the privacy of individuals following some of the below universal principles:
 - **Data minimisation:** The data collected through means of surveillance should not exceed the purpose for which it was collected and should not be held/stored post the completion of the purpose.
 - **Proportionality:** The data required through surveillance must have a rationale connection with the object of the investigation, such that the data demanded is absolutely necessary. The UK also propagates this principle through its Investigatory Power Act, 2016 (previously Regulation of Investigatory Powers Act, 2000), which mandates that data demanded by intelligence agencies must be necessary and proportionate.
 - **Purpose limitation:** The information received through surveillance must be processed only for the case/investigation it was accrued. The investigating agency must initiate a new request to use the same evidence in other cases/investigations. Besides, the usage of evidence for anything other than law enforcement must be prohibited.
 - **Privacy by design⁴⁴:** The processing of evidence by law enforcement agencies and intelligence agencies should be privacy-friendly and doesn't trade off privacy at the cost of other State interests such as national security, public order etc. It should use Privacy Enhancing Technologies to ensure that unnecessary personal details are not exposed. The access control must be designed to be adequately granular, with audit trails, to enforce privacy and accountability.
 - **Data provenance:** Law enforcement agencies and intelligence agencies must have legal and technical measures to differentiate citizens from foreign nationals within the bulk of data gathered through surveillance. By identifying the provenance of the data, it should be treated differently as Indian citizens have constitutional rights and protections that must be factored in while using their data
 - **Data security:** The data collected through surveillance should be encrypted at rest to ensure the safety of the information stored.
 - **Data deletion:** The data collected through surveillance must not be retained longer than necessary, which is followed by intelligence agencies in the UK under

⁴³ Ryan, J. (2009, April 14). *Torture Memo Gave White House Broad Powers*. ABC News. Retrieved March 12, 2022, from <https://abcnews.go.com/TheLaw/DOJ/story?id=4569746&page=1>

⁴⁴ Privacy by design has seven foundational principles - https://iab.org/wp-content/IAB-uploads/2011/03/fred_carter.pdf

Investigatory Powers Act, 2016.⁴⁵ At the laps of data retention mandate by regulations, the information gathered through surveillance by law enforcement and intelligence agencies must be destroyed.

- **Data disclosure:** When a crime or security threat is not established from the data collection and processing exercise, the agencies must inform the individuals about the surveillance and reveal the data collected (after a period of time) to them.
 - **Fair and lawful processing:** The data acquired through surveillance must be processed fairly and lawfully such that unintended consequences like discrimination, historic disposition, and oppression do not translate into the action.
 - **Training:** The personnel engaged in surveillance, including supervisory officials, must attend training on privacy and ethics annually to ensure that the right culture is built and nurtured.
- **Administrative safeguard:** The new law must ensure that every law enforcement agency and intelligence agency must have privacy/ethics officers within their agencies to ensure day-to-day operations are not violating ethicality and privacy. The officer should also advise and guide the officials on privacy and ethical issues. Many countries, including the US, UK and Germany, follow this system; for instance, in the US, the Office of Privacy and Civil Liberties is formed within the CIA⁴⁶, NSA⁴⁷ etc.
 - **Redressal mechanism:** The new law must have a robust grievance redressal mechanism. When the individual is established not guilty through the data collected and processed through legal means, the individual (or a group) must have a redressal option through the legislation if they consider it unnecessary surveillance. If the individual manages to prove that their data is (a) misused, (b) compromised, (c) infringed privacy (of themselves and others), etc., they must be appropriately compensated, and involved officials must be subjected to punishment.

To perform the above redressal function, the new law must provide an independent surveillance tribunal in India to take grievances from individuals (or groups of individuals). The tribunal must adopt a system that assures efficiency, quick turnaround, and cost-effectiveness. A tribunal system is followed in the UK, where the Investigatory Powers Tribunal⁴⁸ is established under the Regulation of Investigatory Powers Act, 2000.

⁴⁵ Sections 87 and 150 of the Investigatory Powers Act, 2016.

⁴⁶ *Office of Privacy and Civil Liberties*. (n.d.). CIA. Retrieved March 12, 2022, from <https://www.cia.gov/about/organization/privacy-and-civil-liberties/>

⁴⁷ *Civil Liberties & Privacy Overview*. (n.d.). National Security Agency. Retrieved March 12, 2022, from <https://www.nsa.gov/Culture/Civil-Liberties-and-Privacy/Overview/>

⁴⁸ *The Investigatory Powers Tribunal*. (n.d.). Retrieved March 12, 2022, from <https://www.ipt-uk.com/>

Individuals can approach the tribunal in the UK if they believe their right to privacy, property and communication is infringed upon.

The new law must also have provisions to approach the courts, where citizens and service (communication and internet) providers file petitions if they believe the interception order is excessive. They shall also challenge the order and seek a modification to the order. This approach was implemented in the US under Foreign Intelligence Surveillance Act (FISA).⁴⁹

⁴⁹ Section 702 of the Foreign Intelligence Surveillance Act

9. About The Dialogue

The Dialogue™ is a public-policy think-tank with a vision to drive a progressive narrative in India's policy discourse. Founded in 2017, we believe in facilitating well-researched policy debates at various levels to help develop a more informed citizenry on issues concerning technology policy. The Dialogue™ has been ranked as one the world's Top 10 think- tanks to watch out for, by the Think-Tank and Civil Societies Programme (TTCSP), University of Pennsylvania, in their 2020 and 2021 rankings.

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