

THE TECHNOLOGY,
MEDIA AND
TELECOMMUNICATIONS
REVIEW

TWELFTH EDITION

Editor
Matthew T Murchison

THE LAWREVIEWS

THE

TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

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This article was first published in December 2021

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Published in the United Kingdom

by Law Business Research Ltd, London

Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

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Enquiries concerning editorial content should be directed
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ISBN 978-1-83862-834-5

Printed in Great Britain by

Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ANANTLAW

BAGUS ENRICO AND PARTNERS

BAKER MCKENZIE

CEDAR WHITE BRADLEY

CLEARY GOTTlieb STEEN & HAMILTON LLP

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WEBB HENDERSON

ZHONG LUN LAW FIRM

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PREFACE

This volume marks the 12th edition of *The Technology, Media and Telecommunications Review*, which has been fully updated to provide an overview of evolving legal and policy activity in this arena across 25 jurisdictions around the world. This publication continues to occupy a unique space in the literature on TMT issues. Rather than serving a traditional legal treatise, this Review aims to provide a practical, business-focused survey of these issues, along with insights into how this legal and policy landscape in the TMT arena continues to evolve from year to year.

In 2021, the ongoing covid-19 pandemic has continued to loom large over legal and policy developments in this sector. As the threat of infection has continued to affect how we live, work and interact, the importance of connectivity has never been greater or more obvious. For many businesses, remote working has been the rule rather than the exception since March 2020, and may well persist in some form well after the pandemic is over. Many schools switched to distance learning formats during the pandemic. Tele-health is on the rise as doctors check in on patients via videoconference. Even tasks as mundane as grocery shopping have shifted online. And broadband connectivity, where available, has made it all possible.

The experience of covid-19 has, in turn, continued to reshape policymakers' understanding of the TMT arena. The shift to remote working and distance learning has stress-tested broadband networks across the world – providing a 'natural experiment' for determining whether existing policies have yielded robust systems capable of handling substantial increases in internet traffic. At the same time, the pandemic has prompted new initiatives to ensure, improve and expand broadband connectivity for consumers going forward. In various jurisdictions, policymakers are moving forward with subsidy programmes and other efforts to spur the deployment of advanced networks more deeply into unserved and underserved areas. Regulators also have taken steps to preserve internet access where it already exists, including by exploring mandates prohibiting disconnection of customers or requiring certain rates for low-income consumers – measures that, where adopted, sometimes have sparked fresh legal challenges and policy debates over the relative merits of government intervention and market-based solutions.

New technologies likewise have required new approaches and perspectives of policymakers. A notable example is the ongoing deployment of 5G wireless networks, as regulators continue to look for ways to facilitate such deployment. These initiatives take a variety of forms, and frequently include efforts to free up more spectrum resources, including by adopting new rules for sharing spectrum and by reallocating spectrum from one use to another. Multiple jurisdictions have continued to auction off wireless licences in bands newly designated for 5G deployment, capitalising on service providers' strong demand for

expanded access for spectrum. The planned deployment of new satellite broadband services, including multiple large satellite constellations in low-earth orbit, also continues to be a focus of regulatory interest across the world.

Meanwhile, long-running policy battles over the delivery of content over broadband networks continue to simmer in various jurisdictions, and new fronts have opened on related issues involving the content moderation policies of social media companies and other online platforms. Policymakers continue to grapple with questions about network neutrality, the principle being that consumers should benefit from an ‘open internet’ where bits are transmitted in a non-discriminatory manner, without regard for their source, ownership or destination. While the basic principle has been around for well over a decade, unresolved issues remain, including whether newer kinds of network management practices implicate such concerns, and whether efforts to promote a healthy internet ecosystem are best served by light-touch, market-based regimes or by more intrusive government interventions. In the United States, the light-touch approach reinstated in 2018 seems fairly certain to be revisited at the federal level, and certain states are continuing to claim an ability to impose their own restrictions on internet service providers. Regulators around the world have begun taking more aggressive enforcement action against internet service providers’ zero rating plans, which exempt certain data from counting against a customer’s usage allowance. Regulators in Asia are grappling with similar policy questions. In addition, these neutrality principles, usually debated in the context of broadband networks, are now spilling over to the content side, where social media companies are facing increased scrutiny over claims of discriminatory practices in moderating content appearing on their platforms. Indeed, some jurisdictions are considering measures that not only would rescind immunities these platforms have traditionally enjoyed for their content moderation practices, but also would require increased transparency and potentially even impose anti-discrimination mandates or other consumer protections. In short, while the balance of power between broadband network operators and online content providers historically has turned on the degree of regulation of the former, both sides’ practices are now very much in the spotlight.

The following country-specific chapters describe these and other developments in the TMT arena, including updates on privacy and data security, regulation of traditional video and voice services, and media ownership. On the issue of foreign ownership in particular, communications policymakers have increasingly incorporated national security considerations into their decision-making.

Thanks to all of our contributors for their insightful contributions to this publication. I hope readers will find this 12th edition of *The Technology, Media and Telecommunications Review* as helpful as I have found this publication each year.

Matthew T Murchison

Latham & Watkins LLP

Washington, DC

November 2021

INDIA

Rahul Goel, Anu Monga, Saudamini Sharma and Namrata Raj¹

I OVERVIEW

Covid-19 changed many things for the TMT sector all over the world. The onset of covid-19 in 2020 brought significant growth and development in carriage of telecom services and media and broadcasting in the Indian market, only to exponentially increase in 2021.

Like most other jurisdictions across the globe, in India, the onset of covid reflected an inward-looking mindset that nurtured and perhaps even rewarded aspirations of domestic growth. However, 2021 changed this covid-induced perspective (across the world and in India). Stakeholders (including the government) revised plans to facilitate internationalism. Active policy advancements and initiatives are welcoming of foreign investments and new newer players. One prominent policy change to this effect was the announcement by the government of allowing 100 per cent foreign direct investment (FDI) in the telecommunications sector without seeking any prior approval. Previously, foreign investment above 49 per cent required the prior approval of the government. This means that foreign participants investing in the telecom sector in India shall no longer require the approval of the government for the same and such investment may flow freely.

2021 has seen phenomenal growth in the demand for online services, including platform and software services, massive increases in the demand for data and internet connectivity due to the work from home model, and increased consumption of online media and entertainment content. The Indian telecommunication market, being the world's second-largest, saw a dramatic rise in subscription services. It is reported that the total subscriber base in the country stood at 1,201.20 million in March 2021. The density of rural subscribers reached 60.27 per cent in March 2021, from 58.79 per cent in March 2020, showcasing growth potential in the demand from the rural sector. The gross revenue of the telecom sector has been pegged at US\$9.35 billion in the third quarter of FY 2021. The media and broadcasting sector has also seen rampant growth in 2021. The estimated worth of the media and broadcasting sector currently stands at US\$24 billion in 2021, and it is constantly increasing. Similar growth trends have been observed for the online gaming, music and subscription video on demand markets in India, and these sectors show promising projected growth over the next two financial years.

This strong wave of industry growth in the TMT sector has not gone unnoticed by the government, which has brought forth many policy reforms and relief packages for the sector in 2021, and the same has been crucial for propelling increased investments. In line with the

¹ Rahul Goel and Anu Monga are partners and Saudamini Sharma and Namrata Raj are associates at AnantLaw.

vision and policy of the country's Self-Reliant India campaign,² the government has provided encouragement and support to global telecom network manufacturers such as Ericsson, Nokia, Samsung and Huawei to manufacture telecom equipment in India with 100 per cent local inputs. The government approved US\$1.65 billion in a production-linked incentive scheme for the telecom sector in June 2021.³ This has had a positive impact on investments in the sector and has triggered the entry of several global players into the manufacturing of mobile devices and components.

The government has also introduced and approved several structural and process reforms in the telecom sector that are expected to protect and generate employment opportunities, promote much-needed competition in the telecom market, infuse liquidity, encourage investment and reduce the regulatory burden on telecom service providers (TSPs). Some of the key structural reforms include rationalisation of adjusted gross revenue (AGR) to exclude non-telecom revenue on a prospective basis from the definition of AGR. This reform is key, and is aimed at providing relief to current telecom and network service providers in India, which have been subject to heavy monetary penalties imposed by the Supreme Court for non-payment of AGR dues for decades. Further, from 1 October 2021, delayed payments of licence fee and spectrum usage charges will attract the reduced interest rate of 2 per cent instead of the earlier 4 per cent interest, and the same will also be compounded annually instead of monthly, bringing relief to the telecom industry.

The government has also introduced the following under the Telecom Reforms 2021:⁴

- a* e-know your customer (e-KYC) requirements for obtaining connection under the unified licence (UL)/unified access services (UAS) licence;
- b* a one-time password-based process for conversion of mobile connections from prepaid to post-paid, and vice versa; and
- c* an e-KYC service as an alternative process for issuing mobile connections to individual customers, including outstation customers and bulk connection for customer ease.

In terms of legal and regulatory changes, the media and entertainment sector saw the introduction of the Information Technology (Digital Media Ethics Code), 2021 (Digital Media Ethics Code) in early 2021. The Digital Media Ethics Code has primarily been enacted to bring online curated content providers within the regulatory ambit of the Ministry of Information and Broadcasting (MIB). With an increase in international investment, the government has also been wary of the risks associated with exchange of data of India's citizens and compliance with the local laws by foreign entities. 2021 has seen increased friction between technology giants such as Twitter, Facebook and Amazon and the government.

In June 2021, the Ministry of Electronics and Information Technology (MEITY) was sent a notice to Twitter Inc seeking its compliance with the Digital Media Ethics Code and its appointment of a resident grievance officer, among other things. The Digital Media Ethics Code places obligations on social media intermediaries and significant social media

² Atmanirbhar Bharat.

³ Union Cabinet approves Production Linked Incentive Scheme for the Telecom Sector, report available at <https://dot.gov.in/sites/default/files/PLI%20Scheme%20Guidelines%20for%20Telecom%20%26%20Networking%20Product.pdf?download=1>.

⁴ The Telecom Reforms, 2021, available at <https://dot.gov.in/sites/default/files/TelecomReformsBooklet-As%20on%2006.10.2021.pdf>.

intermediaries, which are required to establish and follow elaborate grievance redressal mechanisms in addition to compliance with increased obligations on the protection of consumers of such online services.

2021 has also seen the introduction of new technologies and development in the outer space communication sector. The Self-Reliant India mission has also put the space technology and services sector into motion. In August 2021, the Department of Space released the draft satellite navigation policy for the development of local technologies for satellite navigation and GPS systems and applications for public consultation.

In July 2021, the Ministry of Civil Aviation released a draft bill for the regulation and governance of drones and drone-related technologies in India. After undergoing a rigorous industry consultation process, the Drone Rules, 2021 (Drone Rules) were enacted with effect from 25 August 2021. The introduction of legal and regulatory reforms and legislation in new technologies such as drones has been well received by the Indian market. The introduction of the Drone Rules also opens up a new market segment for production and manufacturing sectors in addition to the growth of home-grown science, technology and innovation. The drone sector is also the beneficiary of a production-linked incentive scheme amounting to US\$16.5 million, as approved by the government, to increase the growth of the sector and give a boost to the local manufacturing and production of equipment in India.

A large part of the Indian consumer base consists of middle-class consumers, with fast-evolving consumption patterns, especially with the onset of a new technological era due to the onset of covid-19. This is the key for investment and return on investment for any company, especially companies in the business of the internet of things (IoT) and the industrial IoT. Many of the corporations in the consumer goods segment including e-commerce/marketplace operation, thrive on this data to understand the trends and future consumption patterns and the targeted marketing. The protection of data such as the consumer pattern data, consumer profiling, and a whole host of other personal and sensitive personal data has led to the government issuing policies and draft laws. The government released the draft Data Protection Bill in 2019, which proposes a data protection law along the lines of the European GDPR. Sectoral regulators such as the Reserve Bank of India have also issued notifications and regulations requiring sensitive financial data of Indian citizens to be locally stored within the jurisdiction of India.

With significant increases in data consumption, the world has experienced the need for newer technologies and a much wider spectrum bandwidth for efficiency in communication, ease of doing business and accessing entertainment. While India eagerly awaits the allocation of 5G spectrum and the efficiency brought by it to Indian consumers, the spectrum tenure for future auctions has been increased from 20 to 30 years, with surrender of spectrum being permitted after 10 years for spectrum acquired in future auctions. In the telecom reforms approved by the government, no spectrum usage charge (SUC) will be applicable to the spectrum acquired in future spectrum auctions. Spectrum sharing has also been encouraged, and the additional SUC of 0.5 per cent for spectrum sharing has been removed.

II REGULATION

i The regulators

The Telecom Regulatory Authority of India (Trai) is the regulatory body that has been set up under the Telecom Regulatory Authority of India Act, 1997, to oversee the functioning and regulation of the telecom and media broadcasting sector in India. Among its several functions, Trai is the sole autonomous body that has the authority to fix tariffs for provision of telecom and broadcasting services. Further, Trai also undertakes the following functions:

- a* ensuring compliance of terms and conditions of various licenses issued by the Department of Telecommunications (DoT);
- b* fixing the terms and conditions and ensuring the technical compatibility of inter-connectivity between service providers;
- c* regulating arrangements among service providers for sharing of revenue derived from providing telecommunication services; and
- d* laying down the standards of quality of service for telecommunication services.

In addition to the above functions, Trai also regularly publishes consultation papers and issues recommendations to the DoT, which the DoT is required to mandatorily consider and subsequently incorporate in the licenses so issued by it. The Trai Act also provides for the creation of Telecom Disputes Settlement Appellate Tribunal (TDSAT), which adjudicates disputes arising from the Trai Act, tariff orders of Trai and inter-party telecom and broadcasting disputes.

The wireless planning and coordination wing (WPC) was established under the DoT in 1952. The WPC is the national radio regulatory authority, which is responsible for the overall management and licensing of spectrum frequencies in India. The WPC was established as a wing under the aegis of the DoT, and it functions as an extension of the DoT and issues licences to establish, maintain and operate wireless stations. The WPC broadly has three sections under which its operations are divided: licensing and regulation, a New Technology Group and the Standing Advisory Committee on Radio Frequency Allocation (SACFA).

The SACFA is a high-level committee that includes heads of major wireless users and administrative ministries of the government. The SACFA makes recommendations on:

- a* major frequency allocation issues;
- b* formulation of the national frequency allocation plan;
- c* various issues related to International Telecom Union and the Asia Pacific Telecommunity and providing clearance of all wireless installations in the country (including the import of radio frequency devices). WPC and SACFA clearance and approval for the installation or import of any equipment for the purpose of wireless transmission of radio frequency is mandatory.

Trai also functions as the overarching national regulatory authority for broadcasting services such as cable television, direct-to-home, terrestrial services and internet protocol TV (IPTV) in India. Trai releases annual tariff rates for cable television interconnection services. Further, the interconnection (broadcasting) regulations enacted by Trai require broadcasters to provide signals on a non-discriminatory basis to distributors, including cable television operators, and also provides for must-carry provisions mandating that broadcasters carry channels of national importance. Broadcasters have to mandatorily comply with the interconnect regulations for broadcasting, which require the prior approval of Trai for the annual release of television channel pricing via the reference interconnect offer (RIO).

While there is no specific regulatory authority that oversees the functioning of television media, the MIB is the primary body that regulates uplinking and downlinking permissions, the content and nature of channels and the overall governance for the same. The broadcasting wing of the MIB also regulates the content of private satellite channels and networks of multi system operators and local cable operators through the Cable Television Networks (Regulation) Act 1995 and policy guidelines issued by it from time to time. The MIB regularly also releases advisories for, inter alia, private television channels, resolves complaints received from viewers and issues penalties to broadcasters for non-compliance.

The film division of the MIB administers the Cinematograph Act, 1952 and provides guidance and regulation of the film industry in India. The Central Board of Film Certification (CBFC) is the primary body that regulates:

- a* the public exhibition of films;
- b* the import and export of theatrical and non-theatrical films and various types of equipment required by the film industry;
- c* developmental and promotional activities relating to films;
- d* the preservation of films and filmic material;
- e* the organisation of international film festivals in India and India's participation in international film festivals abroad; and
- f* the organisation of events in collaboration with the Ministry of Culture, etc.

The media and entertainment sector is also dominated by self-regulatory bodies. Certain self-regulatory bodies such as the Advertising Standards Council of India (ASCI), the News Broadcasters Association and the Indian Broadcasting Foundation provide specific regulations, guidelines and standards that are largely followed by industry players. Further, the ASCI self-regulatory code has also been incorporated into the law by reference in the Cable Television Networks Rules, 1994 (Rule 7 (9)).

ii Main sources of law

The following are the primary sources of legislation regulating the telecommunication and broadcasting sectors in India:

- a* The Telegraph Act 1885,⁵ which governs the use of wired and wireless telegraphy, telephones, teletype, radio communications and digital data communications. Under the prevailing regulatory framework, the government has exclusive jurisdiction to establish, maintain, operate, license and oversee all forms of wired and wireless communications within India.⁶ The DoT is the nodal authority that provides licences and approvals to TSPs.
- b* The Wireless Telegraphy Act 1933,⁷ which regulates the possession of wireless telegraphy apparatus and prescribes penalties for possessing wireless telegraphy apparatus in contravention of the provisions of the Act.

5 The Telegraph Act 1885, available at https://www.indiacode.nic.in/bitstream/123456789/2307/1/a1885__13.pdf.

6 History of the Telegraph Act, available at <https://www.legacyias.com/indian-telegraph-act-1885/>.

7 The Indian Wireless Telegraphy Act, 1933, available at <https://dot.gov.in/act-rules-content/2419>.

- c* The Prasar Bharti (Broadcasting Corporation of India) Act 1990,⁸ which provides for the establishment of the Broadcasting Corporation of India, i.e., Prasar Bharati, and stipulates the composition, functions and powers of Prasar Bharati and matters connected therewith or incidental thereto.
- d* The Cable TV Networks (Regulation) Act 1995 (CTN Act),⁹ which regulates the operation of cable television networks in India. The CTN Act regulates the broadcasting conditions for TV channels and further also governs the content of programmes and advertisements under the programming and advertisement codes, respectively. The programming and advertisement codes are contained within the Cable Television Network Regulation Rules, 1994.
- e* The Telecom Regulatory Authority of India Act, 1997, establishes Trai and TDSAT to regulate the telecommunication services, adjudicate disputes, protect the interests of service providers and consumers of the telecom sector and to promote and ensure orderly growth of the telecom sector.

The telecommunications and broadcasting sector also has the aid of the following prevailing policies and guidelines:

The National Digital Communications Policy 2018 (NDCP 2018)¹⁰ has been adopted with the objective of preparing the country for future developments and next generation technologies while keeping in mind that the key stakeholders (i.e., the central government, the states, local governments, agencies, TSPs, internet service providers, infrastructure providers, handset and equipment manufacturers) need to achieve the strategic objectives of, inter alia:

- a* ensuring digital sovereignty;
- b* job creation;
- c* providing broadband for all; and
- d* enhancing India's contribution to global value chains in a time-bound manner.

The Broadband Policy 2004¹¹ recognises the potential of broadband services to enhance the growth of GDP and quality of life through societal applications including tele-education, tele-medicine, e-governance and entertainment, as well as employment generation by way of high-speed access to information and web-based communications. The government has finalised the Broadband Policy to accelerate the growth of broadband services.

8 The Prasar Bharati (Broadcasting Corporation of India) Act, 1990, available at <http://legislative.gov.in/sites/default/files/A1990-25.pdf>.

9 The Cable Television Networks (Regulation) Act, 1995, available at <http://legislative.gov.in/sites/default/files/A1995-7.pdf>.

10 National Digital Communications Policy – 2018, available at https://dot.gov.in/sites/default/files/Final%20NDCP-2018_0.pdf.

11 Broadband Policy 2004, available at <https://dot.gov.in/broadband-policy-2004#:~:text=Broadband%20Policy%202004&text=Demand%20for%20Broadband%20is%20primarily,by%20Internet%20and%20PC%20penetration.&text=Currently%2C%20high%20speed%20Internet%20access,is%20considered%20as%20'Broadband'>.

Policy guidelines for uplinking and downlinking of television channels¹² were issued by the government in 2011 to regulate private TV channels. Under the guidelines, permissions for satellite TV channels are granted to broadcasters in two categories, being news and current affairs TV channels, and non-news and current affairs TV channels.

In the interests of increasing the ease of doing business and to address the fast-evolving broadcasting technology, among other things, the government introduced new draft policy guidelines for uplinking and downlinking in April 2020 and sought comments from various stakeholders. While the new policy guidelines have not yet been implemented, after several inter-ministerial considerations and discussions, the draft policy guidelines are set to be tabled in the near future. The draft policy guidelines primarily seek to prevent unauthorised receipt of signals to prevent piracy. Further, under the new proposals, uplinking can be done in the frequency band specified by the applicant, which has to be done via an encrypted mode, thereby granting increased protection from signal piracy.

Further, the media and entertainment sector in India is also regulated by the Cinematograph Act, 1952,¹³ mandated for the certification of cinematograph films for public exhibition and which regulates exhibitions by means of cinematographs. The Cinematograph Act provides for the creation of the CBFC, which is the certification body for commercial films in India. The CBFC not only grants content-based certification to films, but also certifies the same for export, and additionally provides certification for the import of international films.

iii Regulated activities

Under the telecommunication and broadcasting regime in India, most activities that are associated with the provision of services in the telecom and broadcasting sector are regulated and administered by national regulators.

Regulated activities under the telecommunication regime in India broadly fall under the categories of access services, carrier services, data services, and spectrum use and planning, whereas in the broadcasting sector, among other things, uplinking and downlinking of television channels, permission to operate satellites, the content of television channels and the registration of channels are regulated and require the permission of the MIB. The film wing of the MIB also requires that all films that are theatrically released for public viewing are mandatorily required to obtain a certificate of approval from the CBFC.

With respect to the telecom sector, in line with the objectives of the National Telecom Policy 2012, it was sought to consolidate all the different licences that were required to be obtained by service providers for the provision of telecom services. Towards that objective, Trai recommended a shift from independent licences to a UL regime for all telecom services.¹⁴

Accordingly, after taking into account the recommendations of Trai, the DoT consolidated various licences and released a UL. The UL provides the convenience of applying to the DoT to seek licences and authorisations for various telecom services under a consolidated UL. The regulated activities under the UL comprise the following services:

- a* access services;
- b* internet service (all-India jurisdiction);

12 Circular dated 30 April 2020 of the Ministry of Information and Broadcasting, available at <https://mib.gov.in/sites/default/files/Draft%20Policy%20Guidelines%20%281%29.pdf>.

13 The Cinematograph Act, 1952, available at <https://legislative.gov.in/sites/default/files/A1952-37.pdf>;

14 Recommendations on Unified Licensing, available at <https://traigov.in/sites/default/files/Recomodifiedfinal.pdf>.

- c* internet service (jurisdiction in specific service area);
- d* internet service (jurisdiction in a secondary switching area);
- e* national long distance service;
- f* International long distance service;
- g* global mobile personal communication by satellite service;
- h* public mobile radio trunking service;
- i* very small aperture terminal closed user group service;
- j* the Indian national satellite system mobile satellite system reporting service; and
- k* resale of international private leased circuit service.¹⁵

Guidelines for granting a UL dated 19 August 2013¹⁶ – apart from the entry fee and licence fee – provide the broad guidelines for granting a UL whereby the applicant must be an Indian company and meet eligibility conditions, and the grant would be subject to fulfilment of all requisites under the application (provided in Annexure II of the guidelines). The UL is issued by the DoT, on a non-exclusive basis, for a period of 20 years. The UL may be renewed for a period of 10 years upon request of the licensee.

iv Ownership and market access restrictions

Any company desirous of providing telecom services in India require a UL authorisation from the DoT. For the purposes of obtaining a UL, an application shall be made to the DoT. The DoT may issue the UL by entering into a UL agreement with the applicant only upon the successful payment of the prescribed one-time entry fee, licence fee and bank guarantees, and compliance with the terms and conditions stipulated by the DoT. However, the applicant can only be a company registered in India. Under the UL agreement, an applicant may apply for authorisation for one or more than one service and service area subject to the terms and conditions of entry. An applicant may choose to meet the conditions of entry, either simultaneously or separately at different times.¹⁷ In addition to the conditions specified in the UL, the applicant must also ensure compliance with the terms and conditions prescribed under the local laws applicable to the concerned sector.

A UL applicant must also ensure compliance with the prevailing FDI restrictions. In 2013, the government allowed 100 per cent FDI in the telecommunications sector wherein up to 49 per cent was allowed through the automatic route, and beyond that through the government route.¹⁸ The government has time and again expressed the desire to attract more FDI in the telecommunication sector,¹⁹ and has also notified the same via Press Note 4 of 2021,²⁰ much to the relief of foreign investors. The entry restriction on FDI in the telecom sector has been relaxed to allow for 100 per cent FDI under the automatic route.

¹⁵ Unified License, DoT, available at <https://dot.gov.in/unified-license>.

¹⁶ Guidelines for Access Services Licences, available at <https://dot.gov.in/access-services/guidelines-for-access-services-licences>.

¹⁷ DoT Guidelines for grant of Unified Licence, available at https://dot.gov.in/sites/default/files/2016_03_28%20ULG%20AS-I.pdf.

¹⁸ FDI In Telecommunications Sector, available at <https://www.fdi.finance/sectors/telecommunications>.

¹⁹ 'India needs additional FDI in the telecom sector': R S Prasad, available at <https://www.medianama.com/2019/09/223-fdi-telecom-sector/>; '100% FDI for Telecom sector', available at <https://zeenews.india.com/economy/100-fdi-for-telecom-sector-read-the-major-announcements-of-modi-govt-here-2394297.html>.

²⁰ Press Note 4 of 2021, available at <https://dpiit.gov.in/sites/default/files/pn4-2021.PDF>.

v Transfers of control and assignments

The UL imposes restrictions on the transfer of a licence by a licensee to a third party, in any manner whatsoever, without the prior written consent of the DoT. The 2014 guidelines for transfers and mergers of various categories of telecommunication service licences, and authorisations under the UL on compromises, arrangements and amalgamations of companies, envisage a strategy for the telecom sector wherein mergers and acquisitions (M&A) are simplified while also ensuring free and fair market competition.²¹ These guidelines have been issued in supersession of the National Telecom Policy 2012, and the circulars and guidelines issued under it provide for intra-service area mergers only.

The guidelines mandate prior notification to the DoT of any proposal of compromise, arrangement or amalgamation of companies, to which the DoT may object within a period of 30 days. Further, after the scheme for compromise, arrangement or amalgamation has been approved by the Company Tribunal, the DoT shall provide its written approval within 30 days of request for the transfer of the licence.²² The guidelines provide for a one-year time period for the transfer or merger of various licences in different service areas.

Under the guidelines, spectrum may also be traded in addition to being surrendered.²³ All M&A or amalgamations shall be subject to a spectrum cap of 25 per cent of the total spectrum assigned for access services and a spectrum cap of 50 per cent in a given band in the concerned service area. M&A will be permitted only when the market share for access services in the respective service area of the resultant entity is only up to 50 per cent. If the market share of the resultant entity exceeds 50 per cent, the entity shall have to reduce its market share up to the permissible limit within the specified period of one year. The amendment of these guidelines in 2018 allows the surrender as well as the trading of excess spectrum within one year of permission being granted by the DoT in cases where it exceeds the prescribed limits, failing which the entity shall be open to separate action.²⁴

Similarly, there exist caps on the collective shareholding of applicant companies under the direct-to-home (DTH) guidelines, whereby the broadcasting companies or cable network companies are not eligible to collectively own more than 20 per cent of the total equity of the applicant company at any time during the licence period. The applicant company shall not have more than a 20 per cent equity share in a broadcasting or cable network company.²⁵

- 21 Guidelines for transfer or merger of various categories of telecommunication service licences or authorisation under a UL on compromises, arrangements and amalgamation of the companies, available at https://dot.gov.in/sites/default/files/DOC200214_0.pdf.
- 22 Amendment in the guidelines for transfer or merger of various categories of telecommunication service licences or authorisation under a UL on compromises, arrangements and amalgamation of the companies dated 24 September 2018, available at https://dot.gov.in/sites/default/files/2018_09_26%20AS%20T%26M.pdf?download=1.
- 23 Amendment in the guidelines for transfer or merger of various categories of telecommunication service licences or authorisation under a UL on compromises, arrangements and amalgamation of the companies dated 20 February 2014, available at https://dot.gov.in/sites/default/files/2018_09_26%20AS%20T%26M.pdf?download=1.
- 24 Amendment in the guidelines for transfer or merger of various categories of telecommunication service licences or authorisation under a UL on compromises, arrangements and amalgamation of the companies dated 24 September 2018, available at https://dot.gov.in/sites/default/files/2018_09_26%20AS%20T%26M.pdf?download=1.
- 25 Guidelines for obtaining license for providing direct-to-home (DTH) broadcasting service in India, available at <https://digitalindiamib.com/Detailsguidelinesupdated6.11.2007.pdf>.

Further, the Competition Commission of India (CCI) is the market regulator for all transactions that have or may have an appreciable adverse impact on competition. The CCI has the mandate to regulate M&A of companies that meet the asset and turnover thresholds prescribed under the Competition Act, 2002.

Furthermore, the proposed merger of government telcos MTNL and BSNL, which had been approved by the government in 2019 due to the huge operational debts of MTNL, has now been deferred as the two companies showed profit in the first quarter of 2021. It would be rather interesting to see the merger go through, given that the resultant entity shall exceed the caps specified in the guidelines for transfers and mergers issued by the DoT and will be detrimental to fair competition in the telecom sector.

III TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and internet protocol regulation

The provision of internet services and internet protocol services within India is regulated under the regime of the DoT, and for the provision of such services, the service provider has to seek a licence from the DoT under the UL regime. Applicable licences include the UL-internet service provider (UL-ISP) licence and the UL-virtual network operator (UL-VNO) licence. Under the UL, internet access is defined to mean the use of any technology, device or methodology to provide access to the internet, including IPTV, and the provider of such services may only be granted permission to provide the same through an application to the DoT. The service provider seeking such permission is required to comply with certain conditions for the same, including having a net worth of 1 billion rupees. In 2018, the DoT released detailed guidelines for the grant of licences to VNOs, which specifically required entities applying for licences to operate a virtual network in India to be Indian companies, partnerships or firms.²⁶

In 2021, several changes have taken place within the internet regime in India. Given the heavy increase in usage of internet and internet protocol services, in April the DoT released a notification seeking scrupulous compliance by ISPs and VNOs with the security related licence conditions under the UL.²⁷ The DoT called upon all ISPs to maintain commercial records, call detail records, exchange detail records and IP detail records with regard to the communications exchanged on their network for a period of at least one year. The DoT has also directed ISPs and VNOs to not haul or route any domestic traffic outside of India for security reasons.

ii Universal service

Due to the inadequacy of the telecom sector in serving rural and inaccessible areas and the significance of providing vital telecom connectivity in such areas, the universal service obligation (USO) fund²⁸ was established via the Indian Telegraph (Amendment) Act 2003. The USO fund was established owing to the higher capital cost of providing telecom services

26 Guidelines for Grant of VNO Licenses, DoT, available at https://dot.gov.in/sites/default/files/2018_08_31%20UL%20VNO%20G.pdf?download=1.

27 Unified License, DoT, available at <https://dot.gov.in/sites/default/files/Authentication%20and%20Maintenance.pdf?download=1>.

28 Section 9A of the Indian Telegraph Act, 1885, available at https://www.indiacode.nic.in/bitstream/123456789/2307/1/a1885__13.pdf.

in remote areas that do not generate much revenue so that people in such areas have access to telecom services at affordable and reasonable prices. The objective of the USO fund was to develop unconnected and remote areas and facilitate the country to reap the benefits of the technological advancements as a whole.

As per the Indian Telegraph Act, the universal service levy is collected from a service provider at a defined percentage of adjusted gross revenue and credited to the consolidated funds of India. Thereafter, the allocation of funds to the USO fund is through parliamentary approval.²⁹ In 2015, the DoT funded the capital expenditure incurred by BSNL (a government-owned TSP) for the augmentation of satellite bandwidth systems in Andaman and Nicobar Islands and Lakshadweep Islands out of the USO fund.³⁰ The territorial optic fibre cable network providing connectivity in these areas was also funded out of the USO fund.

Further, as per the NDCP 2018, under the national broadband mission to secure universal broadband access, the implementation of the following initiatives is to be funded by the USO fund and public-private partnerships:³¹

- a* BharatNet:³² providing 1Gbps to Gram Panchayats³³ upgradeable to 10Gbps;
- b* GramNet: connecting all key rural development institutions with 10Mbps upgradeable to 100Mbps;
- c* NagarNet: establishing 1 million public wi-fi hotspots in urban areas; and
- d* JanWiFi: establishing 2 million WiFi hotspots in rural areas.

iii Restrictions on the provision of service

One of the primary restrictions on the provision of telecommunication and broadcasting services in India is the fixation of tariffs by Trai. Trai is empowered to monitor and regulate charges such as interconnection usage charges, termination charges and TV channel subscription fees, among other things. For the purpose of regulation of charges and terms of service, Trai also has the power to issue directions and notifications.

Trai first issued the Telecommunication Tariff Order 1999 (TTO) on 9 March 1999.³⁴ Amendments to the TTO 1999³⁵ have been made to reflect the evolving telecommunication landscape in the context of the telecom tariff offered in India and abroad by TSPs licensed by the DoT. In addition to the TTO, various regulations, directions and advisories have been issued by Trai for the purpose of regulatory requirements.

At present, mobile tariffs are under forbearance, which means operators have a free hand in fixing rates; they only have to report tariff plans to Trai within seven days of the

29 Section 9B of the Indian Telegraph Act, 1885, available at https://www.indiacode.nic.in/bitstream/123456789/2307/1/a1885_13.pdf.

30 The Indian Telegraph (2nd Amendment) Rules, 2015, available at https://dot.gov.in/sites/default/files/2016_09_29%20AMD-II%20Restructuring.PDF?download=1.

31 National Digital Communications Policy, 2018, available at https://dot.gov.in/sites/default/files/Final%20NDCP-2018_0.pdf.

32 A government-owned broadband infrastructure provider.

33 Governing institutions in Indian villages.

34 Telecommunication Tariff Order, 1999, available at https://traigov.in/sites/default/files/Main_Regulations_09_Mar_1999.pdf.

35 Amendments to the TTO, available at <https://traigov.in/release-publication/regulations/amendments-page/91253>.

launch.³⁶ Trai released a consultation paper³⁷ raising questions relating to the requirement of regulatory intervention in tariff fixation, fixing a floor price for voice and data services on telecom networks and seeking a detailed response on how to compute the floor price and the need to fix a floor price despite the fact that TSPs have increased their tariffs. TSPs had been asking the government to set a floor for tariffs urgently to restore the health of the sector, which has been severely impacted by the adjusted gross revenue (AGR) payments issue.

Trai has issued the Telecom Commercial Communications Customer Preference Regulations 2018³⁸ (Customer Preference Regulations) to curb the problem of unsolicited phone calls and text messages. The Customer Preference Regulations require registration of the senders and the headers (i.e., the unique IDs assigned to telemarketers), and provide complete control to the subscriber to provide its consent (and revoke it if already granted) to receive unsolicited phone calls and messages. However, from the industry's perspective, the Customer Preference Regulations are complex, costly and unlikely to resolve the problem.³⁹

In response to numerous complaints from consumers on the validity period of tariff orders for telecommunication services, Trai released the Consultation Paper on Validity Period of Tariff Offers in May 2021. The purpose of the Paper is to identify such tariff orders that prescribe a 28-day tariff validity period instead of a 30 day or monthly period, and explore the possibility of revising the same and of syncing the tariff order validity period with the aspirations and requirements of consumers.

iv Privacy and data security

Privacy was recognised as a fundamental right by the Supreme Court of India in a landmark judgment⁴⁰ on the issue of privacy and data protection in 2017. Following the Supreme Court judgment, a draft Personal Data Protection Bill 2018 (2018 Bill) was released. This was followed by the Privacy Data Protection (Amendment) Bill 2019 (PDP Bill 2019), which brought about some key changes in the data privacy regime in India. The 2018 Bill and the PDP Bill 2019 are largely based on the principles of the EU General Data Protection Regulation (GDPR), with certain modifications. The PDP Bill 2019 touches upon some key points of data protection and explicitly requires the entities or persons, or both, involved in data collection to adequately inform the data principal of the type of data (i.e., personal or sensitive personal data) that is being collected and seek the explicit consent of the data principal for the collection of data. The PDP Bill 2019 also further obligates data minimisation at the

36 'Trai says no reference yet to set floor prices for mobile services', available at <https://www.livemint.com/industry/telecom/govt-hasn-t-approached-regulator-on-floor-price-for-voice-data-trai-11573805675926.html>.

37 Consultation Paper on Tariff Issues of Telecom Services, 17 December 2019, available at https://traigov.in/sites/default/files/CP_17122019.pdf.

38 Telecom Commercial Communications Customer Preference Regulations, 2018, available at <https://traigov.in/sites/default/files/RegulationUcc19072018.pdf>.

39 'Trai overhauls rules on pesky calls, spam messages; spells out obligation of telcos', available at https://economictimes.indiatimes.com/industry/telecom/telecom-policy/trai-overhauls-rules-on-pesky-calls-spam-messages-spells-out-obligation-of-telcos/articleshow/65057432.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst; see also 'Telemarketer slams Trai on faulty implementation of system to check pesky SMSes/calls', available at <https://telecom.economictimes.indiatimes.com/news/telemarketer-slams-trai-on-faulty-implementation-of-system-to-check-pesky-smses/calls/78144138>.

40 *Justice K S Puttaswamy (retd) & Anr v. Union of India and Ors*, reported at (2017) 10 SCC 1.

time of collection, limited grounds of processing data, sharing of data only on a need-to-know basis, maintenance of data quality and security measures. The PDP Bill 2019 also requires data collectors to inform the data principal and seek its explicit consent for the cross-border transfer of data, and also mandates that the data-collecting entity establish and maintain privacy by design in the data collection and processing systems employed by them.

However, as the PDP Bill 2019 is yet to be passed by the government and thereafter enforced, the data privacy regime in India faces grave uncertainty. In the absence of specific legislation on data protection, issues with regard to data protection and privacy are currently governed by the Information Technology Act 2000 (IT Act) and relevant rules framed under the IT Act, which include:

- a* The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011⁴¹ (SPD Rules). These Rules regard sensitive personal data and information and are applicable to body corporates or any person located within India.
- b* The Information Technology (Information Security Practices and Procedures for Protected System) Rules 2018⁴² (Protected System Rules). These Rules provide details of infrastructure requirements to be implemented by organisations that have protected systems for highly sensitive data or data collection centres; and
- c* The Information Technology (Intermediaries Guidelines) Rules, 2011⁴³ (Intermediaries Guidelines). These Rules provide a due diligence framework to be observed by an intermediary while discharging its duties.

For growing cybersecurity concerns there are laws that aim at addressing cyber-attacks such as Indian Penal Code 1860 (IPC), which provide for punishments for offences like defamation, cheating, criminal intimation and obscenity committed in cyberspace, however, implementing the PDP Bill, 2019 shall be crucial for ensuring and implementing utmost standards of data protection for individuals.

Further, in accordance with the Information Technology (The Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules 2013⁴⁴ (CERT Rules), a computer emergency response team, CERT-In, has been established as the nodal agency responsible for the collection, analysis and dissemination of information on cyber incidents and taking emergency measures to contain such incidents.

The increased dependence on technology during the covid-19 pandemic has led to increased vulnerability of data and the same has become a severe cybersecurity risk. It has been reported that India ranks third after the US and the UK in terms of repeated cyberattacks and data security breaches. Up to May 2021, there were five instances of data leaks and theft, with the Dominos Data leak being the largest so far. Out of these five instances of data breaches and data leaks, sensitive personal data such as a person's name, mobile number, email address, income tax permanent account number (PAN), Aadhaar⁴⁵ and banking information have

41 SPD Rules, available at https://www.meity.gov.in/writereaddata/files/GSR313E_10511%281%29_0.pdf.

42 Protected System Rules, available at <https://www.meity.gov.in/writereaddata/files/NCIIPC-Rules-notification.pdf>.

43 Intermediaries Guidelines, available at https://www.meity.gov.in/writereaddata/files/GSR314E_10511%281%29_0.pdf.

44 CERT Rules, available at [https://www.cert-in.org.in/PDF/G.S.R._20\(E\).pdf](https://www.cert-in.org.in/PDF/G.S.R._20(E).pdf).

45 Aadhaar is a 12-digit unique identification number issued by the Unique Identification Authority of India on behalf of the government.

been leaked in four of them. Data from prominent entities in various sectors such as Upstox (data of 2.5 million users leaked), Air India (4.5 million), Facebook (6 million), Mobikwik (100 million) and Dominos India (180 million) has been leaked online, and alarmingly the same has all taken place within the very first quarter of 2021.

Given the size and extent of such leaks in terms of the number of people whose data was compromised and other relevant details about the leak that are readily available online, it is imperative that the government speed up the process of enactment of a data protection law.

IV SPECTRUM POLICY

i Development

Trai is actively engaged in making recommendations on spectrum management and, inter alia, its allocation and pricing. In 2020, Trai released a consultation paper on the methodology of applying spectrum usage charges (SUC) under the weighted average method of SUC assessment, in cases of spectrum sharing.⁴⁶ After rigorous industry discussions and consultations on the paper, the Union Cabinet has now approved several structural reforms for spectrum allocation and SUC to bolster the Indian telecom sector.⁴⁷ These reforms include:

- a* a reduction in the interest rates applicable on delayed payments of SUC to the State Bank of India's marginal cost of fund-based lending rate plus 2 per cent compounded annually. The penalty on delayed payments and the interest on penalties have also been removed;
- b* an increase in the tenure of spectrum in future auctions to 30 years. Further, surrender shall only be surrendered after 10 years for acquisition of spectrum in all future auctions;
- c* no SUC in future auctions; and
- d* encouraging spectrum sharing and removal of additional SUC of 0.5 per cent for spectrum sharing.

In India, spectrum licensing and allocation is regulated by the Wireless Planning and Coordination Wing of the DoT. The Standing Advisory Committee on Radio Frequency Allocation is the decision-making authority for spectrum frequency allocation while the DoT is the licensing authority. Spectrum management and allocation is regulated as per the provisions of the Indian Telegraph Act 1885, the Indian Wireless Telegraphy Act 1933, the Telegraph Wires (Unlawful Possession) Act 1950 and the Cable Television Networks (Regulation) Act 1995.⁴⁸

Initially, spectrum assignment was done by bundling a spectrum band with the franchise licence for a service (for instance, GSM 900). Additional assignment of spectrums, if any, was at the discretion of the DoT. Trai's recommendations suggested that all spectrum is required to be auctioned. The first spectrum licence was held in 1994. The government had then divided the entire territory of India into 23 telecom circles (Chennai and Tamil Nadu

⁴⁶ Recommendations on Methodology of applying Spectrum Usage Charges (SUC) under the weighted average method of SUC assessment, in cases of Spectrum Sharing, available at https://www.trai.gov.in/sites/default/files/Recommendation_17082020_0.pdf.

⁴⁷ Cabinet approves major reforms in Telecom Sector, available at <https://pib.gov.in/PressReleaseDetail.aspx?PRID=1755086>.

⁴⁸ Spectrum for Development India, APC, https://www.apc.org/sites/default/files/countries/factsheet%20india_eng.pdf.

were merged in 2007). The bidders had to satisfy prerequisites such as financial resources, reliability and investment in research set by the DoT. In 2007, the DoT assigned spectrum on a first-come, first-served basis for 2G services. That year, 2G spectrum assignment was challenged before the Supreme Court in India⁴⁹ (the *2G Spectrum Auction* case) on the ground that actions taken by the DoT to grant UAS licences and allocate spectrum in the 2G band was arbitrary and unconstitutional and had been done at the expense of the taxpayer.

Accordingly, following the decision in *2G Spectrum Auction*, spectrum allocation regulation in India switched from command and control to more market-oriented methods. Currently, spectrums are auctioned in formats such as first price sealed bid auctions, second price sealed bid auctions, Dutch auctions, English or Japanese auctions.

Further, in the wake of recent trends, the DoT, via its Guidelines on Trading of Access Spectrum by Access Service Providers,⁵⁰ permits spectrum trading allowing licence operators to trade their exclusively assigned spectrum usage rights to unlicensed parties in order to efficiently use the spectrum. These Guidelines further mandate that spectrum trading may only be permissible when the seller as well as the buyer is fully compliant with the conditions specified therein.

Pursuant to the *AGR* case,⁵¹ the DoT filed an affidavit with the Supreme Court stating that AGR dues have to be calculated based on spectrum sharing⁵² and spectrum trading agreements signed between the two TSPs. This brought the spectrum trading pact between RComm and Reliance Jio under the DoT's scrutiny.⁵³ The DoT reported to the Supreme Court in its affidavit that there is spectrum trading between Reliance Communications Limited (seller) and Reliance Jio Infocomm Limited, Aircel Limited/Dishnet Wireless Limited (seller) and Bharti Airtel Limited (buyer), Videocon Telecommunications Limited (seller) and Bharti Airtel Limited (buyer), and TIKONA Digital Networks Ltd (seller) and Bharti Hexacom (buyer). Subsequently, it was also brought to the notice of the Supreme Court that several telecom companies were in insolvency proceedings and were requesting permission from the DoT for trading of their licence. The crucial question was whether spectrum can be the subject matter of insolvency proceedings under the Insolvency and Bankruptcy Code, 2016 (IBC Code), and would AGR dues arising out of spectrum licence qualify as operational debt. As per the waterfall mechanism envisaged under the IBC Code, financial creditors take precedence over operational creditors, making AGR dues payable to the DoT subservient to the dues owed to banks and financial institutions. In this regard, the Supreme Court directed the National Company Law Tribunal (NCLT) to decide the issue and order the TSPs to clear the dues by 2031.⁵⁴

49 Writ Petition (Civil) No. 423/ 2010 and 10/ 2010.

50 Guidelines for trading of access spectrum by access service providers, available at https://dot.gov.in/sites/default/files/2015_10_13%20Trading-WPC_0.pdf?download=1.

51 *Union of India v. Association of Unified Telecom Service Providers of India and Ors*, Supreme Court, civil appeal No. 63286399 of 2015.

52 Guidelines for sharing of Access Spectrum by Access Service Providers, available at https://dot.gov.in/sites/default/files/2015_10_13%20Sharing-WPC_1.pdf?download=1.

53 'The DoT submits details of spectrum sharing, trading of telcos to SC', available at <https://www.livemint.com/news/india/dot-submits-details-of-spectrum-sharing-trading-of-telcos-to-sc-11598251285437.html>.

54 *Union of India v. Association of Unified Telecom Service Providers of India and Ors*. Supreme Court, Sou Motu Contempt Petition [C] No. 1 of 2020, available at https://main.sci.gov.in/supremecourt/2020/9887/9887_2020_32_1501_23776_Judgement_01-Sep-2020.pdf.

In terms of the pendency of appeals before the National Company Law Appellate Tribunal (NCLAT) against the NCLT order pertaining to the approval of resolution plans in respect of Aircel Ltd, Dishnet Wireless Ltd and Aircel Cellular Ltd, the NCLAT has held that spectrum, being an intangible asset of the licensee, TSP or corporate debtor, can be the subject of insolvency or liquidation proceedings upon clearance of AGR dues.⁵⁵ Further, the NCLAT has also held that AGR dues and default payment instalments of spectrum acquisition owed to the DoT fall within the ambit of operational debts; however, spectrum cannot be utilised or transferred under insolvency proceedings without payment of the requisite dues. The position today is that spectrum dues cannot be wiped out by triggering insolvency proceedings under the IBC Code; however, this is a huge setback for TSPs and the possibility of their revival, and has again been challenged before the Supreme Court.

ii Flexible spectrum use

Apart from the traditional use of spectrum, the Ministry of Railways had recently proposed the installation of an ultra-high-speed long term evolution-based communication corridor along the rail network for train–ground and train–train communication, and had sought the DoT's suggestions on the same. Accordingly, Trai, at the request of the DoT, issued a consultation paper dated 24 June 2019 on the allotment of spectrum to Indian railways for public safety and security services. This consultation paper addresses issues such as which band of spectrum and how much spectrum should be assigned to Indian Railways.

iii Broadband and next-generation services spectrum use

Further, digitisation and the covid-19 pandemic have increased the demand for online services and, as a result, increased the demand for spectrum, leading the Cellular Operators Association of India to seek more spectrum from the government.⁵⁶ Spectrum sharing and spectrum trading are also a way to deal with the increasing spectrum demand. Developments in the 5G spectrum auction look uncertain, given the financial burden following the *AGR* case.

The DoT has also released a consultation paper on the regulation of international mobile roaming services in 2020,⁵⁷ discussing the pricing and the availability of international mobile roaming services to customers in foreign countries. To improve connectivity during international travel, the DoT is exploring the possibility of mobile phones being set up to be used abroad:

- a* upon a requirement that subscribers request the activation of international roaming;
- b* upon the pre-activation of international roaming; or
- c* upon the automatic activation of international roaming when a customer lands in another country.

⁵⁵ *Union of India v. Vijaykumar V Iyer* dated 13 April 2021, Company Appeal (AT) (Insolvency) No. 733 of 2020.

⁵⁶ 'Leroy Leo, covid-19 lockdown: COAI urges government to provide telcos additional spectrum, Live Mint, 25 March 2020', available at <https://www.livemint.com/industry/telecom/covid-19-lockdown-coai-urges-government-to-provide-telcos-additional-spectrum-11585124047318.html>.

⁵⁷ Consultation Paper on the Regulation of International Mobile Roaming Services in 2020, Trai, available at https://www.trai.gov.in/sites/default/files/CP_26052020.pdf.

iv Spectrum auctions and fees

Broadly, there are three types of licence fees levied by the DoT: an initial licence fee, which generally is non-refundable; an annual licence fee; and an additional fee for the allocation of spectrum.⁵⁸ During a spectrum auction, the DoT generally sets a reserve price, which is the minimum price at which the spectrum can be licensed.⁵⁹

In January 2021, the government invited bids for the auction of spectrum in the 700MHz, 800 MHz, 900 MHz, 1800 MHz, 2100 MHz, 2300 MHz and 2500 MHz frequency bands.⁶⁰ The process has completed, and bands have been allotted as per bids.⁶¹

V MEDIA

i Regulation of media distribution generally

India has a large broadcasting and distribution industry, comprising approximately 900 satellite TV channels, 6,000 multi-system operators, around 60,000 local cable operators, seven DTH operators and a few IPTV service providers.⁶² The media and entertainment sector is traditionally regulated by statutes such as the CTN Act and allied Rules, which provide the legal framework for distribution of television media throughout India. The CTN Act and Rules primarily obligate broadcasters and cable and multi-system network operators, *inter alia*, to:

- a* comply with registration and reporting requirements and the compulsory transmission of certain channels;
- b* regulate the content of the programmes and advertisements transmitted through the channels; and
- c* provide rights such as the right of way for laying down of distribution infrastructure, etc.

While the basic infrastructure of linear television transmission is regulated by the CTN Act and its Rules, the interconnection between broadcasters and cable and multi-system operators (including cable, headend in the sky (HITS), IPTV and DTH) are regulated by Trai.

Trai regulates broadcasting interconnection through the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations (Interconnect Regulations) and annual tariff orders. Broadcasters are under an obligation to annually release a RIO, which is made public, and all cable and multi-system operators are offered uniform terms of interconnection so as to promote uniformity and fairness in interconnection agreements. While it has been seen that the online media and entertainment

58 Licensing Framework for Telecom: A Historical Overview, available at <https://cis-india.org/telecom/resources/licensing-framework-for-telecom>.

59 Spectrum Pricing, available at https://www.gsma.com/spectrum/wp-content/uploads/2018/12/spectrum_pricing_positioning_2017.pdf.

60 Notice Inviting Applications for Auction of Spectrum in 700 MHz, 800 MHz, 900 MHz, 1800 MHz, 2100 MHz, 2300 MHz & 2500 MHz Bands, 2021 available at https://dot.gov.in/sites/default/files/Notice%20Inviting%20Applications%20%28NIA%29%202021_1.pdf

61 Auction 2021-bids by area band, available at <https://dot.gov.in/sites/default/files/Auction%202021-Bids%20by%20Area%20Band.pdf>.

62 <https://www.investindia.gov.in/sector/media>.

sector has been booming, it is also imperative to note that offline (linear) modes of broadcasting such as cable, IPTV, HITS and DTH are experiencing a reduced consumer base due to a shift from linear to non-linear modes of transmission.

Content providers are also required to follow guidelines and directions issued by the MIB with regard to the content and transmission of TV channels in addition to initial channel registration. The MIB has also issued guidelines for provision of IPTV services. These guidelines enable distribution of TV channels using managed IP networks.

With increased usage of online entertainment services such as video on demand, online gaming and social media platforms in 2021, many legal developments in the media and entertainment industry have taken place. In early 2021, the Digital Media Ethics Code was enacted to bring social media intermediaries, significant social media intermediaries, digital media platforms and all online curated content service providers within the regulatory ambit of the government. The Digital Media Ethics Code was brought into force so as to increase the obligations and responsibilities of digital media service providers, which previously were only regulated by self-regulation codes in the absence of dedicated legislation. The need for regulation of all digital media was also felt due to the steep rise in the use of social media and online entertainment in recent years and a corresponding unaccountability of such entities.

While the Digital Media Ethics Code seeks to bring about reforms from the perspective of transparency and accountability in the digital media sector, it has not escaped opposition, and it has faced challenges to its validity in multiple high courts in India. In a challenge to the Code filed by publishers and news broadcasters before the High Court of Bombay, the Court *prima facie* found certain provisions of the Code, especially Rule 9, *ultra vires*, the provisions of the IT Act being beyond delegated power, and it therefore stayed the operation of such provisions in an interim order.⁶³

Further, in an amendment to the CTN Rules,⁶⁴ the MIB has proposed the implementation of a three-tier grievance redressal mechanism. The model implements grievance redressal and regulation at three levels: self-regulation by broadcasters, self-regulation by the self-regulating bodies of broadcasters and an oversight mechanism of the central government.

The Cinematograph Act 1952 provides certification of cinematograph films for exhibition and regulates cinema and its content.⁶⁵ To tackle film piracy, in February 2019 an amendment was proposed to the Act through the institution of penal provisions for the unauthorised recording and duplication of films by making it a legal offence and punishing offenders with a three-year jail term and a fine of 100,000 rupees.⁶⁶ However, the amendment bill of 2019 was not passed, and it was referred to a standing committee for examination and changes. Following examination by the standing committee, the Cinematograph Act (Amendment) Bill, 2021 was released earlier this year with revisions and changes. The 2021 Bill has met a backlash from industry players for being unable to adequately address the issue of piracy of films in India, and for additionally granting the central government with unfettered powers to reverse orders of the CBFC. Further, the film industry is also reeling

63 *Nikhil Mangesh Wagle v. Union of India*, W.P. (L.) No.14172 of 2021.

64 Cable Television Networks Amendment Rules, 2021, available at https://mib.gov.in/sites/default/files/25-6%20CTN%20Appl%205X8.5inch%281%29_0.pdf.

65 The Cinematograph Act, 1952, available at https://www.cbfcindia.gov.in/main/CBFC_English/Attachments/cine_act1952.pdf.

66 Union Cabinet approves amendment to Cinematograph Act to tackle film piracy, available at <https://www.livemint.com/industry/media/union-cabinet-approves-amendment-to-cinematograph-act-to-tackle-film-piracy-1549518226819.html>.

from the abolition of the Film Certification Appellate Tribunal via the Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021, which Tribunal had previously served as an appellate authority for adjudication of appeals from decisions of the CBFC.⁶⁷

Further, in line with the Digital India Campaign, which aims to transform India into a digitally empowered society and knowledge economy, the government has permitted FDI of 26 per cent for uploading or streaming of news and current affairs through digital media. However, the government has recently proposed that the 26 per cent FDI limit should be applicable to news aggregators as well as the print media, which has not been welcomed by industry players.⁶⁸ If a cap is put on FDI investment by aggregators, it may have a direct impact on players that have raised investments from foreign investors.

The covid-19 pandemic has overturned all assumptions of business-as-usual for India. To tackle the crisis, the government must support traditional media and entertainment businesses for digital transformation. However, the pre-covid-19 trend demonstrates that most traditional domestic players had already begun to transform, including investments in digital platforms by TV, print and radio industry players. Another reason for transformation is the greater competition that traditional players may face since telecommunications providers have also moved into the over-the-top business through the provision of syndicated content offerings on the likes of Jio Apps and Airtel Wynk.⁶⁹

ii Internet-delivered video content

In 2020, the government issued a notification bringing online media content within the ambit of the MIB. Accordingly, the various policies of the MIB on content are now applicable to online video content. This is a significant shift from the stand taken earlier by the government. Following this development, the MIB has enacted the Digital Media Ethics Code so as to oblige online video content providers to comply with mechanisms for grievance redressal and other such obligations.

VI THE YEAR IN REVIEW

Following on from the trends of 2020, the TMT sector has shown continued growth and expansion throughout 2021. While covid-19 has led to an overall reduction in revenues, earnings and participation of different sectors in the economy, the TMT sector has played a key role during this time. With many developments on the legal, regulatory and policy front, 2021 has been quite engaging.

Following a decision of the Supreme Court and burdened with heavy penalties concerning the payment of AGR dues, the TMT sector left it to the government to come to its rescue. The dismissal of appeals filed by prominent TSPs before the Supreme Court seeking recalculations of and relief on penalty amounts prompted the government to action. After the

67 MIB Plans To Block State Governments & Others From Entering Cable Distribution by Amending Cable TV Networks Act, available at <http://www.satiitv.com/amending-cable-tv-networks-act/>.

68 'I&B Ministry's Amit Khare says 26% FDI limit should apply to news aggregators', available at <https://www.medianama.com/2020/07/223-news-aggregators-amit-khare-fdi/>.

69 'Over-the-Top Video Services in India: Media Imperialism after Globalization', available at <https://quod.lib.umich.edu/m/mij/15031809.0006.206?view=text;rgn=main>.

recent dismissal of a plea by Bharti Airtel and Vodafone Idea for the re-computation of AGR dues owed, the government approved a 'telecom relief' package to provide much-needed relief to the telecom sector.

This year, the telecom sector has also seen an increase in incentives by way of production-linked incentive schemes. These schemes have been brought into force to provide a much-needed boost to the local manufacturing and production sectors associated with the telecom sector in India.

Trai has undertaken consultation processes and issued recommendations on several subjects in the past year. Arising from the heavy demand for internet and broadband services in 2021, Trai released a supplementary Roadmap to Promote Broadband Connectivity and Enhanced Broadband Speed consultation paper in May 2021, and has followed it up with recommendations released in August 2021.⁷⁰ Trai has recommended an increase of the minimum download speed from 512kbps to 2Mbps and has also sought the creation of three segments of broadband based on its speed: basic, fast and super-fast. Further, to increase connectivity of broadband in rural areas by fiberisation, Trai has recommended the use of the BharatNet network by service providers to reach remote areas.

In March 2021, Trai released a consultation paper on the licensing framework for satellite-based connectivity for low bit rate applications to address the current licensing framework of the DoT and revise the same to account for advanced satellite-based services, which are currently not addressed in the DoT licence regime. Trai has sought recommendations to enlarge the scope of satellite-based low-bit rate communication technologies.

In an interesting and surprising move, Trai released recommendations on enabling unbundling of different layers through differential licensing on 19 August 2021.⁷¹ Under the differential licensing model, Trai proposes enabling the unbundling of different layers of the telecom sector for, inter alia, infrastructures, networks, services and application layers through differential licensing, thereby enabling the entry of several new market players and increasing participation from different layers of the Indian market. This aims to fulfil the action plan for the 'propel India' strategy by creation of jobs, opening up a new sector for local manufacturing and production of telecom equipment and infrastructure services.

These recommendations essentially aim to create a separate licence authorisation for access network providers and a broad framework for VNOs for entering into an agreement with such network providers. Implementation of these recommendations is likely to result in:

- a* increased sharing of network resources;
- b* a reduction of costs;
- c* new investment in the sector;
- d* strengthening of the service delivery segment; and
- e* customer management.

70 Supplementary Consultation Paper on Roadmap to Promote Broadband Connectivity and Enhanced Broadband Speed, Trai, available at https://www.trai.gov.in/sites/default/files/Recommendations_31082021_0.pdf.

71 Recommendations on Enabling Unbundling of Different Layers Through Differential Licensing, Trai, available at https://www.trai.gov.in/sites/default/files/Recommendation_19082021_0.pdf; https://www.trai.gov.in/sites/default/files/PR_No.36of2021.pdf.

Further, the last mile connectivity to the consumer may also see improvements, and better management of connectivity and turnaround times for customer care services.

The PDP Bill 2019 remains much-awaited legislation, albeit considerably deferred. Once passed by Parliament, the PDP Bill 2019 will become the primary statute governing privacy and data protection laws in India. In parallel, the draft e-commerce rules (Draft Rules) were released for public consultation in June 2021. Several concerns under the Draft Rules have been pointed out for further deliberation and revision. The wide definition of related parties under the Draft Rules poses a difficulty in transactions between online e-commerce platform owners and their downstream commercial entities. Further, difficulties in achieving compliance with extraterritoriality rules also need to be addressed.

The proposed amendments focus on integrating the draft rules into the existing consumer protection law relating to the prohibition of misleading advertisements for the protection of consumers, in addition to the guidelines issued by the Central Consumer Protection Authority (in 2019) regarding the same. The establishment of a grievance redressal mechanism, which is similar to the one prescribed under the Digital Media Ethics Code Rules 2021, is also envisaged under the Draft Rules.

The Draft Rules are highly likely to lead to over-regulation of e-commerce platforms that also fall under the definition of intermediaries and that will have to incur high compliance costs. Furthermore, under the wide definition of related parties, while e-commerce platforms are regulated based on the rationale of protecting consumers from discriminatory and anticompetitive practices, such definition fails to take into account the consequences of imposing an absolute ban on the enlistment of such related parties of these platforms as sellers. The effect of such regulation will lead to a constriction of the marketplace and will unjustifiably deny market access to platforms' related parties.

VII CONCLUSIONS AND OUTLOOK

2021 has seen considerable legislative, policy and regulatory reforms in the TMT and media and entertainment sector, which has experienced unparalleled growth. The TMT industry has showcased unprecedented growth with, among other things:

- a* SpaceX accepting pre-orders for the beta version of its Starlink satellite internet service in India;
- b* Vodafone Idea Ltd announcing the acquisition of spectrum in five circles to offer a superior digital experience to customers;
- c* Advanced Television Systems Committee (ATSC) and Telecommunications Standards Development Society, India signing a deal to boost the adoption of ATSC standards in India, fostering global digital broadcasting standard harmonisation; and
- d* BSNL's partnership with Skylotech India announcing a breakthrough in satellite-based narrowband IoT for fishing, farming, construction, mining and logistics enterprises.

It is interesting that, while the government has been seen to advocate light-touch regulatory frameworks and amend the existing laws to promote ease of doing business, new laws such as the Digital Media Ethics Code have been enforced to bring a wider gamut of online industries within regulation. Challenges to the Digital Media Ethics Code have primarily been brought by news broadcasters and publishers, who have also been unwittingly rounded up and brought within additional regulation.

The impact of recent orders of the high courts further highlights the struggle for control by the government and objections raised by publishers. Owing to challenges to the Digital Media Ethics Code in several high courts, such cases have been transferred to the Supreme Court of India, which is due to take up a transfer petition to transfer all the pending petitions against the IT Rules, 2021 to the Supreme Court. While the regulation of the social media intermediaries was long overdue, it remains to be seen how the Digital Media Ethics Code will play out.

Further, the government is also actively trying to revive the telecom sector, inter alia, by way of structural and operational reforms, a reduction of applicable interest rates and SUC and encouraging spectrum sharing. The extant FDI policy has also been amended to allow for 100 per cent investment via the automatic route. This only reaffirms the faith of stakeholders, as the government is also keen on tapping the industry's full potential. With an exponentially increasing subscriber base, there has been a lot of investment and development in the sector. As per the data released by the Department for Promotion of Industry and Internal Trade, FDI inflow into the telecom sector from April 2000 to March 2021 totalled US\$37.66 billion.

Given these trends, the number of internet subscribers in the country has almost doubled to 829 million and overall IP traffic is expected to grow four-fold at a compound annual growth rate of 30 per cent in 2021. According to a Zenith Media survey, India is expected to become the fastest-growing telecom advertisement market, with an annual growth rate of 11 per cent between 2020 and 2023.

The government is also planning to develop 100 smart city projects, and the IoT will play a vital role in developing these cities. The National Digital Communications Policy 2018 envisaged attracting investment worth US\$100 billion in the telecommunications sector by 2022.

With growing demand for online services, several industries such as healthcare, food, agriculture, telecommunications and media are the new sunrise sectors. The advent of new technologies such as drones with diverse uses across industries and sectors, the evolution of space law, leaps in digital healthcare, online gaming and remote working in most multinational corporate sectors, the world is surely experiencing the dawn of a new era. It remains to be seen how the legal and regulatory trends and developments will keep pace with advancements in science and technology.

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ISBN 978-1-83862-834-5