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**Strategic Partners**



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## EDITORIAL

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Welcome to the tenth edition of *The International Comparative Legal Guide to: Telecoms, Media & Internet Laws & Regulations*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of telecoms, media and internet laws and regulations.

It is divided into two main sections:

One general chapter. This chapter provides an overview of the EU's digital single market proposals.

Country question and answer chapters. These provide a broad overview of common issues in telecoms, media and internet laws and regulations in 27 jurisdictions.

All chapters are written by leading telecoms, media and internet lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Rob Bratby of Olswang LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at [www.iclg.co.uk](http://www.iclg.co.uk).

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# India

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Smitha Prasad



Nishith Desai Associates

## 1 Overview

- 1.1 Please describe the: (a) telecoms; (b) audio-visual media distribution; and (c) internet infrastructure sectors in your jurisdiction, in particular by reference to each sector's: (i) importance (e.g. measured by annual revenue); (ii) 3–5 most important companies; (iii) whether they have been liberalised and are open to competition; and (iv) whether they are open to foreign investment.**

### *Telecom and internet:*

The Communications Sector has assumed the position of an essential infrastructure for socio-economic development in an increasingly knowledge-intensive world. Reports suggest that India is currently the second-largest telecommunication market and has the third highest number of internet users in the world. The industry has attracted FDI worth US\$ 17.7 billion during the period April 2000 to September 2015, according to the data released by the Department of Industrial Policy and Promotion (DIPP).

Driven by strong adoption of data consumption on handheld devices, the total mobile services market revenue in India is expected to touch US\$ 37 billion in 2017, registering a Compound Annual Growth Rate (CAGR) of 5.2% between 2014 and 2017, according to research firm IDC.

The Indian telecom industry started as a monopoly and has slowly liberalised and private sector participation was permitted through a gradual process. Today the market is open for competition, though it is a heavily regulated sector. Foreign investment has also been gradually liberalised and is permitted up to 100% albeit government approval is required for investment beyond 49% (please see response to question 1.4).

Some of the largest brands in the telecom industry are Bharti Airtel Limited, Tata Teleservices and Reliance Communications.

### *Audio-visual media distribution:*

The Indian Media and Entertainment (M&E) industry is a sunrise sector for the economy and is currently growing at a very fast pace with the increased usage of internet and smartphones in India. The media and entertainment industry grew 11.7% over 2014, and the industry is expected to grow at a CAGR of 13% over the next three years. Foreign investment in this sector is liberalised with 100% foreign investment being allowed for uplinking/downlinking of non-news and current affairs television channels.

Some of the largest brands in the industry are: Star India (Television and online distribution); Sony (Television and film); and Viacom (Television and online distribution). Companies such as Netflix have recently entered the online content distribution market in India.

- 1.2 List the most important legislation which applies to the: (a) telecoms; (b) audio-visual media distribution; and (c) internet sectors in your jurisdiction.**

Laws which apply to or may affect various media are as follows:

- (a) Telecom and internet sector:
- Indian Telegraph Act, 1885.
  - Indian Wireless Telegraphy Act, 1933.
  - Regulations, tariff orders and directions which may be issued by telecom policies issued by the government/regulator.
- (b) Audio-visual media distribution:
- Cinematograph Act, 1952.
  - Cable Network Television Rules, 1994.
  - Uplinking and downlinking guidelines.
  - Regulations issued by the telecom regulator for the internet.
- (c) General laws that may be of importance to the above sectors:
- Indian Penal Code, 1860.
  - Copyright Act, 1957.
  - Indian Contract Act, 1872.
  - Information Technology Act, 2000.

- 1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms; (b) audio-visual media distribution; and (c) internet sectors in your jurisdiction.**

- Department of Telecommunications.
- Department of Electronics & Information Technology.
- Telecom Regulatory Authority of India.
- Ministry of Information and Broadcasting.
- Central Board of Film Certification.
- Indian Broadcasting Foundation.
- Advertising Standards Council of India.

#### 1.4 Are there any restrictions on foreign ownership or investment in the: (a) telecoms; (b) audio-visual media distribution; and (c) internet sectors in your jurisdiction?

The Indian Foreign Exchange Management Act, 2000, and the Foreign Direct Investment Policy, 2015 (“**FDI Policy**”), provides for restrictions on foreign investment in various sectors, as well as compliances to be undertaken when such investment is made.

Foreign investment of up to 100% is permitted in the telecom. However, investments beyond 49% require prior approval from the Government. This would also hold true for companies providing internet services in India.

The FDI Policy contains restrictions on investments made in the broadcasting sector, including in companies that undertake broadcasting carriage services (setting up of teleports, DTH services, cable networks, mobile TV, head-end in the sky broadcasting), and broadcasting content services (terrestrial broadcasting FM/FM radio, Up-linking of ‘News & Current Affairs’ TV Channels, and Up-linking of Non-‘News & Current Affairs’ TV Channels/Down-linking of TV Channels). However, there is no restriction as such on investment in companies that undertake online distribution of audio-visual media, such as music/content streaming services.

The FDI Policy also restricts companies with foreign investment from undertaking retail trading, including in the form of e-commerce. E-commerce activities have been described as the activities of buying and selling by a company through an e-commerce platform. These restrictions may be applicable depending upon the nature of distribution of the audio-visual media.

## 2 Telecoms

### General

#### 2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Yes, India is a member of the World Trade Organisation. India has limited commitments regarding telecommunications under the GATS, and has adopted the telecoms reference paper on this basis. India’s commitments regarding telecommunications are largely limited to the ‘commercial presence’ mode of supply, i.e. mode 3 under the GATS schedule of commitments\* (and the ‘presence of natural persons’, i.e. mode 4, where applicable horizontally under the GATS itself).

\*Mode 3 – commercial presence – refers to supply of service by a service supplier of one member nation of the GATS through commercial presence in the territory of another member nation.

The commitments under mode 3 (for commercial presence) typically provide that the service supplier may undertake activities in India subject to certain restrictions on foreign equity, and upon obtaining a license from the Department of Telecommunications or the relevant local agency.

#### 2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

Telecommunication networks and services in India have traditionally been heavily regulated. As per the Indian Telegraph

Act, 1885 (“**Telegraph Act**”), and the Indian Wireless Telegraphy Act, 1933 (“**Wireless Telegraphy Act**”), the Central Government has the exclusive privilege of establishing, maintaining and working telegraph and wireless telegraphy equipment and is the authority to grant licences for such activities. The Central Government acts through the Department of Telecommunications, Government of India (“**DoT**”). Further, the Telecom Regulatory Authority of India (“**TRAI**”) is a statutory telecom regulator and has certain mandatory rule-making powers (such as in tariff-making) and recommendatory powers (such as with respect to telecom licence terms). The use of radio spectrum by any telecom operator is governed by the Wireless Planning and Co-ordination Wing (“**WPC**”), a wing of the DoT which is responsible for frequency spectrum management.

Telecom operators have to provide their services in compliance with the terms of the telecom licence granted to them by the DoT, as also the terms imposed by the WPC for the use of spectrum and with the rules, regulations, directions and tariff orders which may be issued by the TRAI.

Some services, which though they come within the broader ambit of telecommunications services (such as Other Service Providers (“**OSP(s)**”) who provide services such as call centre services), are lightly regulated and do not require a licence from the DoT; rather a registration process is followed.

#### 2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

TRAI is a statutory body formed under the Telecom Regulatory Authority of India Act, 1997 and is the regulator for the telecoms, broadcasting and cable television industries. There is no separate sector-specific regulator for competition law issues in this sector. The TRAI has (i) the power to make recommendations to the DoT on various issues, such as telecom licence terms, (ii) the obligation to discharge certain functions, such as laying down quality of service standards, and (iii) set out the commercial rates at which telecom services shall be provided by telecom operators in India. In carrying out the rate fixing function, the TRAI has set out rates and related terms and conditions for the provision of certain telecom services and at the same time has followed a policy of forbearance for certain telecom services (such as internet) and has let market forces determine the rates.

The TRAI itself does not exercise judicial functions. Pursuant to the TRAI (Amendment) Act, 2000, the Telecom Disputes Settlement and Appellate Tribunal (“**TDSAT**”) was set up as the adjudicatory body empowered to adjudicate disputes between: (i) the DoT and licensees; (ii) between two or more service providers; (iii) between a service providers and a group of customers; and (iv) to hear and dispose of appeals against any decision or order issued by the TRAI. An appeal from an order of the TDSAT lies with the Supreme Court of India (which is the apex court of the country).

The Competition Commission of India (“**CCI**”), established under the Competition Act, 2002, exercises jurisdiction on all competition law issues in India. It serves as a market regulator which supervises anti-competitive behaviour or practices of enterprises which may distort competition, across different sectors. It is further required (i) to eliminate practices which have an adverse effect on competition, (ii) promote and sustain competition, and (iii) protect the interests of consumers and ensure freedom of trade in the markets of India. The CCI can have adjudicatory powers and can initiate investigations (i) *suo moto*, (ii) upon receipt of information from the public, or (iii) upon reference made to it by the government or a statutory authority.

The Competition Act, 2002, also provides for the establishment of a Competition Appellate Tribunal (“CAT”) which hears and dispose of appeals against any direction issued or decision/order passed by the CCI in certain cases, and to adjudicate on findings by CCI with respect to claims for compensation. An appeal from the order of the CAT can be filed with the Supreme Court of India.

While the Government does appoint certain higher officials in the TRAI and the CCI, such as the chairperson of the TRAI and the CCI, both the TRAI and the CCI have been constituted as autonomous bodies and independent statutory regulators.

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#### 2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

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Please refer to response at question 2.3.

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### Licences and Authorisations

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#### 2.5 What types of general and individual authorisations are used in your jurisdiction?

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The Telegraph Act grants the Central Government the exclusive privilege of establishing, maintaining and working telegraph and wireless telegraphy equipment and the authority to grant licences for such activities. The Central Government acts through the DoT which acts as the licensing body. Prior to 2013, the DOT used to issue separate licences for different telecom services. Post 2012, India has adopted the Unified License regime, under which an applicant does not need to apply for separate licences for separate services. The Unified License (“UL”) consolidates all the primary telecom services under one encompassing licence. Telecom operators who were operating under the erstwhile licences are required to migrate to the UL regime.

Apart from obtaining the UL, separate service specific authorisations will also have to be obtained from the DoT. The UL accounts for most of the telecom services such as access services, internet services, national and international long distance, Global Mobile Personal Communication through Satellite Service, VSAT, etc.

The UL does not cover authorisations for certain services such as voicemail, audiotex and unified messaging services for which a separate licence is available. The UL also does not cover a service category termed as ‘Other Service Providers’ (“OSP”), which is a registration granted to entities providing telecom and IT enabled services such as call centres and network operation centres.

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#### 2.6 Please summarise the main requirements of your jurisdiction’s general authorisation.

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The main requirements under the UL can be broadly classified into the following categories:

- (i) *Ownership and Investment Requirements:* The applicant must be an Indian entity. Foreign direct investment of 100% is allowed; although, foreign investment above 49% requires the prior approval of the government. The applicant also requires certain minimum net worth and paid up capital requirements – which are different for different services.
- (ii) *Fee requirements and License Term:* The applicant is required to pay a one-time non-refundable entry fee for authorisation of each service and service area as provided in the UL and an annual licence fee as a percentage of the adjusted gross revenue.

(iii) *Technology Standards:* The licensee shall use only the equipment and products which meet the relevant standards set by International standardisation bodies such as, ITU, ETSI, IEEE, ISO, IEC, etc.

(iv) *Security Standards:* There are various security standards to be adhered to, such as:

- The Chief Officer in charge of technical network operations and Chief Security Officer/Chief Information Security Officer in charge of equipment such as MSC, Soft-Switch, and Central Database, etc. shall be a resident Indian Citizen.
- All foreign personnel likely to be deployed for installation, operation and maintenance of the network shall be security cleared by the Ministry of Home Affairs.
- The licensee needs to ensure that it and its vendors allow the DoT to conduct security inspections on the equipment, development and manufacturing facilities.
- The licensee may only provide details of its network/infrastructure diagrams to OEMs and group companies – in all other cases, prior approval of the DoT is required.
- The licensee shall generally not transfer any accounting information/user information outside India.

(v) *Spectrum:* The operator has to make separate application to the WPC for the allotment and use of spectrum.

There are other service-specific requirements for different kinds of telecom services.

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#### 2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded.

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Please refer to our response to question 2.3 which discusses the subject matter of different service authorisations.

The UL itself is valid for a period of 20 years. The duration of the individual authorisations are coterminous to the validity of the UL. For instance, if an individual authorisation is taken five years after the UL was obtained, the duration for the service shall be the same as that of UL, i.e. 15 years.

Telecom operators are prohibited from either directly or indirectly assigning/transferring the licence to a third party or sublicensing or entering into partnership relating to any subject matter of the licence. The UL does allow for intra service mergers and acquisitions and transfer of licence, subject to the guidelines issued by DOT. A licensee can transfer or assign the UL subject to the prior approval of DOT (i) when such transfer is part of an arrangement contemplated with lenders, or (ii) in case of any amalgamation or restructuring in accordance with law.

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### Public and Private Works

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#### 2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

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In order to gain access to public land, an operator needs to take Right of Way (“RoW”) permissions. The UL requires the licensee to make its own arrangements for RoW. An operator is authorised to seek way-leave from any person/public authority for providing services (such as public authority, public corporation, autonomous bodies, state governments).

Currently, there are no universal RoW regulations provided by the DOT and different states provide their own RoW policies. In order

to simplify and streamline the process of RoW permissions, the DOT formulated the Draft Indian Telegraph Right of Way Rules, 2016, which, *inter alia*, propose the criteria for levying of fee, uniform application procedure and time limit for the grant of permission. However these rules have not yet been finalised.

Separately, there is a category of service providers called Infrastructure Providers who can provide assets such as Dark Fibre, Right of Way, Duct space and Tower to other telecom operators.

## Access and Interconnection

### 2.9 How is network-to-network interconnection and access mandated?

The UL makes it mandatory for a service provider to interconnect its network with other telecom service providers as well as national long-distance operators. Interconnection between the networks of different operators for carrying circuit switched traffic shall be as per standards which may be set from time to time by the Telecom Engineering Centre (“TEC”) and shall also be subject to technical feasibility and technical integrity.

There are various guidelines issued by the TRAI in respect of interconnection. For instance, the TRAI requires that that interconnection charge generally be cost-based, that interconnection charges be non-discriminatory and that there be no bundling of unnecessary facilities by an interconnection provider.

### 2.10 How are interconnection or access disputes resolved?

In accordance with the Telecommunication Interconnection (Charges and Revenue Sharing) Regulation, 2001, when an interconnection provider informs the interconnection seeker that it cannot provide interconnection as sought for by the latter, the interconnection seeker, within 45 days of being so informed, may approach the TRAI to seek its intervention.

### 2.11 Which operators are required to publish their standard interconnection contracts and/or prices?

An operator with Significant Market Power (SMP) (i.e. an operator who generally has market share greater or equal to 30% of the relevant market) must make a Reference Interconnect Offer (“RIO”) publicly available. After the RIO has been accepted by the interconnection seeker, a mutually agreed agreement can be entered into, within the framework of the RIO. The RIOs, require prior approval from the TRAI before they are published.

### 2.12 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and if so, how?

The charges for accessing other networks for inter-network calls shall be based on mutual agreements between the service providers and must also conform to guidelines which may be issued by the TRAI from time to time.

TRAI has generally followed a policy of forbearance in fixing telecom interconnection charges although providers must adhere to prices of some services (e.g. Interconnection for STD calls) which have been fixed by the TRAI and to the TRAI mandated ceilings on the termination, carriage and access deficit charges.

### 2.13 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

India does not impose functional or legal separation as such on telecom operators. There are accounting separation rules imposed by the TRAI which are intended to collect financial data from telecom operators that enable a meaningful analysis of the financial performance of different telecom products and services, costs, returns and capital employed.

### 2.14 Are owners of existing copper local loop access infrastructure required to unbundle their facilities and if so, on what terms and subject to what regulatory controls? Are cable TV operators also so required?

The owners of existing copper loop access infrastructure are not currently required to unbundle their facilities. In 2004, TRAI had made a recommendation on local loop unbundling in order to reduce the barriers to entry in the broadband sector. TRAI recognised that one of the primary barriers to entry in the broadband sector was the lack of access to copper in the local loop and the high expenditure involved in duplicating the existing infrastructure. However, the recommendation was not accepted by the DOT.

### 2.15 How are existing interconnection and access regulatory conditions to be applied to next-generation (IP-based) networks? Are there any regulations or proposals for regulations relating to next-generation access (fibre to the home, or fibre to the cabinet)? Are any ‘regulatory holidays’ or other incentives to build fibre access networks proposed? Are there any requirements to share passive infrastructure such as ducts or poles?

In April 2016, the DoT amended telecoms licence terms to make allowance for carriage of IP-based traffic which shall be as per standards issued by the Telecom Engineering Center. However, inter-connection is not permitted between PSTN and IP networks.

The government has also embarked on an ambitious project called “Digital India” that aims to provide internet connectivity to every citizen as a core utility. One of the initiatives of the Digital Indian movement is the National Optical Fibre Network which will facilitate broadband connectivity to over 600 million rural citizens of the country. NOFN is being managed by Bharat Broadband Network Limited.

Further, there have been reports of the TRAI recommending that fibre networks of operators be awarded a critical infrastructure status.

The UL allows sharing of “passive” infrastructure *viz.*, building, tower, dark fibre, duct space, Right of Way, etc. between operators.

## Price and Consumer Regulation

### 2.16 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

The TRAI has the authority to regulate telecom tariffs. The Telecommunication Tariff Order 1999 and various amendments thereto imposes ceilings and other terms and conditions on various telecoms. The TRAI has followed a policy of forbearance in tariffs for internet (except lease lines).

### 2.17 Is the provision of electronic communications services to consumers subject to any special rules and if so, in what principal respects?

The UL and regulations issued by the TRAI contain a number of rules on pricing and consumer protection. For instance:

- (i) The operator is obliged to register demand/request for any telecom service without any discrimination from any applicant.
- (ii) Operators are not allowed to discriminate between subscribers.
- (iii) Operators have to provide continuity of service unless their licence is cancelled or suspended.
- (iv) Operators need to provide itemised billing to the subscribers.
- (v) Operators need to offer standard package(s) to all subscribers. In addition to standard packages, operators may offer alternative combinations of tariffs to different classes of subscribers in a non-discriminatory manner.
- (vi) Operators cannot terminate any existing tariff plan without giving notice of at least 30 days to the subscriber of its intention to terminate the tariff plan.
- (vii) ISPs to provide unrestricted access to all the content available on the internet, except for such content which is restricted by the DoT or under law.

ISPs are restricted from charging differential prices on the basis of content.

## Numbering

### 2.18 How are telephone numbers and network identifying codes allocated and by whom?

Telephone numbers and the network identifying codes are allocated by the DoT in accordance with the National Numbering Plan, 2003. The Numbering Plan lays down the policy for the use and assignment of numbers to the telephone services in accordance with the relevant ITU standards. It provides for assigning of numbers (including prefix) for services such as home country direct service special services like emergency services, supplementary services, inquiry and operator assister services, national long distance service, toll free numbers, etc.

### 2.19 Are there any special rules which govern the use of telephone numbers?

The UL and the National Numbering Plan contain a number of rules relating to telephone numbers. For instance:

- (i) All mobile numbers need to be 10 digits long.
- (ii) All mobile numbers in India must have the prefix nine, eight or seven (this includes pager services).
- (iii) Providing an “Emergency and Public Utility Service” is a mandatory condition for grant of the access service licence to telecom operators.

### 2.20 Are there any obligations requiring number portability?

The Telecommunication Mobile Number Portability Regulations, 2009, impose an obligation on the service provider to provide mobile number portability. Previously, there was limited mobile number portability (MNP) that only allowed intra-circle transfers. However, nationwide MNP was launched on 3 July 2015, where it

allowed for inter-circle transfers as well as allowing a subscriber to retain an existing number and transfer it to another service provider in any part of the country.

Operators need to enter into mutual commercial agreements with a MNP service licensee to ensure proper implementation of MNP. At present, two companies have been granted the MNP License by DoT viz. Syniverse Technologies (India) Pvt. Ltd. and MNP Interconnection Telecom Solutions India Pvt. Ltd.

## 3 Radio Spectrum

### 3.1 What authority regulates spectrum use?

The Wireless Planning and Coordination (“WPC”) Wing of the Ministry of Communications, is the National Radio Regulatory Authority responsible for Frequency Spectrum Management, including licensing of spectrum.

An applicant also needs to obtain a no objection from the Standing Advisory Committee of Frequency Allocation for the use of spectrum.

### 3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative ‘beauty parades’, etc.?

The WPC exercises the statutory functions of the Central Government and issues licences to establish, maintain and operate wireless stations. While deciding the manner of usage of spectrum, the WPC is guided by the National Frequency Allocation Plan, an overarching policy document that lays out the national policy that is formulated in accordance with international standard laid down by the International Telegraph Union Telecommunication Standardization Sector (“ITU-T”) on how spectrum must be used.

In the past, the WPC has allocated spectrum using different methods such as “First come – First Serve” and “auctions”. However, in 2012, the Supreme Court of India struck down all spectrum allocation done in 2008 other than through auctions, and mandated that spectrum can be allocated only through auctions (Center for Public Interest Litigation and OrsV/s Union of India – Writ Petition (Civil) No 423 of 2010).

### 3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

Yes, certain bands of spectrum have been made licence-exempt. The primary unlicensed spectrum bands are: *Frequency band 2.4 GHz to 2.4835 GHz; 5GHz, for indoor use of low power wireless equipment; and 5.150 to 5.350 GHz and 5.725 to 5.875 GHz for indoor usage. Currently, the spectrum bands in 2.4 GHz and 5.8GHz have been delicensed and are being used for Wi-Fi and CTS applications.* While the use of spectrum in such bands may not require a licence, certain other technical conditions may need to be complied with. For instance, the types of antennae, the coverage area and the Maximum Effective Isotropic Radiated Power may be specified for unlicensed use.

### 3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

Spectrum usage charges may be calculated at different rates depending on the band of the spectrum or as per the applicable slab rates



prescribed by the DoT. In practice, the spectrum usage charges are provided under the specific Notice Inviting Applications for auction of the spectrum. For instance, in November 2014, the DoT prescribed that spectrum in 1800 MHz and 900 MHz bands acquired through auction during February 2014 was to be charged at 5% of the Annual Growth Rate. It further stated that the minimum AGR shall be no less than 5% of the bid amount and the calculation of SUC shall be on the basis of minimum AGR or the Actual AGR, whichever is higher.

### 3.5 What happens to spectrum licences if there is a change of control of the licensee?

If the legal entity that holds the spectrum authorisations does not change, a change of control would not usually affect the spectrum authorisations, provided that the requirements of the FDI Policy for change in ownership have been followed.

Further, the Guidelines for Transfers and Mergers dated February 20, 2014, issued by the DoT, contain provisions with respect to the treatment of spectrum upon any arrangement/merger/transfer, etc. For instance:

- (a) Transfer.
- (b) If an operator participates in a spectrum auction and is consequently subject to a lock in condition, and if such operator proposes to merge/amalgamate/compromise into another operator, the lock in would apply in respect of new shares which would be issued in respect of the resultant company/transferee company.
- (c) Upon the implementation of the arrangements/amalgamations/merger in a service area, the total spectrum held by the resultant entity shall not exceed 25% of the total spectrum assigned for access services and 50% of the spectrum assigned in a given band (by way of auction or otherwise) in the concerned service area. If, as a result of the merger, the total spectrum held by the relevant entity is beyond the prescribed limits, the excess spectrum must be surrendered within one year.

### 3.6 Are spectrum licences able to be assigned, traded or sub-licensed and if so, on what conditions?

Spectrum may be shared and traded in accordance with the guidelines provided by the DoT. Leasing of spectrum is prohibited in India. Certain primary provisions of these guidelines have been reproduced below:

The DoT guidelines for sharing of spectrum, *inter alia*, provide that:

- sharing is allowed for all access spectrum (including traded spectrum) within the same bands;
- both licensees need to fulfil specified roll-out obligations and specified quality of service norms;
- sharing is subject to the condition that there will be at least two independent networks independent networks in the same band; and
- both operators must have paid the One Time Spectrum Charges for their respective spectrum holdings based on reserve price/auction determined price.

The DoT guidelines for trading of spectrum, *inter alia*, provide that:

- Spectrum trading has been permitted for spectrum earmarked for Access Services and which can be traded for the entire Licensed Service Area in which it was allotted in the following bands: 800; 900; 1800; 2100; 2300; and 2500 MHz.
- Operators will be allowed to sell the spectrum after two years from the date of acquisition through auction or, in case of administratively assigned spectrum, two years after conversion into tradable spectrum.

In order to cover the administrative charges incurred by the Government, a transfer fee of 1% of the transaction amount of the trade or 1% of the prescribed market price, whichever is higher, would be payable by the buyer to the Government.

## 4 Cyber-security, Interception, Encryption and Data Retention

### 4.1 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

The Information Technology Act, 2000 (“IT Act”) provides that the Central or State Governments in India may issue directions or authorise their agencies as follows:

- (i) To intercept/monitor/decrypt information generated, transmitted, received or stored in any computer resource, if deemed required: (a) in the interest of: the sovereignty or integrity of India; defence of India; security of the State; friendly relations with foreign States; or public order; or (b) for the purpose of preventing incitement to the commission of any cognisable offence relating to the above. The reasons for issuing such orders are required to be recorded in writing.
- (ii) To block public access of any information through any computer resource, if deemed required: (a) in the interests of the sovereignty and integrity of India; defence of India; security of State; friendly relations with foreign State public order; or (b) for the purpose of preventing incitement to the commission of any cognisable offence relating to the above. The reasons for issuing such orders are required to be recorded in writing.
- (iii) To monitor and collect traffic data or information generated, transmitted, received or stored in any computer resource, for the purpose of (a) enhancing cyber security and (b) for identification, analysis and prevention of intrusion or spread of computer contaminant in India

The Government has prescribed procedures and safeguards for each of the above actions in the form of rules issued under the IT Act.

Further, the Telegraph Act provides allows the Central or State Governments to order that any messages or classes of messages, brought for transmission, or transmitted or received by a telegraph cannot be transmitted, are intercepted, are detained, or are disclosed to the Government in the following cases: (a) on the occurrence of any public emergency, or in the interest of public safety; and (b) where it is deemed necessary in the interests of sovereignty and integrity of India, security of the state, friendly relations with foreign states or public order, or for preventing incitement to the commission of an offence.

The UL also contains provisions which oblige operators to provide monitoring/interception facilities and to maintain call data records.

### 4.2 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

Please refer to our response to question 4.1.

### 4.3 How does the state intercept communications for a particular individual?

Please refer to our response to question 4.1.

#### 4.4 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

The IT Act provides that the Central Government of India may prescribe certain encryption methods for the purpose of promoting e-governance and e-commerce. However, no specific methods or standards of encryption have been specified under the IT Act as yet.

There are, however, certain sector-specific requirements relating to the methods of encryption. For instance, in the banking industry, the Reserve Bank of India requires the use of at least 128-bit SSL for securing browser to web server communications and, in addition, encryption of sensitive data like passwords.

A draft of a proposed encryption policy was published by the Central Government towards the end of 2015. However, this draft was withdrawn by the Central Government amid criticism from a number of stakeholders.

#### 4.5 What call data are telecoms or internet infrastructure operators obliged to retain and for how long?

The UL specifies that operators must maintain all commercial records/call detail records/exchange detail records/IP detail records, relating to any communications exchanged on their network, for at least one year.

### 5 Distribution of Audio-Visual Media

#### 5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

There are various methods for the distribution of audio-visual content in India.

- *Distribution via television/satellite*

Distribution via satellite is primarily governed by the ‘downlinking’ and ‘uplinking’ guidelines issued by the Ministry of Broadcasting (“MIB”). The ‘downlinking’ guidelines regulate the downlinking of all satellite television channels downlinked, received or transmitted and re-transmitted in India for public viewing. The ‘uplinking’ guidelines regulate the uplinking of any television channels, including specifically the uplinking of news channels.

Further, the Cable Television Network (Regulation) Act, 1995, and the rules and guidelines issued under this legislation also contains certain regulations on the content of programmes that are distributed via television. Further, sports broadcasting is also separately regulated.

- *Theatrical distribution*

The operation of theaters, as such, is not regulated. However, several content related regulations are applicable to all films which are released theatrically, and every such film must obtain and be in compliance with a certificate issued by the Central Board of Film Certification.

- *Online distribution*

The operation of online distribution platforms, as such, is not regulated. Further, the content related regulations that are otherwise applicable to film and television content are dated, and it is not clear whether such regulations would be applicable to online distribution of content as well. However, reports indicate that the Government may be mulling over regulating content that is distributed online.

The IT Act, which is applicable to any electronic communications also penalises distribution of certain content, such as obscene content, or content that depicts children in sexually explicit acts, etc.

In addition to the above-mentioned sector-specific content regulations, the general criminal laws in India (such as the Indian Penal Code, 1860) also penalise the distribution of certain types of obscene or harmful content.

#### 5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

The content regulations currently in force in India are specifically applicable to film content that is distributed in theatres in India, and to content that is broadcasted on television. There is no specific law with respect to content distributed over the internet. Some laws are broad enough to be interpreted as being applicable to all forms of distribution, including the internet. For instance, provisions under the Indian Penal Code, 1860 which deal with the distribution of obscene content are not specific to any form of distribution and may apply to the internet as well. However, censorship laws under the Cinematographic Act, 1952 which require rating of certain types of content, may not extend to the internet.

#### 5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

The main licence for the distribution of audio-video content for television are the ‘downlinking’ and ‘uplinking’ guidelines issued by the MIB. Every entity that undertakes uplinking or downlinking activities must meet certain eligibility criteria in order to receive the uplinking/downlinking licence. For instance, an applicant must be a company incorporated in India and must meet certain required minimum net worth criteria.

Some general obligations applicable in relation to the uplinking or downlinking of television channels are as follows:

- Uplinking:
  - Uplinking is permitted in either of the C or Ku bands. However, uplinking in the Ku band is permitted through Indian satellites only.
  - Records of all content that is uplinked must be maintained for specified periods of time.
  - The uplinking entity must also set up a monitoring facility using which the regulatory authorities can monitor the programme/content uplinked.
- Downlinking:
  - Prior approval of the regulatory authority must be obtained before undertaking any upgradation, expansion or any other changes in the downlinking and distribution system/network configuration.
  - Records of all content that is uplinked must be maintained for specified periods of time.

Further, every television channel that is uplinked from or downlinked in India must be registered with the MIB. The company will also need approval from the WPC for use of spectrum.

Additional obligations may be applicable in relation to specific channels, such as news channels, or sports broadcasting channels.

Distribution of audio-video via the internet is considered to be an ‘Over The Top’ service and there is no specific regulatory licence which is required. However, in recent times, the government has started consultation processes to determine whether such distribution ought to be regulated/monitored.

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#### 5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

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Generally, all regulatory licences may only be assigned or transferred upon approval of the regulatory authorities.

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## 6 Internet Infrastructure

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#### 6.1 How have the courts interpreted and applied any defences (e.g. ‘mere conduit’ or ‘common carrier’) available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

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The IT Act and rules thereunder, which are specific to intermediaries, provides a safe harbour for ‘intermediaries’ (defined to mean “any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web hosting service providers, search engines, online payment sites, online-auction sites, online market places and cyber cafes”), and shall not be liable for any third party information, data, or communication link in the following situations:

- where the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored; or
- where the intermediary does not initiate transmission, select the receiver of transmission, and the intermediary does not modify or select the information contained in the transmission.

The intermediary is also required to observe certain due diligence requirements in order to be eligible for the safe harbour protection. Intermediaries are permitted to block or remove unlawful content in accordance with the rules under the IT Act.

In the case of *Shreya Singhal v Union of India* (Writ Petition (Criminal) No. 167 of 2012), the petitioners challenged the constitutionality of the provisions of the IT Act which allow intermediaries to block content stating that these provisions were vague, broad and in violation of constitutional provisions of the fundamental right to the freedom of speech and expression. The Supreme Court held here that both Section 79(3)(b) and Rule 3(4) of the Intermediary Rules under the IT Act are to be read down to mean that the intermediary must receive a court order/notification from a government agency requiring the intermediary to remove specific information.

Similarly, the copyright laws also contain an exemption from liability arising from the transient or incidental storage of third party information in certain cases.

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#### 6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

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Both the IT Act and the copyright laws require intermediaries such as telecommunications operators and/or internet service providers

to take down any infringing content. The Supreme Court of India has, in the judgment of *Shreya Singhal v Union of India* (discussed in question 6.1 above), held that the requirement to take down such content under the IT Act would only be applicable where a government agency/court has issued an order/directions to that effect.

On the other hand, the copyright laws provide that an intermediary would be required to refrain from storage of any alleged infringing content, upon receiving a complaint regarding such content. However, the intermediary may restore such storage after 21 days, if no court order has been received, ordering the intermediary to continue to refrain from such storage.

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#### 6.3 Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks? Are there any ‘net neutrality’ requirements?

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The UL contains provisions which place an obligation on an internet service provider to ensure that the subscribers have unrestricted access to all content on the internet except for unlawful content.

Further, the TRAI issued the *Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016*, in February 2016, which prohibits ISPs from offering differential tariffs on the basis of content. This restriction is not applicable where such tariffs are charged for data services provided over a closed electronic communication network (where data is neither received nor transmitted over the internet), or for the purpose of accessing or providing emergency services or at times of grave public emergency.

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#### 6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content?

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Please refer to our responses to questions 4.1 and 6.2 above. Certain categories of telecom licensees such as national long distance telecom licensees can provide VPN services.

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#### 6.5 How are ‘voice over IP’ services regulated?

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VoIP services are allowed within the category of ‘internet telephony’ telecom services which allows the transfer of message(s) including voice signal(s) through public internet. Only operators who have obtained an authorisation to provide access services or internet services may provide internet telephony services.

The UL provides that internet telephony may be provided by internet service providers through the public internet and can connect (a) a personal computer to another personal computer within/ outside India, (b) a personal computer in India to the PSTN abroad. However, voice communication to and from a telephone connected to PSTN/PLMN/GMPCS is prohibited.

### Acknowledgment

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