

Telecom Hotline

September 16, 2013

FOREIGN INVESTMENT NORMS EASED AND 'ONE NATION - ONE LICENSE' BECOMES A REALITY

The Department of Telecom, Ministry of Communications and Information Technology, ("DoT") released the much awaited Unified License, paving the way for the implementation of DoT's *One Nation - One License* plan. The Unified License seeks to consolidate license terms for different telecom services. The Unified License has also introduced certain new concepts and clarified some key areas which need to be kept in mind. Notably, spectrum has been officially delinked from the license, cross holding has been prohibited and 3G roaming pacts have been recognised.

This change in policy was accompanied by the Government of India ("GoI") fulfilling a long standing demand of the industry, i.e. allowing 100% foreign investment in the telecom sector.

One crucial aspect which is yet awaited is the policy on mergers and acquisitions in the telecom sector. The telecom sector is quite fragmented and consolidation is considered crucial at this stage. We hope to see consolidation activity pick up as soon as the M&A guidelines are notified.

We now discuss the changes in the FDI policy and some of the key provisions of the Unified License.

FDI POLICY

The GoI through an amendment to its Foreign Direct Investment ("FDI") policy has allowed 100% foreign investment in the telecom sector as opposed to the previous limit of 74%. FDI upto 49% continues to be under the automatic route, and any investment above 49% (upto 100%) will require prior approval from the Foreign Investment Promotion Board.

100% FDI is expected to give an impetus to funding, consolidation, restructuring and exits for telecom operators and their shareholders including private equity investors. It is interesting to note that India is one of the few countries that has permitted 100% foreign ownership of telecom operators.

UNIFIED LICENSE

The DoT has released the final version of the license agreement for Unified License along with the guidelines for grant of Unified License and migration of existing telecom licenses into the Unified License regime. The Unified License is replacing the old regime of a telecom operator applying for separate licenses for separate services proposed to be offered by bringing all the major telecom services under one license.

The National Telecom Policy ("NTP") is the main policy document that lays down the broad objectives that are sought to be achieved so as to align efforts of policy makers, stakeholders and law makers to achieve a common goal. The latest version of the NTP, i.e. NTP 2012 lays down creation of *One Nation - One License* across services and service areas as one of its main objectives. With respect to the Unified License, NTP 2012 specifically provides as follows:

"To move towards Unified Licence regime in order to exploit the attendant benefits of convergence, spectrum liberalisation and facilitate delinking of the licensing of Networks from the delivery of Services to the end users in order to enable operators to optimally and efficiently utilise their networks and spectrum by sharing active and passive infrastructure. This will enhance the quality of service, optimize investments and help address the issue of the digital divide. This new licensing regime will address the requirements of level playing field, rollout obligations, policy on merger & acquisition, non-discriminatory interconnection including interconnection at IP level etc. while ensuring adequate competition."

In the following paragraphs we shall discuss the scheme of the Unified License, some important provisions of the Unified License and some salient changes with respect to the provision of specific telecom services.

SCHEME OF THE UNIFIED LICENSE

Services Offered: The Unified License includes within its ambit the following services:

- Access Service;
- Internet Service;
- National Long Distance Service ("NLD Service");
- International Long Distance Service ("ILD Service");
- Global Mobile Personal Communication By Satellite Service ("GMPCS Service");
- Public Mobile Radio Trunking Service ("PMRTS Service");

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■ Commercial Very Small Aperture Terminal Closed User Group ("Commercial VSAT CUG Service");

■ INSAT Mobile Satellite System-Reporting Service ("INSAT MSS-R Service"); and

■ Resale of International Private Leased Circuit Service ("Resale of IPLC Service").

The Unified License is split into two portions; part one contains general conditions such as security and technical conditions which is applicable to all service categories and part two contains specific conditions applicable to specific services.

Application: The Unified License is a sort of umbrella document which all companies seeking to provide telecom services will need to obtain. Apart from this, the company would also need to obtain separate authorization from the DoT for specific services which the company wishes to provide. One company can have only one Unified License, but the same company can apply for authorisation for more than one service and / or service area subject to fulfilment of all the conditions of entry, simultaneously or separately at different times. At the time of applying for Unified License, the applicant has to apply for authorisation of at least one service that is listed in the Unified License.

Tenure: The Unified License shall be issued on non-exclusive basis for a period of 20 years. The license may be renewed by the DoT for an additional period of 10 years at a time upon request of the service provider, if made during the 19th year of the license period. Where any additional service has been authorized during the tenure of the license, the tenure of such additional service shall be co-terminus with the license.

MIGRATION TO UNIFIED LICENSE REGIME

In order to ensure the smooth transition of licensees from their existing licenses to the Unified License regime, the guidelines for grant of Unified License lay down the manner for migration of the existing licenses. Licenses of any of the existing operator shall be eligible to migrate to the Unified Licenses with any number of additional services, however, in such a case, the operator needs to migrate all of its existing licenses.

Currently, migration has been made completely voluntary until such time that the existing license of operators expires. All renewals / extension of license will be made only under the Unified Licensing regime. However, it would be mandatory for an existing licensee to migrate to Unified License regime under following conditions:

1. Expansion of scope of the license / service to include any additional service or any service area;
2. Merger or acquisition between entities who have not migrated to the Unified License. In such a case, the merged entity must migrate to Unified License regime.

On migration, Unified License shall be valid for a period of 20 years from the effective date of issuance of the Unified License, regardless of the validity period of the license already held;

The Entry fee applicable for migration of all existing licenses to Unified License shall be equal to the entry fee laid down for a new Unified License. This entry fee is applicable for all services / licenses other than for an Internet Service Provider with BWA spectrum. This exception appears to have been made after the DoT's

clarification¹ allowing the carriage of voice over the BWA Spectrum, following which an additional fee equal to the difference between the entry fee for UASL (Voice Service Providers) and entry fee paid for ISP license shall be payable in addition to the entry fee as applicable for a new Unified License.

SALIENT FEATURES AND SIGNIFICANT CHANGES

- **De-linking Spectrum from the License:** In line with the recommendations of the Supreme Court in its judgment³ whereby it canceled 122 telecom licenses, the Unified License has un-bundled spectrum and the license. Under the earlier regime, spectrum was considered as an integral part of the license, whereas, under the Unified License, spectrum will now have to be separately acquired once a license has been acquired. This change has been in line with NTP 2012 which suggested that spectrum should be made available at a price determined through market related processes, rather than being bundled with the License.
- **Entry Fee:** While the Unified License mandates that separate entry fees must be paid according to the services proposed to be offered, the Unified License has imposed an overall cap on the entry fees payable for multiple services under the Unified License, at INR 15 Crores.
- **License Fees:** Important changes have been brought about with respect to license fees.
 - **Change in calculation of license fee:** In the earlier regime, differential percentage of the Adjusted Gross Revenue ("**AGR**") was to be paid as license fees on the basis of the circle in which services were offered. The Unified License now mandates a flat license fee of 8% of the AGR, inclusive of Universal Service Obligation which is presently 5% of AGR. However, from the second year of the effective date of service authorization, the license fee shall be subject to a minimum of 10% of the Entry Fee of the respective authorized service and service area.
 - **Presumptive AGR:** Presumptive AGR is a concept that has been made applicable to all spectrum holders and places a premium on spectrum even where the spectrum holder does not utilize the spectrum made available to them. This move appears to be recognition by the DoT of spectrum as a scarce national resource and to that extent an attempt has been made to ensure that only serious players enter and operate in this industry. A spectrum holder will now be required to pay license fees in the form of a percentage of notional revenues or a percentage of the actual revenues, whichever is higher. Notional revenue which is essentially a minimum amount of revenue for this purpose will be calculated in accordance with the relevant provisions of the Notice Inviting Application document of the auction of spectrum or conditions of spectrum allotment depending on the service and service area. Therefore, unlike the previous regime whereby license fee was determined on the basis of revenue generated by an operator, spectrum holders will now have to pay a minimum pre-determined percentage as license fee or actual AGR or the minimum license fee whichever is higher. Further, this move also appears to be an attempt by the DoT to speed out rollout of services by spectrum holders since they will now have to pay license fees regardless of the actual revenue earned and will reduce hoarding of spectrum.

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- **Prohibition on Cross Holding:** The old licensing regime allowed one licensee to hold an equity interest of up to 10% in another licensee in the same service area - this concept was known as "Cross Holding". Under the Unified License, this de-minimis exemption has been done away with. Licensees are no longer allowed to hold any equity interest (directly or indirectly) in any other licensee which provides services in the same service area. The Unified License provides a window of one year for entities to comply with this provision from the date of migration to the Unified License. This provision may have been included to prevent cartelisation in light of the allegations levelled against telecom operators for forming cartels in the last round of auction of spectrum by the Comptroller and Auditor General of India (CAG)³. This particular provision will directly impact licensees such as Vodafone and Bharti Airtel since most of their licenses are due for renewal in the next year following which their licenses would only be renewed under the Unified Licensing regime and in such a situation Vodafone would need to divest its minority stake in Bharti Airtel⁴.
- **Transfer of license:** In the section of restriction on 'transfer of license', there is a clarification that has been made with respect to court approved merger and acquisitions which provides that any scheme of amalgamation or restructuring filed with the court must be drafted in a manner so that such amalgamation or restructuring shall be effective only after the written approval of the DoT for such transaction. It should be noted that there have been various rounds of litigation wherein the DoT's role has been challenged vis-à-vis approval from the Courts in the case of a court approved merger⁵. As such this clarification makes clear the DoT's position in this issue. However, there is no clarity on when the DoT will need to be approached for such approval. It is not clear whether such approval may be sought simultaneously with the court approval process or if one would need to seek such approval from the DoT after the completion of the court approval process.
- **Dispute Resolution:** With respect to the appropriate forum for settlement of any disputes under the Unified License, it has now been clarified that all disputes which lie outside the domain of the Telecom Disputes Settlement Appellate Tribunal ("**TDSAT**") will lie in the jurisdiction of competent Courts in the National Capital Territory ("**NCT**") of Delhi only. The TDSAT currently has jurisdiction to adjudicate disputes between (i) a licensor and a licensee; (ii) two or more service providers; and (iii) between a service provider and a group of consumers. Therefore, it appears that the Unified License attempts to contractually restrict jurisdiction to competent Courts in NCT of Delhi for their disputes such as Writ Petitions. The move by the DoT to restrict jurisdiction to courts in NCT of Delhi may be challenged since jurisdiction of courts is to be determined in accordance with the Code of Civil Procedure, 1908.
- **Applicability of other statutes:** It has now been clarified that in addition to the Indian Telegraph Act, 1885 or Indian Wireless Telegraphy Act, 1933 the statutory provisions and the rules made under the Information Technology Act, 2000 and / or the Telecom Regulatory Authority of India ("**TRAI**") Act, 1997 and the rules and regulations thereunder shall govern the provision of service under the Unified License. Further, any order passed under these statutes shall also be binding on the licensees.
- **Electromagnetic Radiation and renewable energy:** The DoT has incorporated their notifications on the permissible level of electromagnetic radiation from base stations as part of the Unified License. The Unified License requires the licensee to audit and self-certify that the base stations are conforming to the limits for public exposure. Similarly, the DoT has included its obligation to adopt Renewable Energy Technologies as part of the Unified License.
- **Discontinuation of Service:** With respect to discontinuing a service launched by an operator, a new provision has been added by the Unified License under which notice must be given to the DoT as well as the TRAI of at least 60 calendar days in advance with reasons. Additionally a notice must also be given to all the subscribers by sending a 30 calendar days notice to each such subscriber. However, the DoT reserves the right to reject such request. As such it appears that the DoT has reserved with itself the right to review an operator's proposal for discontinuation and even reject such proposal.

NOTABLE EXEMPTIONS FROM THE UNIFIED LICENSE

- **Other Services Provider ("**OSP**") Registration:** The Unified License does not include services that fall under the category of "Application Services" under the OSP regime (such as call centres). However, the OSP regime is in any case separate from the regular telecom licenses since it is a registration process under the OSP regulations as opposed to a license.
- **Voice Mail/Audiotex/ Unified Messaging Services:** Prior to the Unified License, this service was governed under a specific license. This service has not been identified as a separate service category under the Unified License. The decision not to include a separate service category for this service under the Unified License may raise questions on whether this services would continue be governed by the old license agreement or if the intention of DoT is that there would be no license applicable to this service. The Unified License mentions that Access Service providers will be allowed to provide Voice Mail/Audiotex/ Unified Messaging Services by itself; however this was the case under the old regime as well. It is not clear how operators who do not wish to invest in the Access License may provide Voice Mail/Audiotex/ Unified Messaging Services. There have been discussions on creating a separate license category for value added services⁶ - it may be that the GoI is contemplating categorising Voice Mail/Audiotex/ Unified Messaging Services as a value added service subject to a separate licensing regime. It is not yet clear what such a licensing regime would entail.
- **Mobile Virtual Network Operator ("**MVNO**"):** MVNO essentially is the provision of telecom services using the bandwidth / spectrum of a licensed service provider under a separate brand name. TRAI had issued its recommendations in 2008 suggesting that the DoT should issue a separate license category for MVNOs⁷, however, no notification has been made by the DoT giving effect to these recommendations. MVNO gains even more significance under the Unified License due to the introduction of the concept of Presumptive AGR, whereby a spectrum holder will be required to pay license fees in the form of a percentage of notional revenues or a percentage of the actual revenues, whichever is higher, regardless of the actual revenues earned. Therefore, the introduction of MVNO would help spectrum holders utilize excess spectrum by leasing the same to MVNO operators.

PROVISIONS WITH RESPECT TO SPECIFIC SERVICES - SALIENT POINTS

■ Access Services

- It has been clarified that the Access Service are the only license category which can interconnect Internet Telephony Network to a normal landline (PSTN) / Cellphone. In the earlier license, while it was clear that Access Service providers could provide internet telephony, it was not expressly stated that Access Service providers could provide interconnection between the data network and the PSTN (that is expressly prohibited for ISPs).
- An important change that has been introduced under this license is the recognition of roaming arrangements specifically allowing 3G intra-circle roaming (ICR) pacts. The license now provides that an operator may enter into agreements for roaming facilities (within the same service area or other service areas) with other service providers. It has been clarified, that any such roaming arrangement will not entitle such operator to acquire customer in the spectrum band / technology not held / not deployed or for services / facilities not offered by the operator in its home network. This change in policy has come after various rounds of litigation and disputes regarding 3G Roaming Pacts and is a welcome change in this regard and will incentivize the adoption of the Unified License by existing licensees.

■ Internet Service

- The erstwhile ISP license regime provided for two kinds of licenses, i.e. one an authorization to provide services at a national level (Category A) and an authorization to provide services at telecom circle level (Category B). The Unified License has introduced an authorization for an additional service area, i.e. Secondary Switching Areas ("**SSAs**") (Category C) which is more concentrated than a Telecom Circle and has divided the country into 322 SSAs. This means that ISP service providers can now opt for providing services in smaller service areas. However, in the event that an entity applies for a Category C authorization for more than 4 SSAs such entity must obtain a Category B authorization. This would encourage deeper penetration of data networks in the country.
- The position with respect to Internet Telephony remains unchanged, i.e. ISPs are allowed to offer limited Internet Telephony⁸ in India and cannot connect an Internet Call to a landline / cellphone in India. The recommendations of TRAI⁹ for unrestricted IP telephony have not been accepted in this round of reforms.
- The DoT has permitted internet service providers who also have a DTH service license from the Ministry of Information and Broadcasting, to allow customers for downloading internet data through DTH after obtaining necessary permission from the DoT.

Apart from the changes and clarifications that have been discussed above, the Unified License has consolidated within its ambit various other services such as the GMPCS Service, PMRTS Service and Resale of IPLC service. The Unified License has been a long pending demand of the industry and was widely considered as one of the most important reforms required to help revitalize this sector. With the increase in FDI Limits and a new mergers and acquisitions policy on the anvil the telecom sector looks like it may be able to regain some of the sheen that it lost in the last few years.

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You can direct your queries or comments to the authors

¹ <http://www.livemint.com/Industry/tZ2wA8sa2XY1BbHXctzD7M/DoT-says-there-was-never-any-bar-on-BWA-spectrum-holders-for.html>

² Centre For Public Interest Litigation & Ors. Vs Union Of India & Ors (2012)1CompLJ497(SC) our analysis of the same is available at → <http://nishithdesai.com/SectionCategory/33/Telecom-Hotline/12/27/TelecomHotline/5690/1.html>

³ http://articles.economictimes.indiatimes.com/2013-05-21/news/39418944_1_cartelisation-telecom-firms-spectrum

⁴ <http://gadgets.ndtv.com/telecom/news/bharti-has-no-intention-to-buy-back-vodafone-stake-in-airtel-sunil-mittal-415121>

⁵ http://articles.economictimes.indiatimes.com/2012-07-13/news/32663691_1_idea-spice-merger-licence-and-merger-guidelines-tdsat

⁶ TRAI's Recommendations on Application Services issued on May 14, 2012 wherein the TRAI has inter alia recommended that value added services be subject to a licensing regime.

⁷ TRAI's Recommendations on Mobile Virtual Network Operator (MVNO) issued on August 6, 2008.

⁸ ISPs were allowed to provide internet telephony connecting the following: (i) PC to PC; within or outside India (ii) PC in India to PSTN/PLMN abroad and (iii) Any device connected to ISP node with static IP address to similar device within or outside India

⁹ TRAI's Recommendations on Issues related to Internet Telephony issued on August 18, 2008.

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