

The Trilegal Telecom, Media and Technology Bulletin is a periodic update on recent developments in telecom, media and technology law and policy in India.

NATIONAL TELECOM POLICY 2012 NOTIFIED

The Union Cabinet recently approved the National Telecom Policy 2012 (**NTP 2012**), which provides an outline for the regulation of the telecom sector in the country. The NTP 2012 will replace the National Telecom Policy 1999, and for those engaged in the telecom sector in India, it represents an important roadmap that will affect present activities and future plans. Like its predecessor, though, the NTP 2012 does not – in and of itself – provide the details of regulation of various aspects of the telecom sector. The NTP 2012 will, however, form the basis for future laws and regulations in the telecom sector.

The Government of India, in October 2011, released the draft National Telecom Policy 2011 (**Draft NTP 2011**), inviting the comments of various stakeholders. We have discussed in detail, the implications of Draft NTP 2011 in our newsletters dated 12 October 2011, 21 October 2011 and 17 February 2012.

In this article, we discuss the salient features of NTP 2012, the deviations from the Draft NTP 2011, and its impact on telecom licensees.

Spectrum

The NTP 2012 proposes far reaching changes to the process of spectrum allotment, utilization and management. It proposes the delinking of spectrum from the license, and requires that all future licensees procure spectrum "at a price through market related processes".

Spectrum Sharing

The NTP 2012 seeks to "move at the earliest so that the Government will allow spectrum pooling, trading and sharing". This is a significant departure from the present regulations that expressly prohibit the sharing of spectrum.

New Licensing Regime

A particularly significant change introduced by the NTP 2012 is a new unified licensing regime. The Government has recommended that the plethora of licenses that telecom operators currently need to apply for and maintain be converged appropriately along the following lines: (a) Services, (b) Networks and Devices.

Resale of Telecom Services

The extant regulations contain a prohibition on resale of telecom services, except in certain specified circumstances and only by a stipulated category of licensees. The NTP 2012 seeks to do away with this prohibition and facilitate resale, both at the wholesale as well as retail level, in order to encourage robust competition at the consumer end while ensuring security and other license related obligations.

One Nation One License

At present, the country has been divided into 23 services areas or 'circles' and licenses are awarded to telecom companies in a specific circle. The NTP 2012 has proposed the removal of circle based licensing and the introduction of the concept of 'One Nation-One License'. This will result in the abolition of the concept of 'national roaming'.

Telecom Infrastructure

Another change sought to be brought out under the NTP 2012 is in relation to streamlining the use and rollout of the infrastructure for telecom services.

The NTP 2012 proposes policies that will simplify regulations relating to rights of way and tower installation to facilitate coordination between the operators and the State Governments. This would include measures such as the provision of common service ducts for orderly growth of telecom infrastructure, mapping of infrastructure assets on an inter-operable GIS platform by all telecom infrastructure and service providers, improvement of the SACFA clearance process to speed up site clearances, the use of alternate sources of energy to power the telecom infrastructure coupled with the use of low powered active radio devices.

Exit Policy

The present licensing regime does not adequately deal with the exit of a telecom service provider from its obligations under the license.

The NTP 2012 proposes the formulation of a sound exit policy to pave the way for rationalization of the number of cellular licensees in the country to a number that is closer to the global norm. Recognizing, also, that many licenses are due to expire in the relatively short term, it will look to establish clear guidelines for extension or migration of the existing licenses.

Review of Role of Regulator and Change in Legislation

The NTP 2012 also proposes a review of the Telecom Regulatory Authority of India (TRAI) Act and the Indian Telegraph Act, with a view to address regulatory and legislative inadequacies.

Deviations from the Draft National Telecom Policy 2011

While the NTP 2012, which was approved by the Union Cabinet, is largely based on the Draft NTP 2011, a few significant departures may be mentioned. First, the NTP 2012 makes no mention of the Spectrum Act, a comprehensive legislation that was contemplated in the Draft NTP 2011 to deal with issues such as spectrum licenses, re-farming/ withdrawal of allotted spectrum, spectrum pricing, spectrum sharing, spectrum trading, etc. This suggestion is conspicuous by its absence in the final NTP 2012. While the suggestion of a separate legislation to regulate spectrum has been omitted, one must note that the NTP 2012 does contemplate the regulation of each of the issues that was sought to be brought under the ambit of the legislation.

Second, the Draft NTP 2011 envisaged a two-tier regime for technology neutral unified licenses – (i) A Network Service Operator (NSO)/ Communication Network Service Operator (CNSO) license, and (ii) Service Delivery Operator (SDO)/ Communication Service Delivery Operator (CSDO) license. These provisions have also been omitted in NTP 2012. It is anticipated that the details pertaining to the structure of the unified licensing regime will be dealt with in detail by specific regulations, in consultation with TRAI.

Third, the NTP 2012 also seeks to put in place a liberalized mergers and acquisition policy with necessary thresholds, while ensuring adequate competition. This provision has been added in the NTP 2012, and was not present in the Draft NTP 2011. The ambit of this new regime is as yet unclear. The cancellation of 2G licenses has caused apprehension amongst investors, and this is expected to have the knock-on effect of

consolidation in the Indian telecom sector. In this background, any attempt at liberalizing the mergers and acquisition policy must be welcomed.

MADRAS HC CLARIFIES EXTENT OF JOHN DOE ORDER

Responding to an application made by a consortium of internet service providers (ISPs), the Madras High Court (Court) clarified in *Creative Commercials v. Bharat Sanchar Nigam Limited* (C.S. No. 294/2012), the extent of an earlier interim 'John Doe' or 'Ashok Kumar' order which sought to prevent the infringement of the copyrights of the makers of the film 'Dhammu'. Holding that the order did not apply to entire websites, the Court held that it applied only to specific uniform resource locators (URLs) that host infringing content.

The last two years have witnessed a trend of 'John Doe' orders being obtained by movie producers in order to protect their copyright, the most recent example being the order obtained by the makers of the film 'Gangs of Wasseypur'. Unlike the previous John Doe orders, which were directed against local cable TV operators and video stores to prevent them from selling camera print or cam print (camera recordings of movie made from local movie halls), the **Dhammu** order resulted in ISPs blocking file sharing websites (such as Piratebay, Isohunt) and video sharing networks (Vimeo). This move has outraged netizens, who have staged protests both online and offline. The internet vigilante group 'Anonymous' even held hackathons targeting the website of the Supreme Court of India, as a response to such orders.

A 'John Doe' or 'Ashok Kumar' order is an injunction that restrains unknown persons or unnamed persons against infringing the copyright of the applicants in any manner. Rights owners frequently file applications for such orders against ISPs, in addition to several unnamed persons, designated as 'Ashok Kumar'. Contrary to popular perception though, these 'John Doe' or 'Ashok Kumar' orders do not require ISPs to block certain websites. They merely compel ISPs to ensure that they play no role in violating the copyright of the owners. Since ISPs are neither competent – nor willing – to monitor every piece of content uploaded to websites using their connections, they have responded to these orders by blocking entire websites that they deem most likely to host infringing content.

Clarifying the extent of the earlier injunction, the Court held that the injunction was granted only in respect of a particular URL where the infringing content is hosted, and not in respect of an entire website. The Court further directed the owners of the copyright to inform the ISPs about the particulars of the URL hosting the infringing content within 48 hours. This order of the Court shifts the onus of identifying the infringing content onto the copyright owners, and clarifies the role of ISPs in preventing copyright infringement when faced with 'Ashok Kumar' orders. The order may signal the advent of more controlled John Doe injunctions, and not the excessively broad orders that we have seen in the recent past. It is also interesting to note that the process of takedown of infringing content as mandated by this order is in line with the procedure envisaged by the recent Copyright Amendment Act 2012.

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