

market intelligence

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GETTING THE
DEAL THROUGH 

Telecoms & Media

Global interview panel covering key economies led by Laurent Garzaniti

EU's Digital
Single Market
edges closer

Regulatory developments • Major cases • Business models • 2015 trends
Europe • North America • Asia-Pacific • Latin America

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GETTING THE
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market intelligence

Welcome to *GTDT: Market Intelligence*.

This issue focuses on global telecoms markets.

Getting the Deal Through invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

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Anoop Narayanan

TELECOMS & MEDIA IN INDIA

Ranked as a leading Indian lawyer in corporate law, intellectual property law, and information technology law by *Chambers and Partners* and other publications on a regular basis, Anoop Narayanan has more than 21 years of experience. He focuses on a broad range of intellectual property, IT, outsourcing, employment, technology, data protection, telecommunications and entertainment law matters, and his practice encompasses both litigation and commercial or transactional

advice in these areas. He has worked with some of the nation's highest profile companies as well as global corporates in the manufacturing industry, banking and finance sectors, and telecommunications and technology companies. He has spoken at several Indian and international forums on his areas of practice and has also published many articles touching upon several areas of Indian law.



“The current Indian government has proposed to take strong initiatives for a digital India.”

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GTDT: *What were the key developments in communications and media regulation in your jurisdiction last year?*

Anoop Narayanan: There have been no recent significant changes to the communications and media regulations in India.

However, in a recent landmark judgment, India’s Supreme Court had strengthened citizens’ fundamental right to freedom of speech and expression and had upheld the Indian citizens’ online right to freedom of expression (*Shreya Singhal v Union of India*, Writ Petition (Criminal) No. 167 of 2012). India’s Information Technology Act, 2000 (IT Act) prescribes the punishment for any person who sends or posts ostensibly offensive information through computer resources (section 66A of the IT Act and similar other provisions). There have been numerous instances where the government had abused these provisions to protect political and religious interests. The Supreme Court has finally held section 66A of the IT Act as unconstitutional, which was welcomed by many as a positive step to reinforce the strength of Indian democracy.

Further, the current Indian government has proposed to take strong initiatives for a digital India. For instance, the Department of Telecom (DoT) proposes to launch highly advanced products to enable internet accessibility in the remotest part of India, such as solar-powered Wi-Fi set-up, a long-distance Wi-Fi system, C-DOT Next Generation Network (NGN) and a 100Gbps OFC link. The government has its focus on digital

development and aims to make every Indian household digitally literate by 2019.

GTDT: *Does sector-specific regulation – as opposed to the general – play a significant role in your jurisdiction? Is this expected to change?*

AN: There is a certain confusion between the sector-specific regulations and the general competition regime. The telecommunications sector and all aspects of the industry have been historically regulated by sector-specific regulations. The Telecom Regulatory Authority of India (TRAI) regulates the telecoms sector. A primary purpose of TRAI is to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services. Prior to India’s Competition Act, 2002, and the establishment of the Competition Commission of India (CCI), TRAI was alone in handling the competition aspects in the telecoms industry. However, subsequent to the setting-up of the CCI, and considering that both the TRAI and CCI had similar powers in respect of competition aspects, it gave rise to significant confusion in choosing the appropriate forum. Similarly, there has been confusion with respect to tariff disputes. As regards the dominant market position and mergers and acquisitions (M&A), although TRAI has prescribed certain thresholds, the CCI approaches the dominant position issues on different parameters. Currently, from a practical standpoint, there have not been many

cases directed to both the authorities, creating conflict between the regulators. As regards the future, just as market forces currently decide the dynamics of the telecoms industry in India, the regulators will also evolve, identifying and restricting their respective roles, considering that the ultimate goal for all the regulators is to ensure fair play in the market and protect the interests of both the consumers as well as industry. The next-generation network and subsystem are new to India, and the regulatory regime and approaches are still evolving.

GTDT: What is the attitude to net neutrality in your jurisdiction?

AN: Currently, there is no specific law governing net neutrality in India. Although the TRAI guidelines for the Unified Access Service licence promote net neutrality, they do not enforce it.

In March 2015, TRAI released a consultation paper on net neutrality for public feedback. It appears that the government is in complete favour of net neutrality, implying equitable access without any obstruction or prioritisation.

There has been a recent debate on net neutrality in India, and the idea of free and equal internet for all has gathered wide attention across the country. This was pursuant to the Indian telecom provider Airtel's proposed zero-rating plan with e-commerce portal Flipkart, charging preferential rates from the Flipkart users. This resulted in a nationwide resistance to Airtel and although there was no formal regulatory order against it, Airtel had to withdraw its proposal. The government announced that a committee will be formed to study the net neutrality issue. It was of the view that blocking and deliberate slowing down or speeding up of lawful content on the internet should not be permitted.

The CCI had also agreed to review any practice that may affect net neutrality, subject to the final regulations from TRAI.

Therefore, it appears that the regulator is inclined towards, and in the process of providing guidelines, regulating net neutrality.

GTDT: What is the regulator's approach to over-the-top services?

AN: Currently, there is no specific law to regulate over-the-top (OTT) services in India. Considering that internet penetration is still evolving in India, access speeds are generally low and there is limited coverage of high-speed broadband in the country, TRAI is contemplating whether the OTT services should be regulated or brought under the licensing regime at this stage.

According to TRAI, there are also certain public policy issues associated with OTT services, such as regulatory imbalances, impact on the

economy and security issues. The telecom service providers (TSPs) fall under a regulatory regime, while OTT players are simply bypassing such a regime. Also, the regulator is concerned whether the growth of OTT is affecting the traditional TSP revenue stream, and if so, whether the increase in data revenues of the TSPs will be sufficient to compensate for this impact.

In India, the network infrastructure is still at an early stage of development, which is a major challenge for OTT service providers.

Therefore, with the increasing debates between the OTT service providers and the telecom service providers, the TRAI prepared a consultation paper in March 2015 to invite public and industry comments on the proposed regulatory framework for OTT services in India. The feedback provided by people and the industry is not available publicly, and therefore, one has to wait for TRAI's decision on regulating OTT in India, and at what stage.

Notwithstanding, it is abundantly clear that the government is concerned that crucial consumer data as well as national security information may be compromised by the fast-paced proliferation of applications on mobile phones. The DoT has recommended steps to regulate and monitor content on mobile applications, including location of data servers in India. Further, the DoT has proposed putting in place interim provisions enforceable through licensing conditions, until an appropriate legal framework is enacted.

GTDT: Has there been any recent granting of spectrum? Are any significant grants planned in the near future?

AN: Yes, a recent spectrum grant in India took place in 2015, through an auction which lasted for almost 20 days with 115 rounds of bidding. There were eight telecom firms that participated in the bidding process across four bands: 800MHz, 900MHz, 1,800MHz and 2,100MHz and 22 circles. The eight telecom firms were Bharti Airtel, Idea, Vodafone, Reliance Communications, Reliance Jio, Tata Teleservices, Aircel and Uninor.

The list of provisional winners declared by the Department of Telecom (DoT) include Bharti Airtel, Vodafone, Idea, Reliance Communications and Reliance Jio Infocomm, out of which Bharti Airtel, Vodafone and Idea successfully defended their share, although at a significantly high cost.

Around the same time of the spectrum grant, various telecom companies including Vodafone and Bharti Airtel had filed petitions in the Supreme Court of India and had sought extension of their 20-year-old allotted spectrum licences by another 10 years, and had also challenged the government's decision to auction the spectrum surrendered by these telecom companies. In May 2015, The Supreme Court had rejected the telecom



companies' petitions seeking to extend their licences and restrain the auction.

There are no significant spectrum grants announced or planned by the government in the near future.

GTDT: *How has the debate about 'big data' played out in your jurisdiction? What has the debate focused on?*

AN: There is a lot of debate on the ethical limits of the use of big data. India does not have a specific law governing big data issues. However, Indian business entities and even political parties make use of the data for a variety of purposes. In the absence of a specific regulatory environment, the legal aspects applicable to big data in India are similar to those in other countries, such as copyright law issues, database breaches, data protection and privacy issues.

India's IT Act provides a legal framework to address the issues relating to hacking and security breaches of information technology infrastructure, including sensitive personal data. The IT Act prescribes penalties for a body corporate for negligently handling sensitive personal data and not maintaining reasonable security practices and procedures. The Data Protection Rules prescribe rules for data controllers and data subjects for collection and retention of personal information, transfer and

disclosure of information and the rights of the data subject. These Rules are in harmony with the EU data privacy regime.

GTDT: *What about media plurality? How have policymakers and regulators addressed this issue?*

AN: Although the Indian regulator favours media plurality, currently, there is no specific law to ensure media plurality in India. In August 2014, TRAI published a set of recommendations on issues relating to media ownership. The recommendations aimed to establish a regulatory framework to preserve external plurality (diversity of ownership) and internal plurality (diversity of content) in the media sector. TRAI has primarily taken into account the TV and print media, owing to their pervasive reach and influence.

TRAI has recommended imposing cross-media ownership restrictions on companies, and using the Herfindahl-Hirschman Index (HHI) to ascertain the concentration of media within specific Indian states to ensure that there is adequate compensation. These cross-media ownership rules restrict ownership within a relevant market (ie, between the newspaper and television outlets), and not across different relevant markets.

The TRAI has further recommended that M&A in the media sector will be permitted only

THE INSIDE TRACK

What are the most important skills and qualities needed by an adviser in this area?

As this is a continuously evolving sector, the government policies, laws, regulations and practices also keep changing on a regular basis. Therefore, an adviser should at every point in time be updated about the developments in the media and telecoms sector as well as the changes in the applicable policies, laws and the practices. Further, an adviser should also be able to understand the trends in the market and any potential regulatory developments anticipated, while advising on a project. This is because there can be a significant time lapse between conceptualisation and the actual roll-out of various projects, which may then be affected by unexpected regulatory changes, unless the adviser had the ability to anticipate the possible future trends and structure the projects accordingly. The adviser should be practical and should have an in-depth understanding about the business and have the ability to provide advice keeping in mind the clients' commercial interests.

What are the key things for the parties and their advisers to get right when dealing with a case in this area?

- Understand the cultural aspects of the country;
- updated knowledge and understanding of the government policies;
- futuristic approach;
- compliance with competition law and other applicable law; and
- strong and clear contractual provisions with the vendors and service providers.

What were the most interesting or challenging cases you have dealt with in the past year?

The past year witnessed a lot of companies seeking opinions on their new generation products including online and mobile application-based products and services, import of telecom equipment, intricate issues on transborder data protection and privacy of personal and sensitive data, data leakage handling, e-commerce issues, etc.

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to the extent that the rule based on the HHI is not breached. There are stringent annual disclosure or reporting norms for the media companies under the TRAI recommendations.

TRAI has also provided suggestions on vertical integration between direct-to-home providers and broadcasters. Further, political and religious bodies and central and state government ministries must be barred from entering into broadcasting and TV channel distribution sectors. Editorial independence in the media must be ensured.

TRAI is of the view that the government should not regulate the media, and an independent single regulatory authority must be appointed for TV and print media.

In view of the foregoing, the regulator is making efforts to preserve media plurality by regulating media ownership in the relevant markets. However, considering the present situation where certain large media houses control a major share of the market in TV as well as print, the regulator, including the CCI, will have to take strong measures to enforce ethical media practices.

GTDT: Is the global trend for consolidation in the sector also visible in your jurisdiction? If so, what were the most prominent deals in the past year or so?

AN: Yes, there is a trend for consolidation in India as well. A major recent development in the television sector is Reliance's acquisition of Network18 and TV18.

Reliance Industries Limited (RIL), India's largest private sector company, through its trust, Independent Media Trust, acquired control of Network18 Media & Investments Ltd and its subsidiary TV 18 Broadcast Ltd. The Network18 Group comprises several prestigious media and entertainment companies with interests in television, internet, films, e-commerce, magazines, mobile content and allied businesses.

The transaction is likely to enable RIL's Jio Infocomm to get access to broadcast, digital and e-commerce content for its 4G mobile data services platform.

From a competition law standpoint, the CCI had analysed in detail the various segments in which the Reliance Group and the Network18

Group co-existed, including in television channels, event management services, broadband internet services and access to content through such services. The CCI concluded that it was unlikely that the proposed combination would have any adverse effect on competition in India. Accordingly, the CCI did not raise any objections to the proposed acquisition.

In the radio sector, many operators propose to enter the market through M&A rather than the auction process. This trend of consolidation commenced with the acquisition of a radio channel, Radio City, by the Dainik Jagran Group, a leading media and communications group specifically in print media.

Therefore, it is expected that the consolidation trend will continue across the sector as larger firms merge with smaller firms to tighten their grip on the market.

GTDT: Have there been any major antitrust cases in the communications and media sectors in your jurisdiction recently?

AN: Google Case (Case Nos. 07 & 30 of 2012)
The CCI's investigation arm has recently submitted its final report on alleged unfair business practices in India by internet major player Google.

In 2011, a complaint was filed against Google before the CCI alleging that Google had created an uneven playing field in the market by favouring its own services and those of its vertical partners by manipulating the search algorithms. During the investigation, Google did not submit the complete information as required by the DG, and the CCI imposed a penalty of approximately US\$160,000 on Google.

After a detailed investigation, the CCI recently received the DG's report. The parties concerned will now be given an opportunity to present their case before the CCI.

HT Case (Case No. 40 of 2011, Order dated 10 October 2014)

HT Media Limited, a leading Indian media company, filed a complaint against a large Indian music company, T-Series. HT alleged that T-Series, which is the largest private publisher of Indian music and owns or controls over 70 per cent of the latest music, was abusing its dominant position by levying excessive charges as licence fees for grant of rights for the broadcast of HT's

“TRAI is of the view that the government should not regulate the media.”

music content on its radio channels. The CCI had directed investigations against T-Series, and held that T-Series had contravened the anti-competition law provisions. The CCI had also imposed a heavy penalty of 8 per cent of the T-Series' average turnover for the three preceding financial years.

GTDT: What is your outlook for regulation in the communications and media sectors in the next two to three years? Are any major changes expected in your jurisdiction? If so, what do you predict will be the impact on business?

AN: We do not anticipate any major regulatory changes in the next two to three years. However, considering the issues related to spectrum allocation and the NGNs, the government may come up with regulations to ensure more transparency and level playing fields. Further, in the context of big data, the growth of e-commerce and m-commerce businesses in India in the past couple of years, and the increasing mobile banking platforms, the country will face the need for significant regulations on data security, privacy, quality of networks, etc. Additionally, with the new generation handheld devices replacing the traditional computing platforms, the technology sector has been significantly aligned towards servicing the telecommunication industry, both in respect of hardware and software. This will give rise to more regulations for monitoring the import of telecommunication equipment, as well as software applications, to ensure that they are safe and free of bugs, etc. From a practical standpoint, we feel that new regulations will be introduced as necessary with the market's growth.

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