

# market intelligence

## Telecoms & Media

Regulators remaining watchful  
of consolidation

Global interview panel  
covering key economies  
led by Laurent Garzaniti

Regulatory developments • Major cases • Big Data • 2016 trends  
Europe • North America • Asia-Pacific • Latin America

# market intelligence

Welcome to *GTDT: Market Intelligence*.

This is the second annual issue focusing 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 22 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.

Priyanka Gupta is a senior associate at ANA Law Group and has been in practice for approximately 10 years. She advises on international TMT transactions and regulatory aspects of the Indian telecoms sector. Ms Gupta also advises multinational banks, financial institutions, technology businesses and other companies on data protection and privacy law issues. She has extensive experience in handling advisory, transactional and litigation projects in all areas of TMT and intellectual property practice.

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

**Anoop Narayanan & Priyanka Gupta:** In the new government regime, the Indian telecoms regulator, the Telecom Regulatory Authority of India (TRAI) has become significantly active in both the telecoms and broadcasting sectors, with several key developments.

First, earlier this year, TRAI issued the Prohibition of Discriminatory Tariffs for Data Services Regulations 2016. This effectively prohibits internet service providers from offering data plans to subscribers on the basis of the content accessed by the subscribers. This regulation came in the wake of intense debates on the issue of net neutrality and differential pricing for internet data packs.

Second, TRAI has laid down the standards of quality of service for various services provided by the telecoms service providers to their customers. TRAI has engaged independent agencies to audit and assess the quality of service, and also carry out regular surveys to assess the customers' perception of the services. Under its consumer protection regulations, TRAI has imposed various financial disincentives on the service providers to improve the quality of services; for instance, a penalty for each call drop, which the Supreme Court of India later held to be ultra vires.

Third, TRAI has also amended the quality of service regulations for broadcasting to provide more transparency in the digital cable TV systems provided by multisystem operators. TRAI has made a framework to simplify the process for subscribers to switch from one direct-to-home (DTH) service provider to another.



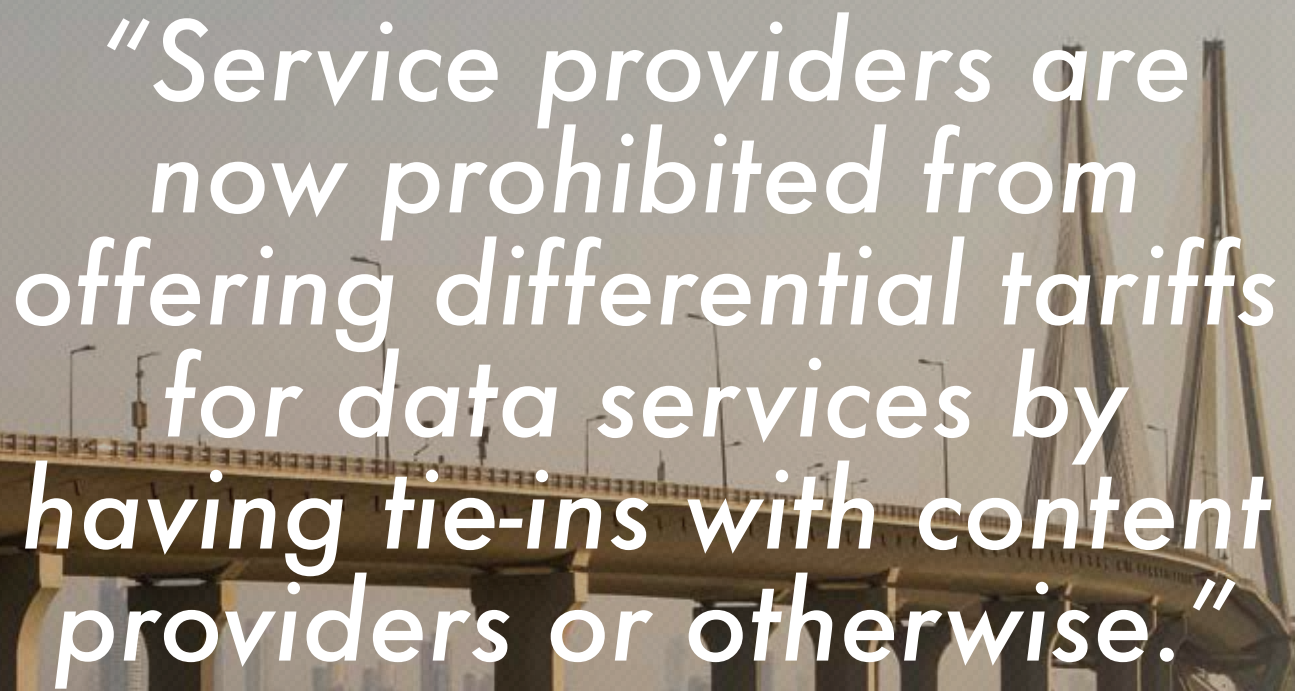
Priyanka Gupta

Fourth, TRAI has completely implemented mobile number portability, allowing subscribers to retain their mobile numbers, in any part of the country and with any operator.

Finally, the Digital India initiative introduced by the government to digitally empower and transform Indian society and its economy has also seen tremendous progress in the past year. Nine major projects have been initiated under this programme: (i) broadband services to rural areas and urban developments and buildings; (ii) easy mobile connectivity and internet services to all villages in India; (iii) turning post offices in rural areas into multiservice centres for the people; (iv) online applications and interface between departments, online certificates and cards, government databases and information, public grievance redressal, etc; (v) setting up of the digital service programme e-Kranti, for the educational and health sectors, services for justice, the security service and financial sectors and also for the farmers in India; (vi) hosting data online and creating social media platforms for communications and discussions between government and citizens on various issues; (vii) zero imports of electronics in India by setting up smart meters, smart cards, micro ATMs, set-top boxes, etc; (viii) training around 10 million students from villages and small towns for IT jobs, and training delivery agents and service providers for delivery of IT services; and (ix) the setting up of mass messaging applications, government e-greetings and Wi-Fi installations in public places and universities across India.

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

**AN & PG:** There exists certain confusion between sector-specific regulations and the general competition regime. Historically, the telecommunications sector and all aspects of the industry have been governed by sector-specific regulations. TRAI regulates the telecoms sector and one of its primary purposes is to facilitate competition and promote efficiency in the operation of telecommunications 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 alone handled the competition aspects of the telecoms industry. However, the fact that both TRAI and the CCI had similar powers in respect of competition gave rise to significant confusion when choosing the appropriate forum. Similarly, there has been confusion with respect to tariff disputes. As regards dominant market position and mergers and acquisitions, although TRAI has prescribed certain thresholds, the CCI approaches dominant position issues using different parameters. Currently, from a practical



# “Service providers are now prohibited from offering differential tariffs for data services by having tie-ins with content providers or otherwise.”

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standpoint, there have not been many cases that have been directed to both authorities or created conflict between the regulators. As regards the future, just as market forces currently decide the dynamics of the telecoms industry in India, and given that the ultimate goal for all the regulators is to ensure fair play in the market and protect the interests of both consumers and the industry, so the regulators also will evolve, identifying and determining their respective roles. The next-generation network and subsystem are new in India, and the regulatory regime and approaches to these are still evolving.

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

**AN & PG:** Currently, there is no specific law governing net neutrality in India. Although the TRAI guidelines for Unified Access Service licences 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 have been debates on net neutrality in India, and the idea of free and equal internet for all has gathered wide attention across the country. The government is of the view that blocking and deliberate slowing down or speeding up of lawful content on the internet should not be permitted.

In the context of net neutrality, and as we mentioned earlier, in issuing the Prohibition of Discriminatory Tariffs for Data Services

Regulations 2016, TRAI effectively prohibits service providers from offering data plans to subscribers on the basis of the content they access. Therefore, service providers are now prohibited from offering differential tariffs for data services by having tie-ins with content providers or otherwise.

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

In May 2016, TRAI issued another pre-consultation paper on net neutrality, inviting comments from stakeholders on the areas of core principles, reasonable traffic management and measures to preserve security interests, etc. Once comments have been received, TRAI is expected to draft legislation on net neutrality.

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

**AN & PG:** Currently, there is no specific regulation of over-the-top (OTT) services in India. Considering that internet penetration is still ongoing in India, access speeds are generally low and there is limited high-speed broadband coverage, TRAI is contemplating whether 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, the impact on the economy, and security issues. While the telecoms service providers (TSPs) fall under a regulatory regime, OTT players are simply bypassing regulation. Also, the regulator is concerned the



Anoop Narayanan

the growth of OTT services may be impacting the TSPs' traditional revenue stream, and if so, whether the increase in TSPs' data revenues will be sufficient to compensate for this.

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

Therefore, following increased debates between OTT service providers and TSPs, 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 consultation feedback is not publicly available and, therefore, we are awaiting TRAI's decision on whether, and at what stage, to regulate OTT in India.

Nonetheless, 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 Department of Telecommunications (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 & PG:** Following the 2015 auction of spectrum, the Indian telecoms sector is speculating about the country's largest spectrum auction yet, including 4G airwaves, which is planned for the end of 2016. Telecom operators such as Bharti Airtel Ltd, Vodafone India, Idea Cellular Ltd and Reliance Communications Ltd

are expected to spend more than US\$1 trillion buying spectrum at the forthcoming auction. In this regard, TRAI has released its 'Consultation Paper on Valuation and Reserve Price of Spectrum in 700, 800, 900, 1800, 2100, 2300 and 2500 MHz Bands'. In its recommendations, TRAI has provided a weighted average methodology to calculate spectrum usage charges (SUC) and has also lowered the rate for the 2016 auction. TRAI submitted its recommendations to the Ministry for final approval and the Ministry has approved the recommendations. Consequently, the DoT has released a notice inviting applications for the spectrum auction, which is scheduled to take place in October 2016.

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

**AN & PG:** There is a lot of debate on ethical limits on 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 such 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 the 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 harmonised with the EU data privacy regime.

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

**AN & PG:** 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 TV and print media, because of 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

## 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 keep changing on a regular basis. Therefore, an adviser should at all times be up to date with developments in the media and telecoms sector as well as changes in applicable policies, laws and 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 significant time lapses between conceptualisation and the actual roll-out of various projects, which may then be impacted by unexpected regulatory changes, unless the adviser can anticipate possible future trends and structure projects accordingly. The adviser should be practical and have both an in-depth understanding of the business and the ability to provide advice relevant to 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?*

It is key to understand the cultural aspects of the country; to have an updated knowledge and understanding of government policies; and to have a futuristic approach. Compliance with competition law and other applicable law is also essential; as are 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 saw a lot of companies seeking opinions on their next-generation products, including online and mobile application-based products and services, imports of telecoms equipment, intricate issues on trans-border data protection and privacy of personal and sensitive data, data leakage handling, e-commerce issues, etc.

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within specific Indian states, to ensure that there is adequate compensation. These cross-media ownership rules restrict ownership within a relevant market (ie, between newspaper and television outlets) and not across different relevant markets.

TRAI has further recommended that mergers and acquisitions in the media sector will be permitted only to the extent that the rule based on HHI is not breached. There are stringent annual disclosure and reporting norms for media companies under the TRAI recommendations.

TRAI has also provided suggestions on vertical integration between DTH 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's view has been that the government should not regulate the media but an independent single regulatory authority must be appointed to regulate 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 have controlling major shares in the market, in TV as well as print media, 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 & PG:** Yes, there is a trend for consolidation in India as well. Some of the recent relevant deals in the sector include the merger of Sistema's Indian telecoms unit, SSTL, which offers the MTS brand, with Reliance Communications (RCom). The deal between RCom and SSTL is stated to be valued at around US\$690 million, and is expected to close in the second half of 2016. The deal will make RCom the largest holder of the 800/850MHz band for wireless 4G services. The deal has already been approved by the CCI and the Indian securities regulator, SEBI.

Bharti Airtel has acquired from Videocon Telecommunications Ltd (VTL) the right to use 2X5MHz spectrum in the 1800MHz band allotted to VTL in six circles for approximately US\$665 million.

Bharti Airtel has also acquired rights to use 4G spectrum from Aircel in eight telecoms circles, for approximately US\$550 million. This second deal by Bharti Airtel within a short span has made the company a pan-India operator for providing high-speed mobile data services.

Star India, a unit of 21st Century Fox, has acquired the entire broadcast business of MAA Television Network Ltd for an undisclosed amount, giving Star India access to the US\$300 million Telugu television market.

It is expected that the consolidation trend will continue across the sector as larger firms merge with smaller ones to increase their grip on the market.

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

**AN & PG:** There have been several major antitrust cases. In the first of these, the *Google* case (Case Nos. 07 and 30 of 2012), the CCI is now conducting final hearings on alleged unfair business practices of internet giant Google in India.

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 search algorithms. During the investigation, Google did not submit the complete information as required by the Director General, Investigations (DG), and the CCI imposed a penalty of approximately US\$160,000 on Google.

After a detailed investigation, the CCI received the DG's report. The concerned parties are now presenting their case before the CCI.

In the second case, *Best IT World (iBall) v Telefonaktiebolaget LM Ericsson* (Case No. 04 of 2015) the CCI had, in 2015, ordered an investigation into Ericsson for an alleged abuse of dominant position for charging higher royalty on GSM technology patents, following a complaint by iBall. The CCI observed that Ericsson had 33,000 patents to its credit with 400 of those granted in India. The CCI also noted that Ericsson was the largest holder of standard essential patents for mobile communication technologies, such as 2G, 3G and 4G, and as there is no other alternate technology available in India, Ericsson had dominant position in the market of GSM and technology standards. Further, the CCI stated that the royalty rates charged by Ericsson were discriminatory and contrary to fair practices. Also, Ericsson had requested iBall to execute non-disclosure agreements with unreasonable terms prior to disclosing the details of its patents. Therefore, the CCI ruled that forcing a party to execute non-disclosure agreements and imposing excessive and unfair royalty rates, prima facie, amount to abuse of dominance, and it ordered an investigation into Ericsson. In 2016, Ericsson challenged the jurisdiction of the CCI before the Delhi High Court. The High Court dismissed Ericsson's allegations and ordered the CCI to continue with its investigation of Ericsson.

The third case was *Prasar Bharati (the Broadcasting Corporation of India) v TAM Media Research Private Limited* (Case No. 70 of 2012; order dated 25 February 2016).

Prasar Bharati filed a complaint against the television audience measurement services agency TAM Media Research Private Limited, alleging that TAM was the only entity to measure television viewership in India in the form of television rating points or television viewership ratings since 2011. To measure viewership, TAM uses an electronic gadget called a 'People Meter', which is connected to each TV set in the selected sample households to monitor what is being viewed and for how long. While TAM has installed about 8,000 meters, they are only in cities with a population of more than 100,000, which represents a very narrow statistical base. Considering that the primary source of revenue is from advertisements and the ratings provided by TAM underestimate Prasar Bharati's viewership, it puts the complainant in a disadvantageous position and gives undue advantage to broadcasters who have programmes for urban areas only. The CCI directed an investigation, following which it ruled that, although TAM was in a dominant position in the market, there was no abuse of dominant position as the broadcasters and advertisers were not similarly placed subscribers of TAM, and charging broadcasters higher subscription rates was not discriminatory.

**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 & PG:** Considering the significant growth in the Indian telecoms sector, the government's Digital India initiative, issues related to spectrum allocation, new laws on net neutrality, and next-generation networks, the government may come up with regulations to ensure greater 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 increase in mobile banking platforms, the country faces a need for significant regulation of data security, privacy, quality of networks, etc. Additionally, with new-generation handheld devices replacing traditional computing platforms, the technology sector has been significantly skewed towards servicing the telecommunications industry, in respect of both hardware and software. This will give rise to more regulations for monitoring imports of telecommunications equipment and 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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