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Refresh

Changing Regulatory Landscape

Newsletter

November- December 2013

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In this Issue

The FIPB meeting

Some of the interesting cases which were recently discussed in the FIPB meetings have been classified under various sectors below:

Pharmaceuticals

1. The three standard conditions which have been part of all pharma brownfield approvals were removed while granting approval in the case of an inter-se transfer of shares between two foreign promoter companies i.e., NR to NR.
2. Conversion of ECB proceeds into equity shares was approved
3. Increase in foreign equity participation from 85% to 100% by way of issue of fresh equity shares and transfer of equity shares from resident to non-resident shareholders was approved.
4. An existing foreign investor in brownfield pharma company for buying shares held by NRIs and Indian residents and to infuse fresh equity investment was approved.

Construction development

5. A proposal relating to the condonation of delay in bringing in the minimum capitalisation amount of 5 million USD was approved.
6. Non-resident to non-resident transfer of fully convertible debentures within group companies before the completion of the three year lock in period was approved.
7. A proposal for repatriation of FDI by selling the current undeveloped plots for lack of funding from shareholders was rejected.

Others

8. A proposal wherein a private bank wants to increase the foreign equity from the existing 49% to 62% has been recommended for the consideration of CCEA as the investment involved in the proposal is 6265.76 crore INR.
9. Non-resident to Non-resident transfer of shares within a group company by way of a block deal on the special trading window of BSE Limited and NSE Limited has been approved
10. A proposal to set up a LLP in India to be engaged in representing and promoting cable and satellite industry in India was approved.
11. Issue of equity shares to the shareholders of its foreign parent company pursuant to a high court approval of the scheme of demerger was also approved.
12. A proposal for induction of foreign equity to carry out the business of mobile payment services has been advised to access the automatic route.

Sectoral regulations

Telecommunications

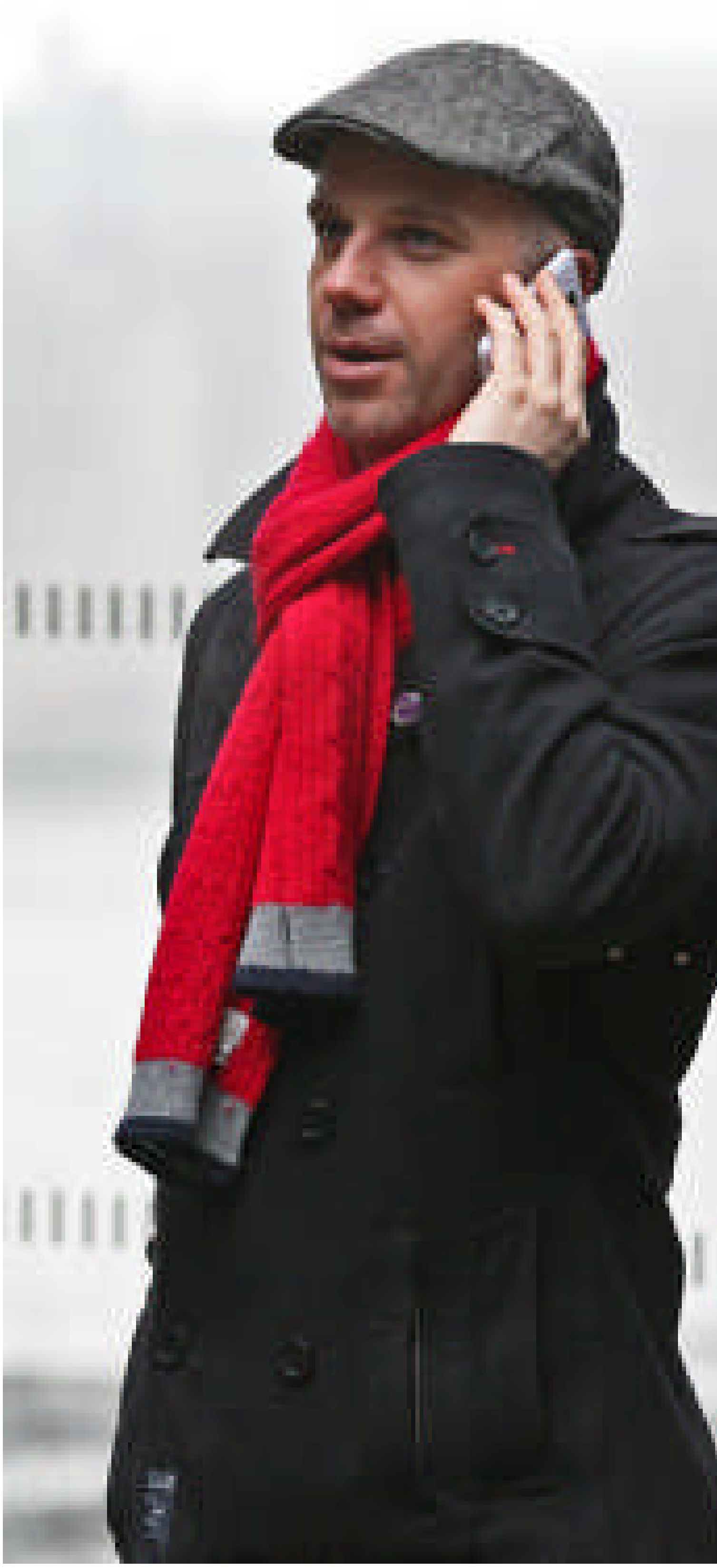
Full mobile number portability (MNP)

TRAI has recommended implementing full MNP within the next six months. With the implementation of a full MNP the subscribers can port to service providers in other licence service areas as well, without changing their number. Currently, the portability is restricted to telecom service providers within same licence service area.

TRAI will prepare a roadmap for national MNP rollout and implementation. TRAI is of the opinion that six months will be sufficient for operators to carry out the required changes in their existing systems, complete inter-operator testing and implement the solution.

On the issue of STD charges to be borne by the person calling on a number ported to other service area, telecom service providers are of the view that the person making such calls has to bear the charges as STD charges. STD charges have almost been reduced to the calling rates equivalent to local call rates.

TRAI also recommended that, once full MNP is in place, subscribers should be informed to dial numbers in the '+91' format which is the standard dialling format, so that the calls get connected across the country without any trouble.



Recommendations of the Telecom Commission on spectrum pricing during its meet held on 6tNovember 2013

Key recommendations

- The Telecom Commission has hiked the reserve price in eight circles in 1800 MHz by 15% due to TRAIs recommendation
- It has accepted 900 MHz prices in three circles with 25% premium on TRAIs recommendation
- Reserve price in Delhi is at 359 crore INR, in Mumbai at 327 crore INR and in Kolkata at 125 crore INR
- Buyer would be required to pay current market discovered price in case the spectrum was obtained by the previous entity through an administratively decided price
- DoT positive on flat SUC, but will discuss the same with the MoF
- EGoM in its meeting on 22November 2013 has taken a decision to approve the recommendation in respect of reserve price of spectrum

Issue and extension of DTH licence

TRAI had issued a consultation paper dated 1 October 2013 on the issue and extension of DTH licenses, inviting comments from the stakeholders by 15 October 2013. Some of the issues for consultation included:

- Whether an entry fee be charged at the time of issue of a new licence to the existing DTH licencees?
- In case an entry fee is to be charged, what should be the quantum of such an entry fee?
- What should be the period of the DTH licenses to be issued to the existing DTH licencees on the expiry of the licence period of 10 years?
- What should be the period of extension and renewal of the licences, to be prescribed in the DTH guidelines for the extension and renewal of the new DTH licenses on their expiry?
- What should be the quantum and the validity period of the bank guarantee to be furnished by an existing DTH licencee on the issue of a new licence?

Broadcasting

TRAI recommendation paper on Monopoly/Market Dominance in Cable TV Services

Television channel distribution is mostly through cable TV networks and Direct to Home ('DTH') platforms. Cable TV network has grown exponentially with the number of cable TV households increasing from 4.1 lakh in 1992 to more than 9.6 crore till the end of December 2012. DTH services has emerged as an alternate platform for TV channel distribution with the registered number of DTH subscribers reaching a figure of 5.45 crore till the end of December 2012.

There are currently no restrictions on the area of operation and accumulation of interest in terms of market share in a city, district, State or country by individual Multi Sysyem Operators ('MSOs') and Local Cable Operators ('LCOs') in the cable TV sector. It has been observed in some States that a single entity has, over a period of time, acquired several MSOs and LCOs, virtually monopolising the cable TV distribution.

With cable TV networks being the dominant platforms and with growing concerns on monopolisation of the market in some areas, on 26th November, 2013, Telecom Regulatory Authority of India ('TRAI') issued its recommendation paper on means to control the monopoly/market dominance in Cable TV services.

Some of the salient features of the recommendations are:

(i) State to be considered as the relevant market for assessing monopoly/market dominance of MSOs;

(ii) Market dominance to be determined on the basis of market share in terms of the number of active subscribers of MSOs in the relevant market;

(iii) Threshold value of market share prescribed (Herfindahl–Hirschman Index (HHI) should not be more than 2500), beyond which an MSO should not be allowed to build market share;

(iv) Any M&A amongst MSO's or between MSO and LCO in a relevant market to require prior approval of regulator, which shall be granted subject to prescribed conditions based on HHI benchmarks;

(v) Control specifically defined – an entity is said to 'control' an MSO/LCO and the business decisions thereby taken, if the entity, directly or indirectly:

 (a) owns at least 26% of total share capital (indirect shareholding to be determined using the proportionate rule); or

 (b) exercises de jure control by means of not less than 50% of voting rights, or appoints more than 50% of the members of the board of directors or controls the management or affairs; or

 (c) exercises de facto control through contracts and/or understandings that enable the entity to control the business decisions of MSO/ LCO

(vi) MSOs to disclose following information on their website:

 (a) ownership pattern;

 (b) list of MSO's/LCO's being part of the group in the relevant market

 (c) details of chairman, directors, CEO, CFO; and

 (d) state-wise geographical area coverage details

(vii) MSOs to submit the following information on an annual basis to MIB and TRAI

 (a) shareholding pattern, any changes in the same to be reported within 30 days of such change;

 (b) copy of shareholder agreements etc.;

 (c) details of MSO's/LCO's being part of the group;

 (d) entities which control the group of MSOs/LCOs;

 (e) details of chairman, directors, CEO, CFO; and

 (f) State-wise details of active subscribers (to be provided on a quarterly basis);

An amendment to the Cable TV Network Rules would need to be undertaken to incorporate the above rules, thereby making it mandatory for MSOs to comply with the same.

SEZ

Instruction 78 issued by the DoC: Sub-contracting by an SEZ unit to a unit in the DTA

Under the extant rules, an SEZ unit is permitted to subcontract part of its production or any production process in DTA or SEZ or EoU or STPI or BTP with the prior permission of the designated specified officer.

Based on requests from various stake holders seeking grant of sub-contracting for a time longer than the present one year, the DoC has come out with Instruction 78 extending the time frame upto three years and based on the terms and conditions specified below:

- SEZ unit should be a manufacturing unit *(not being gems and jewellery units).*
- Such a unit should have substantial exports with average annual exports of 1000 crore INR or more in at least two years out of four years (ie current plus previous three years).
- The unit should have been a NFE earner over the past five years taken as a block.
- The unit should have an annual average export of not less than 51% of its total turnover in a block of five years.
- It should have an un-blemished track record and no penalties against the unit for any violations under the Customs Act, Foreign Trade Development Regulation Act, etc should have been imposed.
- The Bond-cum legal undertaking executed should adequately cover the goods that leave the SEZ for sub-contracting.
- The period for which sub-contracting will be allowed will not exceed the validity period of the letter of approval of the SEZ unit.
- The DTA unit to whom sub-contract is awarded should be registered with the Central Excise Department.
- No sub-contracting will be permitted for goods which are restricted/ prohibited or otherwise not permitted under any provision of the SEZ Act or Rules.
- No sub-contracting will be permitted for goods which attract anti-dumping duty under the EXIM Policy.
- The sub-contracting permission will be subject to approval of the Development Commissioner.

Policy to regulate the functioning of recycling of plastic scraps or waste by the SEZ units

The DoC has issued a policy for recycling of plastic scrap or waste that will be applicable to SEZ units that recycle plastic scrap or waste. This policy supersedes all the previous instructions and circulars.

Existing provisions

The existing Rule 18(4) of the SEZ Rules, 2006 states that no proposal will be considered for the following:-

a) Recycling of plastic scrap or waste, however, the extension, if any, for an existing unit will be considered by the BoA.

b) Enhancement of the approved import quantum of plastic waste and scrap, beyond the average annual import quantum of the unit, since the commencement of operations.

c) Reprocessing of garments or used clothing or secondary textile material and other recyclable textile materials into clippings, rags, industrial wipers, shoddy wool or yarn, blankets or shawls. The extension of any existing unit will be considered by the BoA.

Provided below is the snapshot of the policy:

Conditions for import of plastic waste and scrap

Import of plastic waste and scrap will be permitted as per the approved capacity of the LoA issued to the SEZ unit. The plastic or scrap will have to be such, for which necessary plant and machinery has been installed for reprocessing.

Description of plastic scrap

Plastic scrap and waste constitute those fractions of plastic generated by plastic processing operations which have not been put to any use and can be termed as new material. These can be recycled into viable commercial products using standard plastic processing techniques but without involving the process of cleaning, whereby effluents are discharged.

The plastic scrap should be imported in one of the forms given below:

- Compressed
- Films in cut condition
- Cut tape soft waste
- Flakes powders
- Pieces of irregular shape

Verification of documents prior to clearing in the SEZ

The consignment that is imported should be accompanied with a certificate from the originating factory stating that it conforms to the prescribed description. The importer will also be required submit a declaration to the DC at the time of goods clearance. .

Consent from the State Pollution Control Board

Such plastic processing SEZ units will be required to obtain consent to establish and consent to operate from the State Pollution Control Board.

Permission from the Ministry of Environment and Forest

Prior permission from the Ministry of Environment and Forest will be required before import.

Scrutiny by SEZ or customs officials

The imported plastic waste and scrap will be subject to scrutiny and testing by the SEZ or customs authorities, which have the power to send the drawn sample to the nearest lab of the Central Institute of Plastic Engineering and Technology.

Meeting the Net Foreign Exchange (NFE) criteria

Like other SEZ units, these units will also be required to fulfill the export obligation criteria, including the positive NFE earnings. Further, no broad-banding of unrelated products shall be permitted.

Meeting the export obligation

The units will have to ensure that apart from meeting the NFE criteria they fulfill the following export obligations:

Period	**Minimum physical export obligation**
At the end of second year	Not less than 40% of the total annual turnover
At the end of fourth year	Not less than 80% of the total annual turnover
At the end of fifth year and onwards	100% of the total annual turnover

Penal action

A unit which does not achieve positive NFE or fails to abide by the terms and conditions of the LoA or Bond cum Legal Undertaking shall be liable to penal action under provisions of the Foreign Trade (Development and Regulation) Act, 1992 or even cancellation of the LoA.

Policy to regulate functioning of worn and used clothing units in SEZs

On similar lines as the policy on recycling of plastic waste and scrap, a policy has been devised for the recycling and reprocessing of the used clothing that supersedes all previous instructions and circulars issued on the matter.

Some of the salient features of the policy are given below:

Verification prior to clearance in the SEZ

The imported consignment should be accompanied with a certificate from the exporter or agency regarding the disinfection and fumigation of the containers from a licensed agency.

Misdeclaration

In case of any misdeclaration regarding the materials being free from toxic or hazardous substances, actions as per the Foreign Trade (Development & Regulation) Act, 1992 will be taken by the competent authority.

NFE criteria

Such SEZ units will be required to fulfill positive NFE earnings. Further, no broad-banding of unrelated products shall be permitted.

Meeting export obligations

The clothes reprocessing SEZ units will have to ensure that a certain minimum percentage of the units' annual turnover is physically exported out of the country. The minimum physical exports are prescribed as under:

Period	Minimum physical export obligation
At the end of second year	Not less than 40% of the total annual turnover
At the end of fourth year	Not less than 80% of the total annual turnover
At the end of fifth year and onwards	100% of the total annual turnover

Further, the sales to DTA of unmutilated clothing on account of export surplus or export rejects do not exceed 15% of the physical export turnover of the unit.

Compliance with environmental laws

Such units will also have to take permission of the Ministry of Environment and Forest before the import.

Scrutiny by SEZ authorities

Before the clearance of used clothes to DTA, all imported consignments of such used clothes shall be subject to 100 % scrutiny at the premises of the unit by SEZ authorities.

Validity of LoA

The validity of the LoA of existing units in SEZs that carry out the recycling of used clothing will be governed by the new policy.

Failure to comply with terms and conditions

Any unit that does not achieve positive NFE or fails to abide by the terms and conditions of the LoA or Bond cum Legal Undertaking shall be liable to penal action under provisions of the Foreign Trade (Development and Regulation) Act, 1992 or even cancellation of the LoA.

Corporate regulations

FDI

Unlisted companies: Raising capital in the international market through ADR or GDR or the FCCB route

The RBI has permitted unlisted Indian companies to raise capital abroad without prior or subsequent listing in India, subject to the compliance of the following key conditions:

- Eligible unlisted companies: The criteria of eligibility for an unlisted company raising funds through ADRs or GDRs shall be as prescribed by the Government of India.

- Country of overseas listing: Overseas listing shall be done only on exchanges in International Organisation of Securities Commissions or Financial Action Task Force compliant jurisdictions or those jurisdictions with which SEBI has signed bilateral agreements.

- Utilisation of proceeds raised through overseas listing: The can be utilized for retiring outstanding overseas debt or for bona fide operations abroad including for acquisitions. In case the funds raised are not utilised abroad, the company shall repatriate the funds to India within 15 days and such money shall be parked only with AD Category-1 banks to be used for eligible purposes.

- Compliance with FDI Regulations: The ADRs and GDRs need to be compliant with sectoral cap, entry route, minimum capitalisation norms, pricing norms, downstream investments, reporting requirements etc as laid down in the FDI regulations.

This window will be available for a period of two years.

A.P. (DIR Series) Circular No 69 dated 8 November 2013

FDI in financial sector: Transfer of shares

As per the extant FEMA regulations, transfer of shares from residents to non residents where the investee company is in the financial services sector requires obtaining of a No Objection Certificate (NoC) from the respective financial sector regulator or regulators of the investee company as well as transferor and transferee entities and such NoC(s) are to be filed with the form FC-TRS to the AD bank.

During a review it was decided that the requirement of NoC(s) will be waived off from the perspective of the Foreign Exchange Management Act, 1999 and no such NoC(s) need to be filed along with form FC-TRS. However, any fit and proper or due diligence requirement for the non-resident investor as stipulated by the respective financial sector regulator shall have to be complied with.

A. P. (DIR Series) Circular No 72 dated 11 November 2013

Foreign investment in India

Participation by SEBI registered FIIs, QFIs and SEBI registered long term investors in credit enhanced bonds

Under the extant FEMA provisions, FIIs, QFIs and long term investors registered with SEBI are allowed to invest in government securities and corporate debt upto a limit of 30 billion USD and 5 billion USD respectively.

During the review of the extant policy, the RBI has allowed SEBI registered FIIs QFI's long term investors registered with SEBI, Sovereign Wealth Funds (SWFs), multilateral agencies, pension or insurance or endowment funds, and foreign central banks to invest in the credit enhanced bonds, as per paragraph 3 and 4 of A.P. In (DIR Series) Circular no. 120 dated June 26, 2013, up to a limit of 5 billion USD within the overall limit of 51 billion USD has been earmarked for corporate debt.

A. P. (DIR Series) Circular No 74 dated 11 November 2013

Export and import of goods and software

Third party payments for export and import transactions

In view of the evolving international trade practices, the RBI has liberalised the export and import regulations to permit payments for exports and imports to be received from or paid to third parties. This facility is subject to specified conditions, some of which have been summarised below:

- <u>In case of the receipt of proceeds of export of goods or software from third parties we need to consider the following conditions:</u>
  - The firm's irrevocable order backed by a tripartite agreement should be in place
  - The exporter should declare the third party remittance in the export declaration form.
- <u>In case of payment for import of goods to be made to third parties we need to consider the following conditions:</u>
  - The amount of an import transaction eligible for third party payment should not exceed 100,000 USD
  - The firm's irrevocable order backed by a tripartite agreement should be in place
  - The bill of entry and the invoice should contain a narration that the related payment has to be made to the (named) third party The bill of entry should mention the name of the shipper

Third party payment should come from or be made to a Financial Action Task Force (FATF) compliant country and through the banking channel only.

A.P. (DIR Series) Circular No 70 dated 8 November 2013

Company Law

MCA issues draft rules under the Companies Act, 2013:

The Government has moved forward in implementation of the new Companies Act 2013 and has issued the following Draft Rules:

- 3rd phase draft rules on acceptance of deposits by companies, the proposal to set up a National Financial Reporting Authority (NFRA) and Serious Fraud Investigation Office (SFIO);
- 4th phase draft rules on the Investor Education and Protection Fund Authority;
- 5th phase draft rules on winding up; and
- 6th phase draft rules on cost records and cost audit.

Issued by MCA on 25th October 2013 (3rd and 4th phase) and 25t November 2013(5th and 6th phase)

Clarification on applicability of Section 372A of the Companies Act, 1956

The MCA has clarified that Section 372A of the Companies Act, 1956 dealing with inter-corporate loans will continue to remain in force until section 186 of the Companies Act, 2013 is notified.

Currently, Section 185 of the Companies Act, 2013 on "loan to directors" has been notified, while Section 186 of Companies Act 2013 relating to "inter-corporate loans and investments" is yet to be notified.

MCA Circular 18/2013 dated 19 November 2011

Competition Law

Combination orders passed by Competition Commission of India (CCI)

Etihad Airways PJSC and Jet Airways (India) Limited

Etihad Airways PJSC (Etihad), Jet Airways (India) Limited filed a notice with CCI on 1 May 2013 under section 6(2) of the CCI Act pursuant to an Investment Agreement, Shareholder's Agreement and Commercial Cooperation Agreement executed on 24 April 2013.

In terms Regulation 19 (3) of the Combination Regulations, CCI asked Air India to furnish its views and comments on the proposed combination. Air India broadly raised two main concerns viz. impact of the alliance on the competitive landscape of the India-Abu Dhabi route and impact of the alliance on Indian aviation and Air India. These concerns were considered and addressed in the assessment of the combination.

The proposed combination related to acquisition of 24% equity stake and certain other rights in Jet by Etihad. The parties sought CCI's approval for the acquisition of 24% equity interest in Jet by Etihad since the combined value of assets and turnover of the parties meet the threshold requirements for the purpose of section 5.

The CCI analysed the Indian aviation sector, the International Aviation Regulatory framework and the relevant market in terms of flight options available from Abu Dhabi to Indian cities in detail and held that that the proposed combination is not likely to have appreciable adverse effect on competition in India.

It is to be noted that one member held a dissenting view and is of a prima facie opinion that the proposed combination is likely to cause an appreciable adverse effect on competition within the market of international air passenger transportation from and to India. The member recommended issuing show cause notice for conducting investigation for the proposed combination.

CCI approved the proposed combination with majority under Section 31 (1) of the Act.

CCI order dated 12 November 2013

Mitsubishi Heavy Industries, Limited and Hitachi Limited

Mitsubishi Heavy Industries, Limited(MHI) and Hitachi Limited filed a notice with CCI on 10 July, 2013 under section 6(2) of the CCI Act pursuant to the joint venture agreement and business integration agreement, executed on 11 June, 2013 as it falls under section 5(a) of the CCI Act.

The proposed combination relates to the integration of the businesses of MHI and HL (operating worldwide including India) in the fields of thermal power generation system, geothermal power system, environmental equipment and fuel cells, by transferring their respective businesses in these fields to a newly incorporated joint venture entity, in which MHI and HL will hold equity interest in the ratio of 65:35 and which will be jointly controlled by MHI and HL, in terms of the agreements.

CCI analysed the relevant BTG equipments market that constitute the core of the thermal power generation system such as boilers; turbines (gas turbine, steam turbine) and generators. CCI also observed that on the basis of the total domestic manufacturing capacity for the BTG equipments in India, including those plants which are likely to be operational over the next two to three years, the combined market share of MHI and HL, through their respective joint ventures in India, will be around 20 %. However, in view of presence of overcapacity in the domestic BTG manufacturing sector as well as the competitive constraint posed by other significant players in the market including imports, it was held that the proposed combination is not likely to raise any appreciable adverse effect on competition.

CCI approved the proposed combination under Section 31 (1) of the Act.

CCI order dated 6 November 2013

Microsoft Corporation and Microsoft International Holdings BV

Microsoft Corporation (Microsoft) and Microsoft International Holding BV (Microsoft International) filed a notice with the CCI on October 3, 2013, the CCI under section 6(2) of the CCI Act for acquisition of the devices and services (D and S) business of Nokia Corporation (Nokia) and related arrangements. The notice was filed pursuant to a purchase agreement, dated September 2, 2013, entered into between Microsoft International and Nokia and other documents and agreements executed in relation to the proposed combination as the same falls under Section 5 of the CCI Act.

In terms of the purchase agreement, Microsoft will acquire substantially the entire D and S business of Nokia, which includes the mobile phones and smart devices business units, as well as industry design team, operations including D and S production facilities, D and S related sales and marketing activities, support functions, and design patents of the devices produced by the D and S business. Further Nokia will grant Microsoft a 10 year non-exclusive licence to its patents, as at the time of closing, with an option to extend the same to perpetuity. Microsoft will grant Nokia reciprocal rights to use Microsoft patents in the services offered by its subsidiary HERE North America LLC (HERE). Additionally, Microsoft will also become a strategic licensee of Nokia's HERE platform, as Nokia will grant Microsoft a four-year non-exclusive licence to the HERE geospatial data and services and will also have a 10 year license arrangement with Nokia to use the Nokia brand on current and subsequently developed products based on the Series 30 and Series 40 operating system.

CCI analysed the mobile phone market, mobile operating systems in detail and observed that the D and S business of mobile, smart phones and tablets, along with the business of operating system and other applications that are used in the devices, is extremely dynamic and is constantly evolving, which makes the product life cycle of such devices very short.

Further, the technology in these businesses is also primarily driven by the eco-systems and its ability to swiftly integrate the different smart products within a given ecosystem. This attribute incentivises the application developers to constantly innovate for new and better quality products. Accordingly, it was discussed that, the proposed combination is not likely to have an appreciable adverse effect on competition in India.

CCI approved the proposed combination under Section 31 (1) of the Act.

CCI order dated 24 October 2013

SEBI updates

Standard operating procedure for the suspension and revocation for trading shares of listed entities

In order to streamline the processes and procedures with regard to noncompliance of listing agreements and suspension of trading by the SEs) SEBI has decided that SEs will first impose fines on the non-compliant listed companies and shall invoke suspension of trading only in case of subsequent and consecutive defaults.

In this regard, SEBI has laid down uniform penal provisions for non-compliance with clause 31 (submission of Annual report), clause 35 (submission of shareholding pattern), clause 41 (submission of financial results) and clause 49 (submission of corporate governance compliance report) of the listing agreement.

Penal provisions

The SE will impose fine on the listed entities for noncompliance with the aforesaid clauses of the listing agreement due to non-submission or delay in submission of reports or documents. The amount of fine realised will be credited to the Investor Protection Fund. The SE will in addition, also indicate on their website, the names of non-compliant listed entities that are liable to pay fine for non-compliance.

Every SE will review the compliance status of the listed entities within 45 days from the end of the each quarter (for clauses 35 and 49) and within 15 days from the due date of submissions under clauses 31 and 41. After this, it will issue notices to the non-compliant listed entities to ensure compliance and payment of fine within 15 days from the date of the notice.

If any non-compliant listed entity fails to pay the fine despite receipt of the notice, the SE can initiate appropriate enforcement action including prosecution.

Creation of a new category 'Z 'for trading

The SE will create a new category 'Z' for trading shares of such non- compliant listed entities wherein trades will take place in 'trade for trade' basis.

If a listed entity commits two or more consecutive defaults in compliance with the listing agreement within 15 days from date of the notice issued, the concerned SE, in addition to imposing fine will also move the scrip of the listed entities to 'Z' category.

The SE will give seven days prior public notice to investors before moving the share of non-compliant entity to "'Z' category or vice versa.

After 15 days of suspension, trading in the shares of non-compliant entity may be allowed on 'trade for trade' basis, on the first trading day of every week for six months. In this regard, the SE will give instructions to its trading members or stock brokers to obtain confirmation from clients before accepting an order for purchase of shares of non-compliant entity on the 'trade for trade' basis.

The SE will also publish the following caution message on trading terminals:

'Trading in shares of the company is under 'suspension and trade to trade basis' and trading will stop completely if the company remains not compliant for six months.'

Significant features of SOP for revocation of suspension of trading

If the non-compliant listed entity complies with the aforesaid requirement or requirements and pays an applicable fine within three months from the date of suspension, the SE may revoke the suspension of trading its shares.

After revocation of suspension, the trading of shares will be permitted only in the 'trade for trade' basis for a period of three months from the date of revocation and after this period of three months, trading in the shares of the entity will be shifted back to the normal trading category. Seven days prior notice will be given before the shift

SEBI CIR/MRD/ DSA / 31 /2013 dated 30 September 2013

SEBI permits contracts for pre-emption and options in shareholders agreements

SEBI, in supersession of the earlier SEBI notification, i.e., S.O.184 (E) dated March 1, 2000, has now permitted the following:

- Spot delivery contract
- Contracts for sale or purchase of securities or contracts in derivatives, subject to compliance with the applicable rules and regulations
- Contracts for pre-emption including right of first refusal, or tag-along or drag-along rights contained in shareholders agreements or articles of association of companies or other body corporate
- Contracts in shareholders agreements or articles of association of companies or other body corporate, for purchase or sale of securities pursuant to exercise of an option contained therein to buy or sell the securities, subject to following conditions:
    - The title and ownership of the underlying securities is held continuously by the selling party to such a contract for a minimum period of one year from the date of entering into the contract
    - The price or consideration payable for the sale or purchase of the underlying securities pursuant to exercise of any option contained therein, is in compliance with all the laws for the time being in force as applicable
    - The contract is settled by way of actual delivery of the underlying securities

The contracts specified above will need to comply with the provisions of Foreign Exchange Management Act, 1999 and rules or regulations made thereunder.

The aforesaid liberalisation will not be in affect or validate any contract executed prior to the issue of notification ie 3 October 2013.

SEBI PR No. 98/2013 dated 3rd October 2013

SEBI releases draft REITs regulations for public comments

SEBI released draft REITs regulations in a press release dated 10 October 2013 for public comments.

Key conditions of the proposed regulations are:

- REITs to be set up as a trust under Indian Trust Act, 1882 and have parties such as SEBI, registered trustee, sponsor, manager and principal valuer
- Listing of units mandatory for all REITs

- Minimum assets under the REITs to be 1,000 crore INR for coming out with an offer

- Minimum initial offer size of 250 crore INR and minimum public float of 25%

- Minimum subscription size shall be two lakh INR and the unit size shall be 1 lakh INR

- REIT may raise funds from any investors, resident or foreign

- Draft regulations also prescribe the disclosure requirements and responsibilities of parties such as the trustee, sponsor, manager and principal valuer under the draft regulations

SEBI (Foreign portfolio investor [FPI]) Regulations, 2013

SEBI has in its board meeting dated 5 October 2013 considered and approved the draft SEBI (FPI) Regulations, 2013.

The SEBI (FPI)) Regulations, 2013 have been framed keeping in view the provisions of SEBI (Foreign Institutional Investors) Regulations, 1995, qualified foreign investors (QFIs) framework and the recommendations of the Committee on Rationalisation of Investment Routes and Monitoring of Foreign Portfolio Investments. =.

The salient features of the SEBI FPI Regulations, 2013 are as under:

- Existing FIIs, sub- accounts and QFIs shall be merged into a new investor class termed as FPIs.

- SEBI approved designated depository participants ('DDPs'). The DDP will be an Authorised Dealer Category-I Bank authorised by the RBI, Depository Participant and Custodian of Securities registered with SEBI

- DDPs shall register FPIs on behalf of SEBI subject to compliance with KYC requirements.

- FPIs have been divided into following category:

    - Category I FPI: Government and government related foreign investors etc

    - Category II FPI: Appropriately regulated broad based funds, appropriately regulated entities, broad based funds whose investment manager is appropriately regulated, university funds, university related endowments, pension funds etc

    - Category IIIFPI : All others not eligible under Category I and Category II FPIs

- Existing FIIs and sub accounts will continue to buy, sell or otherwise deal in securities under the FPI regime.

- Existing QFIs will continue to buy, sell or otherwise deal in securities till the period of one year from the date of notification of FPI regulations. In the meantime, they will need to obtain FPI registration through DDPs.

- FPIs will be granted permanent registration and will be permitted to invest in all those securities in which FIIs are permitted to invest in.

- Category I and Category II FPIs will be allowed to issue, or otherwise deal in offshore derivative instruments, directly or indirectly. However, the FPI needs to be satisfied that such offshore derivative instruments are issued only to persons who are regulated by an appropriate foreign regulatory authority after ensuring compliance with KYC norms.

SEBI PR No. 99/2013 dated 5 October 2013

Centralised database for corporate bonds and debentures

On the recommendation of high level expert committee on corporate bonds and securitisation (Dr R H Patil Committee) SEBI has decided to create centralised database of information regarding bonds which are available in the demat form for public dissemination. Both the depositories; NSDL and CDSL, jointly, will be the repository of information pertaining to the corporate bonds and debentures.

Depositories will also provide the information available with respect to the redeemable preference shares and securitised debt instruments, in a separate section within the database.

SEBI CIR/IMD/DF/17/2013 dated 22 October 2013

Issues pertaining to primary issuance of debt securities

SEBI has been conducting discussions with issuers and various other market participants regarding the issues concerning development of the corporate bond market. Based on the suggestions received in the meetings, SEBI has decided to implement the following measures:

- Disclosure of cash flows: Cash flows emanating from the debt securities will be mentioned in the prospectus and disclosure document, by way of an illustration. Further, for the purpose of standardisation and in line with the dated government securities, it has also been decided that if the coupon payment date of the debt securities falls on a Sunday or a holiday the coupon payment will be made on the next working day. If the maturity date of the debt securities falls on a Sunday or a holiday, the redemption proceeds will be paid on the previous working day. The requirement will be applicable for the debt securities issued, in accordance with SEBI (Issue and Listing of Debt Securities) Regulations, 2008, on or after 1 December 2013.
- Withdrawal of requirement to upload bids on date-time priority: Public issue of debt securities will be made on the basis of the date of upload of each application to the electronic book of the stock exchange. However, on the date of oversubscription, the allotments will be made to the applicants on proportionate basis. This will be applicable for the draft offer document for issuance of debt securities filed with the designated stock exchange on or after 1 November 2013.
- Disclosure of unaudited financials with limited review report: The Listed issuers (who have already listed their equity shares or debentures) who are in compliance with the listing agreement, may disclose unaudited financials with limited review report in the offer document, as filed with the stock exchanges in accordance with the listing agreement, instead of audited financials, for the stub period, subject to making necessary disclosures in this regard in offer document including risk factors. This will be applicable for the draft offer document for issuance of debt securities filed with the designated stock exchange on or after 1 November 2013.
- Disclosure of contact details of debenture trustees in annual Report: The listing agreement for debt securities has been amended by inserting a clause stating that the companies, which have listed their debt securities, will disclose the name of the debenture trustees with contact details in their annual report and as ongoing basis, on their website, to enable the investors to forward their grievances to the debenture trustees. This will be applicable from 1 December 2013 and all stock exchanges are advised to carry out the amendments in their Listing Agreement.

SEBI CIR/IMD/DF/18/2013 dated 29 October 2013

Discussion paper based on the review of guidelines governing stock related employee benefit schemes

SEBI has issued a discussion paper that is based on the review of guidelines governing stock related employee benefit schemes. This discussion paper is open to public comments.

Presently, SEBI (ESOS and ESPS) Guidelines, 1999 enable listed companies to reward their employees through stock option schemes and stock purchase schemes.

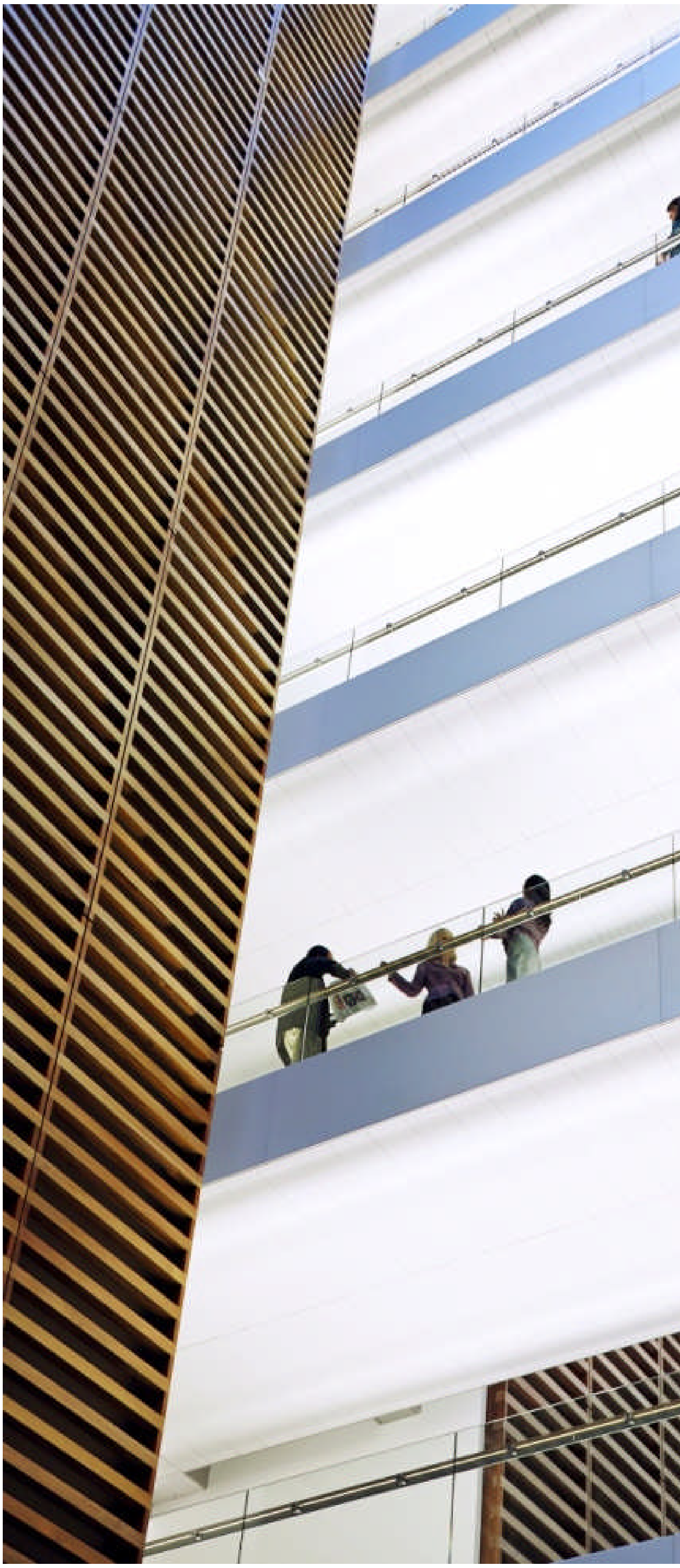
Based on the requests, suggestions and recommendations received from various market participants, SEBI has proposed to replace the extant guidelines with a set of regulations. These regulations will be directed towards the following tasks:

- To ensure better enforceability
- Provide for a regulatory framework for all kinds of employee benefit schemes involving securities of the company
- Address the concerns with regard to composition of employee welfare trusts, disclosures; enable secondary market transactions with adequate safeguards.

Public comments on the recommendations can be forwarded to SEBI on or before 5 December 2013.

SEBI PR No. 109/2013 dated 20 November 2013

Perspective



Mobile Termination Charges (MTC): Issues

A multi operator environment has emerged since the opening of the telecom services market in 1990s. In such an environment, commercial and technical arrangements between operators were required to be in position in order to enable customers of one service provider to access customers of other service providers. These are known as interconnection arrangements.

Interconnection was defined as 'commercial and technical arrangements under which service providers connect their equipment, networks and services to enable their customers to have access to the customers, services and networks of other service providers'[1]

Telephony offers maximum benefits to consumers if network effects are exploited to the largest extent possible. This will enable each consumer to reach as many other consumers as possible. In the situation of plurality of operators and networks that exists in India, the consumers calling each other are quite likely to be on different networks and to take benefits of network effect in such a situation it is absolutely essential that these networks are interconnected. It will not be an overemphasis to say that the efficient interconnection is central to virtually all public policies.

Facilitation and fixing of interconnection between different operator networks and fixing of interconnection charges in a multi operator scenario has emerged as one of the most important issues in the telecom sector today.

[1] Telecommunications Interconnection Usage Charges (IUC) Regulations 2003

Interconnect Usage Charge (IUC)

Interconnection usage charge was defined in the Telecommunications Interconnection Usage Charges (IUC) Regulations 2003 as ”the charge payable by one service provider to one or more service providers for usage of the network elements, resources for origination, transit and termination of calls”.[2]

For fixing the interconnection charges, cost of origination, termination and transition networks should be taken into consideration. The basic principle of arriving at an appropriate IUC is that cost of various components of telecom infrastructure put to use has to be determined and considered, while carefully eliminating the common cost which is necessarily required to be sunk by the operator for its own cause.

Important facts

Licences both in respect of basic services as well as cellular mobile telephone services were granted from 1995 onwards. The Unified Access Service Licence in Clause 26 mandates the licencee to grant interconnection, if and when any request therefor, is made by another service provider. However admittedly, the matter relating to laying down of the terms and conditions of interconnection agreement is within the exclusive domain of the TRAI as per section 11 (1) of TRAI Act.

TRAI therefore, put in place initially a cost based interconnection usage regime for the purpose of compensating the service providers for usage of their networks on ‘work done’ principle. Thus the Calling Party Pays (CPP) regime was put in place.

On or about 14 December 2001 TRAI framed regulations providing for levy of interconnection charges, commonly known as TRAI Regulation of 2001 (5 of 2001) which inter-alia provided for:

“3. Interconnection Charges shall be cost based:

(i) Interconnection charges shall be cost based, unless as may be specified otherwise.

(ii) For determining cost based interconnection charges, the main basis shall be “incremental or additional” costs directly attributable to the provision of interconnection by the interconnection provider.”

IUC Regulation 1 of 2003 came into force on and from 24 January 2003 whereby termination charges payable to the cellular mobile in metro area was prescribed at 0.30 paise while for the circle; it was fixed at 0.40 paise per minute.

However, soon thereafter TRAI upon publication of a consultation paper and obtaining comments of the stakeholders thereon, issued regulations being IUC Regulation 2 of 2003 which came into force on 29 October 2003, in terms whereof termination charge was reduced to an uniform rate of 0.30 paise per minute for all types of calls namely, local, NLD, ILD, basic, WLL and cellular network in both metro as well as circle areas.

The Authority, after following the public consultation process and discussions with the industry notified the revised IUC regime on 23 February 2006 vide The Telecommunication Interconnection Usage Charges (Sixth Amendment) Regulation (1 of 2006), which was implemented from 1 March 2006. In this regulation, the Authority decided to put a ceiling on carriage charges while other IUC components were kept the same for the reasons given in the explanatory memorandum accompanying the regulation. The Authority decided to keep the fixed and mobile termination charges unchanged.

In the Telecommunication Interconnection Usage Charges (Tenth Amendment) Regulations, 2009(2 Of 2009), TRAI *inter alia* provided that Interconnection Usage Charges shall be uniform at the rate of 0.20 paise per minute and the termination charge for incoming International Long Distance voice calls to such Fixed Wireline, Wireless in Local Loop (Fixed),

[2] Section2 (x), The Telecommunication Interconnection Usage Charges (IUC) Regulation 2003

Wireless in Local Loop(Mobile), Cellular Mobile Telephone Service (both 2G and 3G) shall be uniform at the rate of Re. 0. 40 (forty paise only) per minute.

The Telecommunication Interconnection Usage Charges (Sixth Amendment) Regulation (1 of 2006) and The Telecommunication Interconnection Usage Charges (Tenth Amendment) Regulations, 2009(2 Of 2009) were challenged before TDSAT batch of appeals decided on 29th September 2010.

TDSAT in its judgment dated 29th September 2010, held that "*although we agree that it might not have been possible for TRAI to lay down different charges for different operators, it could not have given a complete go by to the cost based principle or work done principle.*" Contrary to TRAI, TDSAT has taken a view that capital cost should be taken into account for computing the IUC. TDSAT also directed TRAI to consider the matter afresh and complete the consultation process in a time bound manner and determine the charges so that the IUC charges could be made effective and implemented from 1 January 2011.

The aforementioned judgment of TDSAT was challenged before the Supreme Court. In 2011 TRAI put up an affidavit in the Supreme Court where it proposed to abolish the mobile termination charge 2014 onwards. [3] An application was also filed with the Supreme Court, seeking permission to notify the regulation relating to revised Interconnection Usage Charges. However, the Court refused to grant permission in an order dated 13 April 2012.[4] The Supreme Court judgment in this case is still awaited.

Incumbent vs new operators

Each individual operators view IUC in a different light. Whether they are co-operating networks like access and long distance or competing networks like two access service providers in the same area.

Incumbent's voice on MTC

- Cost based rates are efficient and cost based methodologies well established.
- Termination rates matter as they incentivise to invest in rural areas and serve low usage customers.
- Low MTC leads to cross subsidy.
- Bill and Keep is not widely adopted because it is flawed: USA, China etc are not Bill and Keep.
- Bill and Keep is neither a viable nor a simple interconnect arrangement; it is only relevant in very special circumstances. Below Cost MTC shall mean:

In Urban Areas – Intense competition for high volume customers. Operators lower prices to drive outbound volumes increasing congestion and quality problems.

In Rural Areas – Serving low usage customers becomes less attractive. All operators shift focus to defending share in urban centres. Affordability limits operator's ability to increase revenue from rural customers. Low MTC leads to lower investment in rural coverage.

New operators voice on Mobile Call Termination Rates

- Low MTC charges are pro-consumer and pro-growth. Wireless penetration increases as MTC decreases. MTC has become the key reason for underutilised network capacity. Arguments claiming MTC reduction will have no impact on usage and penetration are a misrepresentation.
- Low MTC can increase profitability.

[3] http://rtn.asia/1584_supreme-court-set-deliver-judgment-termination-charges

[4] http://www.moneycontrol.com/news/cnbc-tv18-comments/trai-proposes-to-abolish-mobile-termination-charge-by-14_608876.html

- Lower MTC improves affordability and can increase tele-density, especially in rural areas.
- MTC is levied on new entrants to cover cost of infrastructure development of incumbents.
- MTC regime that does not consider 3G/ BWA voice termination be permitted so close to its entry
- Internationally, MTC has been reviewed and reduced significantly periodically. In India tariffs have declined consistently since 2003 but MTC has remained the same.
- Asymmetric MTC is also accepted world over.
- High MTC encourage hugely differential on-net/ off-net differentials which are confusing to the customer.
- Incumbents have clearly benefited from past regulation, they should not be allowed to benefit yet again.
- Cost plus method to determine MTC is no longer valid now.
- Just because Europe has not adopted Bill and Keep does not mean it is not right for India, the factors in Europe are incomparable to those existing in India.
- GSM players also back the claims of new operators.

Conclusion

It is natural for competing operators to transfer network cost to other service providers, realise as much revenue as possible, impede competition and maintain or increase their market share as best as possible. While on the other hand incumbent, public or private, do not want the new competitors to take advantage of their network, take away their business and earn high profits.

Mobile operators who have a large subscriber base will seem to benefit from high termination charges at the cost of smaller and newer operators as the latter are net payers of large amount of termination charges since a higher proportion of their calls terminate because of dominant mobile operators. The termination charge for most operators, particularly new and smaller operators, becomes an item of cost, as they are net payer of termination charge. High termination charge reduces their margins and their competitive ability and gives a distinct cost advantage to the large service providers who are, as a result, able to consolidate the termination market by acquiring more subscribers and the tariff packages which are below the termination cost. The MTC has become a source of revenue for the incumbent operators.

Termination of calls generated by subscribers of other interconnecting service providers involves a small marginal cost for which the service providers need to be fairly compensated.

It becomes very important to have an effective IUC regime in place to facilitate interconnection arrangements among various cooperating and competing service providers and provide greater certainty to the settlements among them. The purpose of such an IUC regime is to ensure that all service providers are able to gain access, on reasonable terms and conditions, to the interconnection facilities while providing seamless, efficient and lower termination charges necessary to promote optimum utilisation of networks and business to prosper by volumes and not by margins.

- Shilpa Bhadoria (Manager, Regulatory Services)

Glossary

ADR	American Depository Receipt
BoA	Board of Approval
BTP	Biotechnology Park
CCPS	Compulsorily Convertible Preference Shares
DC	Development Commissioner
DEA	Department of Economic Affairs
DGFT	Directorate General of Foreign Trade
DIPP	Department of Industrial Policy and Promotion
DoC	Department of Commerce
DTA	Domestic Tariff Area
DTH	Direct to Home
ECB	External Commercial Borrowing
EGoM	Empowered Group of Ministers
EHTP	Electronic Hardware Technology Park
EOU's	Export Oriented Units
FCCB	Foreign Currency Convertible Bond
FDI	Foreign Direct Investment
FEIs	Foreign Educational Institutions
FEMA	Foreign Exchange Management Act
FIIs	Foreign institutional investors
FIPB	Foreign Investment Promotion Board
FY	Financial year
GDR	Global Depository Receipts
INR	Indian rupee
IT	Information technology
JV	Joint venture
LoA	Letter of approval
MBRT	Multi-brand retail trading
MCA	Ministry of Corporate Affairs
MHRD	Ministry of Human Resource Development
MIB	Ministry of Information and Broadcasting
MNP	Mobile Number Portability
MoC	Ministry of Commerce
MoU	Memorandum of association
MTC	Mobile termination charges
NBFCs	Non-banking financial companies
NRI's	Non resident Indians
ODI	Overseas direct investments
PIB	Press Information Bureau
R&D	Research and development
RBI	Reserve Bank of India
REITs	Real Estate Investment Trusts
SBRT	Single brand retail trading
SEBI	Securities Exchange Board of India
SEZ	Special economic zone
STD	Subscriber trunk dial
STP	Software Technology Park
TRAI	Telecom Regulatory Authority of India
UAC	Unit approval committee
USD	United States dollar
UTs	Union Territories
VCF	Venture capital funds
VCUs	Venture capital undertakings
WOS	Wholly owned subsidiary

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