Technology, Media and Telecommunications Law – Legal Milestones Financial Year 2020-21 and a Look Ahead

14 April 2021

This update covers:

1 The Year that Was

As expected, many of the changes in 2020 in the sector were in response to the COVID-19 pandemic. While the last year saw a lot of activity on the regulation of personal data, 2020 marked discussions on the report regulating non-personal data released by the committee constituted by the Ministry of Electronics and Information Technology (MEITY). Further, the retail payments space saw a lot of changes, facilitating the proliferation of digital payments in light of COVID-19. The enactment of the Consumer Protection (E-Commerce) Rules, 2020 (E-Commerce Rules) also brought focus to consumer protection in the age of e-commerce and online retail. The e-commerce sector also came under additional tax obligations in the form of equalisation levy.

The telecommunication sector saw one of the biggest changes with relaxations to the regulatory framework for Other Service Providers. The introduction of the Wi-Fi Access Network Interface brought the focus on providing wider and easier access to internet across the country.

Anti-trust authorities across the world and in India examined the operations of technology companies, including their data collection and processing activities, for anti-trust measures and consumer protection.

2020-21 was a remarkable year for the technology and telecommunications sector, forcing companies and governments to rethink the way things worked, resulting in disruptive changes in the sector. While the pandemic fast-tracked some long due legal and policy changes, many other expected changes were put on a slow burner. This update summarises some of these developments along with our expectations for the year ahead.

The government also took initiatives in formulating policy and regulation around data in different sectors, such as the Data Empowerment and Protection Architecture (DEPA) and the Health Data Management Policy.

2 Major Developments in the Financial Year 2020-2021

2.1 Technology and Data Protection

- Regulation of non-personal data

  The MEITY had constituted a committee of experts (Committee) in 2019 to devise a framework for regulation of non-personal data (NPD). The Committee released its report for public consultation on 12 July 2020 (Draft Report). The Draft Report proposes the introduction of a legislation governing NPD (NPD Legislation) and lays down key principles to be incorporated in the NPD Legislation. The report also proposes the establishment of an NPD authority (NPDA) to enforce the NPD Legislation. The objective of having an NPD Legislation is to create a framework for establishing India's rights over its NPD and to address re-identification concerns and misuse or harm of NPD.

  Pursuant to the public feedback and suggestions received on the Draft Report, the Committee released a revised version of the report on 16 December 2020 (Revised Report), for another round of public consultation.

  Please click here for a more detailed analysis.

- Developments in relation to retail payments

  The retail payments space saw many changes in 2020, with a heavy focus on promoting safe, secure, and seamless payments and innovation. Some of the important developments are:

  i. *Framework for New Umbrella Entity/ entities (NUEs) for retail payments*

  The Reserve Bank of India (RBI) released the Framework for Authorisation of Pan-India New Umbrella Entity/ entities (NUEs) for Retail Payments. The scope of activities of such NUEs include setting up and operating payment systems within the retail payment space and operating clearing and settlement systems for banks and non-banks. The NUE must be a company incorporated in India under the Companies Act, 2013, either as a for-profit or a non-profit company, and will be authorised by the RBI under the Payment and Settlement Systems Act, 2007. The NUEs are expected to be interoperable and interact with the National Payments Corporation of India (NPCI), the umbrella entity that currently manages retail payments in India.

  Please click here for a more detailed analysis.

  ii. *Streamlining Quick Response (QR) Code Infrastructure*

  The RBI has directed all banks and non-banks who have their own proprietary QR codes across their merchant networks to move to the United Payments Interface (UPI) or the Bharat QR codes (which are interoperable with each other) by 31 March 2022. QR code-based payment is a contactless method where payments are carried out by scanning the QR code through a mobile phone. They are generally considered as a secure and low-cost digital payment option.

  The move for all networks to move to UPI or Bharat QR codes has been made to ensure user convenience through better interoperability as proprietary QR codes may not be interoperable with each other. The RBI has also prohibited the launching of any new proprietary QR codes.

iii. *Framework for Recognition of a Self-Regulatory Organisation for Payment System Operators*

The RBI had envisaged the setting up of a Self-Regulatory Organisation (SRO) for Payment System Operators (PSO) in its Payment and Settlement Systems Vision 2019-21. Pursuant to this, the RBI released the framework for recognition of an SRO for PSOs in October 2020. Under this framework, the SRO will be required to submit an application to the RBI for a letter of recognition and adhere to any guidelines issued to them by the RBI. The SRO will act as the representative for its members in public discussions and interactions with the RBI. Some of the important functions of SRO will include working towards (i) establishing benchmarks, ethics and behavioural standards, (ii) promoting research and development in the payments ecosystem and (iii) establishing a uniform grievance redressal framework.

iv. *Volume cap in UPI*

In order to combat the risks arising with the scaling of the UPI ecosystem, the NPCI issued 'Guidelines on volume cap for Third Party App Providers (TPAPs) in UPI' (Guidelines). Under the Guidelines, payment service providers (PSPs) and TPAPs are required to ensure that UPI transactions on their platforms do not exceed 30% of the overall volume of transactions during the preceding three months (on a rolling basis), effective from 1 January 2021. The existing TPAPs who are exceeding this cap will have a period of two years to comply with the Guidelines in phases.

v. *Increase in limit for e-mandates and transactions with contactless cards*

With an aim to promote the adoption of digital payments in a safe and secure manner, the RBI announced enhanced limits for contactless card payments and e-mandates that allow collection of payments without human intervention, on cards and UPI (including recurring transactions) from INR 2,000 to INR 5,000, effective from 1 January 2021.

vi. *RBI Regulatory Sandbox*

The RBI in 2019 announced the opening of the first cohort of its Regulatory Sandbox (Sandbox) with retail payments as its theme, with an expectation to spur innovation in the digital payments space. In 2020, testing of products under the Sandbox commenced with two entities starting their test phase.

- Developments in healthtech

i. *Data Access and Knowledge Sharing Protocol*

In response to the privacy related controversies following the launch of the Aarogya Setu mobile application (App) as a contact tracing tool during the COVID-19 pandemic, an Empowered Group on Technology and Data Management under the Disaster Management Act, 2005 issued a Data Access and Knowledge Sharing Protocol (Protocol). The Protocol provided for basic principles on data collection and processing through the App. It also stated the specific purposes for which the data could be used and the circumstances in which it can be shared with parties for processing.

ii. *Health Data Management Policy*

The Ministry of Health and Family Welfare (MoHFW) released a draft Health Data Management Policy (Policy) under the National Digital Health Mission (NDHM) this year, which was later approved in December 2020. The objective of the Policy is to provide guidance for the creation of a data protection and privacy framework pertaining to health data, for healthcare professionals, governing bodies within the MoFHW, professional bodies and organisations etc.

The Policy provides for a consent framework where data principals must have control of all data relating to them, incorporation of appropriate technological means to guarantee the integrity of access permissions by the data principal and to ensure interoperability across all players in a nationwide integrated digital health ecosystem. The Policy will be rolled out and implemented by the National Health Authority under the MoHFW.

- Developments in gaming

i. *Ban on online real money gaming in States*

In 2020, the States of Andhra Pradesh and Tamil Nadu promulgated ordinances to ban all real money online games within the states including online rummy. This move is despite a 1967 Supreme Court ruling in State of Andhra Pradesh v. K. Satyanarayana and Ors. that 'games of skill' are legal and that rummy for stakes is a game of skill. There is no national level legislation for regulating gaming in the country and the State governments have the power to regulate gaming or gambling within their respective territories. Some states have adopted the Public Gambling Act, 1867 which prohibits public gambling. While most states prohibit only games of chance (and not games of skill), some states like Telangana, Assam and Orissa have a blanket prohibition on all real money gaming, whether they are games of chance or skill.

ii. *Guidelines for gaming advertisements*

In November 2020, the Advertising Standards Council of India (ASCI) introduced guidelines to make real-money gaming advertisements safer and increase awareness amongst users of the financial and other risks involved in online games with real money. The guidelines require certain details of the games to be provided, including a disclaimer containing the financial risks and possibility of addiction, the age requirement of 18 years to engage in the online game, etc.

iii. *Discussion Paper on Self-Regulation of Fantasy Sports Platforms*

In December 2020, Niti Aayog proposed a government-recognised self-regulatory organisation (SRO) for online fantasy sports platforms in a discussion paper. The SRO will be responsible for ensuring that fantasy gaming companies follow applicable rules, resolve customer complaints, and liaise with State governments. This is seen as a step forward to have a national level framework for gaming laws in the country.

- FDI in news and digital media

Pursuant to Press Note 4 of 2019 (PN 4 of 2019) and subsequent amendments (on 5 December 2019) to the Foreign Exchange Management (Non-Debt Instrument) Rules, 2019 (NDI Rules) the government released guidelines on FDI in the news digital media sector. The amended NDI Rules provide that FDI in a company engaged in the business of '*uploading/ streaming of news & current affairs through digital media*' is permitted up to 26%, with government approval. Prior to this, FDI in digital media was unregulated, and the restriction on FDI in news was limited to 26% in print media and 49% in broadcasting content services.

Pursuant to various stakeholders seeking clarifications on the type of entities to whom this is applicable, the Department for Promotion of Industry and Internal Trade clarified that the FDI restrictions would be applicable to the following entities located or registered in India- (i) a news agency which gathers, writes and distributes/transmits news, directly or indirectly, to digital media entities and/or news aggregators; (ii) a news aggregator, which, using software of web application, aggregates news content from various sources, such as news websites, blogs, podcasts, video blogs, user submitted links, etc in one location and

(iii) a digital media entity streaming/ uploading news and current affairs on websites, apps and other platforms. This has impacted the operations of various digital news aggregators as well as digital media agencies who were relying on foreign funding to carry out their activities.

Please *click here for a more detailed analysis.*

- Amendment to the Information Technology Act, 2000

  The Government has commenced internal discussion on amendments to the Information Technology Act, 2000 (IT Act) in January 2021. The amendments are expected to include regulation of e-commerce, digital payments, AI, data security, and cyber crime.

  The Second Schedule to the IT Act was amended by MEITY in September 2020. The amendment recognises signatures where e-authentication technique and procedure for creating and assessing the subscriber's signature key is facilitated by a 'trusted third-party'.

- Consumer Protection (E-Commerce Rules), 2020

  The Ministry of Consumer Affairs notified the E-Commerce Rules to regulate the marketing, sale and purchase of goods and services online. The E-Commerce Rules apply to all goods and services sold over a digital or electronic network and include inventory and marketplace models within its ambit. It primarily governs B2C or consumer purchases and users (who are not just consumers) of e-commerce platforms. It imposes specific duties on all e-commerce entities along with additional obligations and liabilities specific to marketplace sellers and marketplace and inventory entities.

  Please click here for a more detailed analysis.

- Ban on mobile applications by the government

  In June 2020, the MEITY blocked 59 mobile applications (Apps) under the IT Act, citing that the activities of the Apps are prejudicial to national security and public order. Section 69A of the IT Act along with Information Technology (Procedure and Safeguards for Blocking of Access of Information by Public) Rules, 2009 allows the government to issue such orders directing an intermediary to block public access to any information on concerns of national security. After the initial blocking order in June 2020, the MEITY during the course of the year passed more such orders, resulting in about 267 Apps being banned. The ban on the Apps has resulted in popular Apps losing a significant user base in India. In January 2021, the MEITY has issued notices to several mobile applications with an objective of permanently banning such Apps in India.

- Displaying country of origin on product listings

  The government directed e-commerce entities to display the country of origin (COO) for all products as mandated under the Legal Metrology (Packaged Commodities) Rules, 2011 (LM Rules). The LM Rules contain a provision mandating declaration of 'country of origin' for manufacturers, importers, packers and e-commerce entities. The Consumer Protection (E-Commerce) Rules have also incorporated this requirement. The mandate gained ground in 2020 owing to the 'Atmanirbhar Bharat' and 'Make in India' initiatives of the government. As a result, e-commerce entities were required to make changes to their product listings for new as well as products that were already listed.

- Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021

  The MEITY, in consultation with the Ministry of Information and Broadcasting, notified the Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021 (IDMC Rules) seeking to regulate intermediaries and publishers in the digital media space. They supersede the erstwhile

Information Technology (Intermediary Guidelines) Rules, 2011, and considerably expand the scope to impose additional obligations on social media intermediaries and digital media entities. The IDMC Rules impose certain due diligence requirements on intermediaries. It further imposes additional obligations on certain social media intermediaries and aim to regulate online content by prescribing a code of ethics and a three-tiered grievance redressal mechanism for publishers of digital media. The intermediaries classified as significant social media intermediaries under the IDMC Rules have additional due diligence requirements such as having a local presence and appointing resident officers, identification of first originator of messages, filing monthly compliance reports and use of automated tools to identify and remove unlawful content.

Please click here for a more detailed analysis.

- Geospatial Data Guidelines, 2021

The Department of Science and Technology (DST) released guidelines for acquiring and producing geospatial data and geospatial data services including maps (Guidelines). These Guidelines were issued with the aim of liberalizing the regulations in relation to the collection, acquisition and use of geospatial data. Geospatial Data is positional data, with or without attribute data tagged, whether in the form of images, videos, vector, voxel and/or raster datasets or any other type of geospatial dataset in digitized or non-digitized form or web-services. The Guidelines provide for a self-certification regime that all entities who use geospatial data have to follow for demonstrating adherence to the Guidelines and a specific list of sensitive attributes to be shown on any map. The Guidelines permit only Indian entities to undertake certain activities in relation to geospatial data such as collection, storage, generation and dissemination of geospatial data, carrying out surveying activities and using technologies for real-time positioning. The Guidelines liberalize the export of maps and constitutes the Geospatial Data Promotion and Development Committee for governing and promoting activities in relation to geospatial data.

Please click here for a more detailed analysis.

- Developments in blockchain and cryptocurrency

i. *Draft National Strategy on Blockchain*

The MEITY has released the draft National Strategy on Blockchain (Strategy), proposing the creation of a National Level Blockchain Framework (NLBF) and for adoption of the technology in public and government projects. The NLBF will host multiple blockchain platforms for various sectors which would help in adoption and use at a large scale. The draft Strategy also provides for a roadmap for the implementation and recommends utilisation of existing data center infrastructure, encouraging research, and creating a national resource for providing Blockchain-as-a-service (Baas).

ii. *The Cryptocurrency and Regulation of Official Digital Currency Bill, 2021*

The Cryptocurrency and Regulation of Official Digital Currency Bill, 2021 (Cryptocurrency Bill) has been proposed to be introduced in the Parliament. The Cryptocurrency Bill inter alia proposes the creation of a facilitative framework for a digital currency, which would be issued by the RBI.

2.2 Telecommunications

- Relaxations to the Framework for Other Service Providers

On 5 November 2020, the Department of Telecom (DoT) released the new Guidelines for Other Service Providers (OSP Guidelines) overhauling the existing framework for business process outsourcing (BPO) in

India. The new framework applies only to entities carrying out voice-based BPO activities. Several provisions have been removed such as the requirement for registration, bank guarantees, network diagrams, restrictions on interconnection, and penalty and audit provisions. India's IT sector may now implement modern network structures, work from home facilities and infrastructure sharing for greater efficiency. Security-related obligations such as requiring OSPs to maintain call data records and to avoid toll bypass have been retained.

Please click here for a more detailed analysis.

- Changes to the interconnection framework

  i. *The Telecommunication Interconnection (Second Amendment) Regulations, 2020*

  The TRAI has notified the Telecommunication Interconnection (Second Amendment) Regulations, 2020 (Amendment), amending the Telecommunication Interconnection Regulation, 2018. Interconnection is the commercial and technical arrangements under which service providers connect their equipment, network and services to enable their customers to have access to the customers, services and networks of other service providers. The Amendment provides for the location of Point of Interconnection (POI) for calls between two fixed line networks or between a fixed line network and an NLD network to be mutually decided by the interconnection provider and the interconnection seeker. If the interconnection seeker and interconnection provider fail to agree on a mutual location, then the POI will be at Long Distance Charging Centre (LDCC).

  ii. *The Telecommunication Interconnection Usage Charges (Sixteenth Amendment) Regulations, 2020*

  In April 2020, the Telecom Regulatory Authority of India (TRAI), released the Telecommunication Interconnection Usage Charges (Sixteenth Amendment) Regulations, 2020 (IUC Amendment). Interconnection usage charges are charges payable by one service provider to another service provider, in whose network the call terminates. This is paid for covering the network usage costs, as the service provider on whose network the call terminates is required to carry the call to the customers which requires infrastructure investment. The IUC Amendment mandates a non-discriminatory rate of termination charges, for all international calls terminating on a service provider's network and specifies a range within which the charges may be levied. It is pertinent to note that the IUC Amendment is applicable only for international calls. The IUC for domestic calls is zero from January 2021 pursuant to the Telecommunication Interconnection Usage Charges (Fifteenth Amendment) Regulations, 2019.

- Judgement on Adjusted Gross Revenue and payment of dues

  In 2019, the Supreme Court in *Union of India vs Association of Unified Telecom Service Providers of India etc*. upheld the Telecom Disputes Settlement and Appellate Tribunal's order that certain non-telecom revenues like rent, profit on sale of fixed assets, dividend and treasury income would be included in the definition of Adjusted Gross Revenue (AGR), on which a proportionate license fee would have to be paid by Telecom Service Providers (TSP) to the government. The review petitions filed against the judgement in 2020 were dismissed by the Supreme Court. However, the Supreme Court has allowed staggered payment of the AGR dues over a period of 10 years. The payment instalments begin from 1 April 2021 and TSPs are required to report the compliance of the direction and the payment details to the DoT. The decision of the Supreme Court allowing the staggered payment of the AGR dues comes as a much-needed relief to TSPs, as some of them were facing the prospect of winding up their operations as a result of upfront payment of the dues. In January 2021, some TSPs have approached the Supreme Court pointing out errors in the calculation of the AGR as claimed by the DoT in the decision.

- CTRAI Recommendations on Cloud Services

  Pursuant to the feedback on the consultation paper on cloud services released in 2019, the TRAI released recommendations for regulating cloud services. The recommendations call for the creation of a registered not for profit industry body working in conjunction with the DoT/TRAI to which the Cloud Service Providers (CSP) are required to be members. The scope of the CSPs contemplated under the recommendations is limited to providers offering Infrastructure as a Service (IaaS) and Platform as a Service (PaaS) in India or to customers in India. The recommendations seek to bring CSPs into a 'light touch' regulatory regime on the basis that they are a service provider under the TRAI Act. This may potentially lead to CSPs being subject to TRAI's oversight, especially in relation to consumer protection and quality of service aspects.

- TRAI Recommendations on Over-The-Top Services

  Pursuant to its consultation paper on Over-The-Top (OTT) Communication Services, the TRAI released its recommendations. The recommendations note that the telecom sector has witnessed a drastic growth with an increase in usage of OTT. As a result, the recommendations essentially call for no regulatory intervention at the moment and allowing market forces to respond to the growth of OTT, as prescribing any regulation now may have an adverse impact on the industry as a whole. However, the situation will be monitored and intervention may be carried out at an appropriate time.

- Framework and Guidelines for Wi-Fi Access Network Interface

  The Union Cabinet, in order to accelerate the proliferation of broadband internet services and to provide last mile connectivity through public wi-fi network in the country, gave its approval to DoT's proposal for setting up of Public Wi-Fi networks by Public Data Office Aggregators to provide pan-India public Wi-Fi services, known as PM-WANI.

  The DoT has also come up with the Framework and Guidelines (WANI Framework) for registration of Wi-Fi Access Network Interface. The WANI Framework envisages the provision of broadband connectivity to consumers through public Wi-Fi access points. It also provides details regarding the architecture and the ecosystem.

  The WANI Framework has essentially liberalised the resale of bandwidth and is a step towards paving the way for large scale proliferation of broadband without the burden of onerous compliance, license and fees. In furtherance to the WANI Framework, the DoT issued instructions in March 2021 to the licensees to enter into necessary commercial arrangements with Public Data Offices for providing internet bandwidth.

- Transparency in Tariff Publications and Advertisements

  i. *Directions on tariff publications and advertisements*

     The TRAI issued directions on tariff publishing in September 2020, in light of the (i) introduction of 'transparency' in the tariff framework through the Telecommunication Tariff (63rd Amendment) Order, 2018 (63rd Amendment Order) and (ii) inadequacy of the existing requirement of publishing tariff plans in a prescribed format. The directions call on TSPs to make certain specified essential disclosures in relation to specific types of tariff plans such as special tariff vouchers, add-on packs and combo vouchers and also provide for the mediums on which such disclosures must be published.

Similarly, the TRAI also issued directions in tariff advertising in light of the requirement of transparency under the tariff framework.

ii. *Supreme Court on segmented tariff offers*

The 63rd Amendment Order provides for the disclosure of segmented tariffs by TSPs. The Telecom Disputes Settlement and Appellate Tribunal (TDSAT), while hearing the challenge to the 63rd Amendment Order, had permitted TRAI to ask for details of segmented tariffs. This was further allowed by the Supreme Court, which passed an interim direction requiring the TSPs to make these disclosures.

- Spectrum Auction

On 1 and 2 March 2021, the Government conducted and concluded the auction for allocation of spectrum in the 700, 800, 900, 1800, 2100, 2300 & 2500 MHz bands.

The DoT thereafter released the provisional results from the auction specifying the service area, band, price per block and company allotted the specific band, subject to scrutiny and approval by the Government. The DoT also clarified that the spectrum usage charges will be levied at 3% of the AGR excluding the revenue from wireline services.

- Amendment to telecom licenses on procurement of telecom equipment

The DoT in March 2021 amended the security conditions in various license agreements pertaining to procurement of telecom equipment. Pursuant to the amendments, the Government is empowered through the National Cyber Security Coordinator (NCSC) to impose conditions on procurement of telecom equipment on grounds of defence of India or national security. The NCSC will notify the trusted sources, associated telecommunication equipment (Trusted Products) and a list of designated sources from where no procurement can be done. Licensees must only connect Trusted Products in its network and seek permission from the NCSC for any upgradation of existing networks utilizing telecommunication equipment not designated as Trusted Products.

3 Looking Ahead

The dynamism in technology regulation and policy making in FY 2020-21 will likely continue into FY 2021-22. The PDP Bill that underwent revisions and consultations in 2019, was introduced in the Lok Sabha in 2020 and is currently with the Joint Parliamentary Committee (JPC). The JPC has proposed to increase the scope of the PDP Bill to include all types of data, including NPD, with a special focus on digitisation and localisation of data. The PDP Bill is also likely to undergo changes in light of the Revised Report on NPD, especially in relation to provisions on the government's access to NPD. The JPC has reportedly suggested 89 amendments to the PDP Bill, including a change in its title. In the recently concluded Parliamentary session, the JPC has been granted an extension up to the first week of the monsoon session 2021 to submit its report. The monsoon session of Parliament is likely to commence in July 2021.The enactment of the Personal Data Protection Bill, along with regulation around non-personal data is expected to put India on the map in relation to a robust framework for data management and regulation.

In the telecommunication sector, this year is going to pave the way for 5G Further, given the government's consultations and regulation around cloud services in 2020, more developments in this space can be expected. TRAI has also carried out consultations on unbundling specific layers of telecommunication such as network, infrastructure and services through differential licensing. The recommendations on the same can be expected in 2021. More relaxations may be expected in the license conditions of Virtual Network Operators (VNO), such as relaxations in security conditions, FDI, etc. which will further help providing localised services and last mile connectivity.

The Indian Space Research Organisation (ISRO) has also come out with a draft Space Based Communication Policy (Spacecom Policy), which is expected to be finalised this year. The Spacecom Policy would serve as the successor to the Satellite Communications Policy of 1997 and will significantly alter the policy landscape of satellite communications in the country. The ISRO also released a draft Remote Sensing Policy which has taken into consideration the advancement of technology and the demand for remote sensing data.

While 2020-21 has laid down considerable groundwork for legislative and policy changes in the technology and telecommunication space, more changes are expected in 2021-22.

For a round -up of some of the key legal developments in the financial year 2020-2021 across other practices and a brief insight on what to expect in the year ahead, please read our practice-wise updates, which can be accessed here.