HSA ADVOCATES
HEMANT SAHAI ASSOCIATES

Corporate & Commercial

Monthly newsletter | September 2020

Table of contents

Third amendment to FEMA NDI Rules

The FEMA (Non-Debt Instrument) Rules, 2019 (**NDI Rules**), notified by the Central Government on October 17, 2019, were recently amended further. The Ministry of Finance issued the NDI (Third Amendment) Rules, 2020 (**Third Amendment**) vide its notification dated July 27, 2020. At the outset, third amendment seeks to bring about two major changes in NDI Rules, namely granting powers to the Reserve Bank of India (**RBI**) to administer the NDI Rules and to issue directions or circulars, as it may deem necessary, in this regard and amendment in the entry route and other conditions in relation to air transport services. The major changes have been enlisted below:

- **Powers granted to the RBI**
  - **Insertion of rule 2A:** Under the NDI Rules, the powers granted to the RBI was exercisable in consultation with the Central Government. Under the Third Amendment, by way of insertion of rule 2A, the RBI has been granted exclusive powers to administer the NDI Rules and to interpret and issue directions, circulars, instructions or clarifications, as it may deem fit, for effective implementation of the provisions of the NDI Rules.
  - **Amendment to rule 3 and rule 4:** In alignment with the insertion of rule 2A, consequent changes have been made in rules 3 and 4 of the NDI Rules, whereby the RBI may, on an application made to it, permit a person resident outside India to make any investment in India subject to such conditions as may be considered necessary; and an Indian entity or an investment vehicle, or a venture capital fund or a firm or an association of persons or a proprietary concern to receive any investment in India from a person resident outside India or to record such investment subject to such conditions as may be considered necessary, without consultation with Central Government.
- **FDI in air transport services**
  - **Removal of dispensation for OCIs:** Under Schedule I of the NDI Rules, FDI by NRIs and OCIs in scheduled air transport service/domestic scheduled passenger airline and regional air transport service was allowed under the automatic route up to 100%. However, the Third Amendment seeks to remove the dispensation provided to OCIs, in this regard. Currently, under the Third Amendment, S. No. 9.3 of Schedule I provides that only foreign direct investment by NRIs in scheduled air transport service/domestic scheduled passenger airline and regional air transport service, shall be allowed under the automatic route up to 100%. Further, 'Air Operator Certificate' (as opposed to Scheduled Operators' Permit under the NDI Rules) to operate scheduled air transport services (including domestic scheduled passenger airline or regional air transport service) shall be granted to such company or a body corporate which is registered and has its principal place of business within India; whose chairman and at least 2/3rd of its directors are Indian citizens; and whose substantial ownership and effective control is vested in Indian nationals.
  - **Changes in other conditions for investment in air transport services:** FDI in air transport services is subject to other specific conditions prescribed in this regard. The Third Amendment seeks to introduce certain changes in S. No. 9.5 of Schedule I of the NDI Rules, which include the following:
    - **Amendments to 9.5 (c):** Conditions subject to which foreign airlines shall invest in the capital of Indian companies, operating scheduled and non-scheduled air transport services, up to the limit of 49% of their paid-up capital has been amended to include limit of 49% shall include the FDI and FII/FPI investment, the investments made hereunder shall be in compliance with relevant regulations of the Securities and Exchange Board of India (**SEBI**), such as the Issue of Capital and Disclosure Requirements (**ICDR**) Regulations/Substantial Acquisition of Shares and Takeovers (**SAST**) Regulations, as well as other applicable rules and regulations and removal of grant of Scheduled Operators' Permit. However, NRIs, who are Indian Nationals shall not be subject to the limit of aforesaid limit of 49%, in which case foreign investments shall be permitted up to 100% under the automatic route.
    - **Amendments to 9.5 (d):** Prior to the third amendment, foreign investments in M/s Air India Ltd, including that of foreign airlines were not permitted beyond 49% (directly or indirectly). However, under the Third Amendment, the aforesaid restriction of 49% shall not be applicable in case of any foreign investments by NRIs who Indian Nationals are, in which case, foreign investments shall be permitted up to 100% under the automatic route.
    - **Insertion of 9.5 (e):** FDI in Civil Aviation shall be subject to the provisions of the Aircraft Rules, 1937, as amended from time to time.
    - **Other changes:** Any investment by foreign airlines in companies operating in air transport services, including in M/s Air India Ltd, shall be subject to the following:
      - Such investment shall be in the equity of companies operating cargo airlines, helicopter and seaplane services, as per the limits and entry routes prescribed
      - **Conditions specified in 9.5(c):** FDI limits specified in Sr. No. 9.2 (Airports) and 9.3 (Air Transport Services) of the NDI Rules (as amended from time to time, including the Third Amendment) shall be applicable in cases where there is no investment by a foreign airline.

The Third Amendment aims to clearly shift the powers from the Central Government to the RBI to administer the NDI Rules and issue directions and circulars to give effect to the NDI rules. It also restricts the foreign investment by OCIs in air transport services in India up to 49% of their paid up capital and provide clarity on the relevant SEBI regulations to be complied with, in respect of foreign investment in air transport services and combine foreign investments by FII/FPI and FDI to 49% in scheduled and non-scheduled air transport services in India.

The Competition (Amendment) Bill, 2020

In order to examine whether the Competition Act, 2020 (**Act**) is in consonance with the current market trend, the Competition Law Review Committee (**Committee**) was created in 2018. The Committee was established with the aim of suggesting any changes in the current regime taking into account the market trends, best international practices, other governmental policies and regulatory mechanisms that overlap the Competition Act, and any other related competition issues. The Competition (Amendment) Bill, 2020 (**Bill**) was then drafted based on the recommendations of the Committee. This key changes proposed are as follows:

- **Establishment of a governing body:** The Committee recognized that the functions performed by the Competition Commission of India (**CCI**) are diverse. Thus, the Bill introduced the establishment of a governing body, that will consist of ex officio members and part-time members. The rationale behind the introduction of the governing body is to reduce the burden on the CCI, as this governing body will be responsible for carrying out all the quasi-legislative functions and policy decisions.
- **Amalgamation of the office of Director General:** The Bill aims to amalgamate the office of Director General (DG) constituted under Section 16 of the Act, as an investigative branch of the CCI.
- **Recognition of settlement or consent orders:** The Bill introduces provisions that recognize the settlement or consent orders, in case of antitrust proceedings. The Bill proposes the introduction of certain provisions that permit an investigated party to offer a settlement or voluntarily undertake certain commitments concerning an anticompetitive vertical agreement or abuse of dominance proceeding. The Bill under these provisions envisions the mechanism to be adopted to permit such commitment or settlement mechanism. The purpose of the adoption of such orders was to enable the CCI to resolve antitrust cases faster, which would, in turn, aid the businesses to avoid lengthy investigation procedure and uncertainty.
- **Clear standards of 'material influence':** The definition of 'control' under the Act did not define the minimum standards required to establish such control, therefore the CCI would use the ability to exercise 'decisive influence' and 'material influence'. The Bill proposes to recognize the standards of 'material influence'. This can bring consistency and certainty in the decisions and can also ensure that many transactions are scrutinized while an investment-friendly economy is sustained.
- **Changes to combinations regulations:** The Bill proposes many changes with regard to the regulations of combinations. Some of these are certain specific grounds that would constitute combination as per the Act and the parties involved in such a transaction would be under a duty to inform CCI before the execution of any such agreement. The Bill introduces the power of the central government in consultation with CCI to identify any other ground which would constitute a combination. The Bill further states that this power would also include the power to delist any ground which would otherwise constitute combination. This leads to an increase in the jurisdictional threshold of CCI, which would lead to including several digital transactions that were currently out of the scope of scrutiny of CCI.
- **Statutory recognition of the green channel process:** The Bill also proposes to recognize the green channel process statutorily. The rationale behind the introduction of such a process is to enable fast-paced regulatory approvals for a vast majority of mergers and acquisitions that may have no major concerns regarding appreciable adverse effects on competition. The goal is to move towards a disclosure-based regime with severe consequences for not providing accurate or complete information. The power of the green channel will also extend to authorize resolutions arrived at in an insolvency resolution process under the IBC.
- **Reduction in time limit for preliminary opinions:** The Bill also lessens the time within which the CCI has to issue its preliminary opinion on whether a combination would have an adverse effect on competition, from 30 working days to 20 calendar days. Such timelines may help ease the burden on the parties involved in the transactions.
- **Inclusion of digital markets in the scope of the Act:** The Bill aims at expanding the scope of the Act to include within its scope the digital markets through express inclusion of hub and spoke arrangement and buyer's cartel. The Committee recognized the strategies used by the companies to escape inquiry under the Act and also considered the orders issued by the CCI in Hyundai Motors case and Uber case, and suggested that the element of 'knowledge' or 'intention' should not be considered under such agreements.
- **Broadened scope of Section 3 of the Act:** The Bill seeks to broaden the scope of section 3 of the Act. It currently restricts the scope of the section to horizontal or vertical agreement leading to an adverse effect on competition. The Bill intends to include other agreements as well, taking into account the decision in *Ramakant Kini v. Dr. L.H. Hiranandani Hospital* and to expand the scope of the provision to include agreement entered in the digital market.
- **Penal powers to DG and CCI:** The principal Act did not grant any penal powers to the DG or the CCI, whereas the Bill intends to introduce a wide range of powers to the DG as well as the CCI. The Bill proposes a provision under which any person who fails to produce any documents, information or record; did not appear before the DG or fail to answer any question by the DG and/or fails to sign the note of cross-examination, shall be punishable with imprisonment of term extending up to six months or fine up to one crore rupees.
- **Increased penalty on individuals in cartels:** The Bill also introduces the highest cap of penalty as 10% of the income of the individual in the preceding three years, in case of the formation of cartels.

SEBI amends Settlement Proceedings Regulations

The Securities and Exchange Board of India (**SEBI**) on July 22, 2020, vide notification[1] issued the Securities and Exchange Board of India (Settlement Proceedings) (Amendment) Regulations, 2020 (**Amendment**) to amend Securities and Exchange Board of India (Settlement Proceedings) Regulations, 2018 (**Regulations**).

The Regulations deal with settlement for alleged or probable contravention of any provision of the securities laws (defined in the Regulations to mean the Act, the Securities Contract (Regulations) Act, 1956 (42 of 1956), the Depositories Act, 1996 (22 of 1996), the relevant provisions of any other law to the extent it is administered by the Board and the relevant rules and regulations made thereunder).

Salient features of the Amendment are set out below:

- The time limit for remittance of the settlement amount has been increased from fifteen (15) calendar days to thirty (30)[2] calendar days from receipt of the demand notice.
- The time limit for extension for making remittance of the settlement amount has been increased to sixty (60)3 calendar days. The extension for making remittance of settlement may be allowed provided the applicant has filed an extension application within thirty (30) days from the date of receipt of the demand notice.
- The requirement to pay the settlement amount by way of 'a demand draft to be drawn in favor of SEBI Mumbai' has been omitted. Payment can now be made through 'electronic' means "or any other authorized" means.
- Entire Chapter VIII of the Regulations which contained Regulation 18 has been omitted. Prior to the Amendment, in case a settlement application was not filed by an applicant within fifteen (15) calendar days from the date of receipt of the settlement notice, such an applicant could file a settlement application only at the next stage in respect of proceedings pending before a Court or a tribunal, after conclusion of proceedings before the Adjudicating Officer or the Board, as the case may be. Accordingly, it would now be open to an applicant to file a settlement application even during the pendency of the proceedings before the Adjudicating Officer or the Board, as the case may be.
- For the purpose of arriving at a settlement, the applicant can present his case or meet only the Internal Committee[4].
- The Amendment has substituted Schedule II, in Chapter VI, in Table X of the Regulations providing a new table for fines for each unit of alleged default for each applicant or on joint liability basis (as per the sum of applicable amounts in case of joint applicants). Earlier, the table for the residuary base amount for alleged default did not include promoters as an applicant. However, the new table for the residuary base amount for alleged default has now included promoters as an applicant in case of the alleged default.

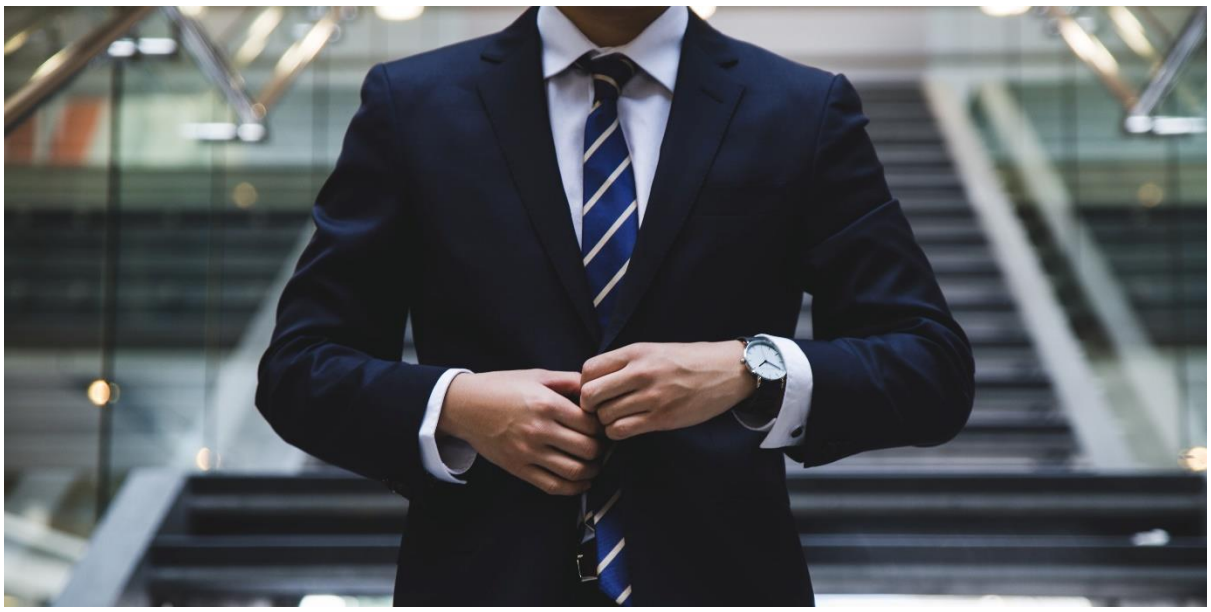
[1] https://www.sebi.gov.in/legal/regulations/jul-2020/securities-and-exchange-board-of-india-settlement-proceedings-amendment-regulations-2020_47147.html

[2] Clause 2(a), Regulation 15 of the Amendment.

[3] Ibid.

[4] Regulation 12 states that Internal Committee(s) shall be constituted by SEBI and shall comprise of an officer of SEBI not below the rank of Chief General Manager and such other officers as may be specified by SEBI.

Beware Observers and Nominee Directors



Shareholders and investors require visibility on the day to day management of a company in which they hold economic interest. The same holds good for lenders with respect to the affairs of the borrowing company. To ensure control and supervision, clauses providing for the appointment of observers and nominee directors on a company's board are commonplace in transaction documents today. The observer is often a predecessor of the nominee director. Since the observer is appointed post-signing but before the consummation of a transaction, once the transaction is consummated, his role ends and the role of the nominee starts. It is thus important for both the nominator as well as the observer/nominee to understand the risks associated with his appointment.

Observers v nominee directors

As compared to observers who are appointed due to contractual obligations, while the genesis of their appointment may lie in a contract, nominee directors are appointed by following the provisions of the Companies Act, 2013 (**Act**). Section 149 read with Section 161(3) of the Act recognizes the appointment of nominee directors under various situations.

Ordinarily, though not independent, nominee directors are non-executive directors and thus, unlike executive directors, are not employed by the company on whose board they sit. Nominee directors may also be vested with powers to veto certain important actions proposed to be taken by the company. Such powers are not conferred statutorily but find mention in contractual arrangements which are then reproduced in the charter documents of the company. Observers are ordinarily appointed in a company to provide the appointer visibility on the actions by the company pending consummation of a transaction. As opposed to a nominee director who can participate in a board meeting, an observers role is limited to merely observing and reporting his observations to his appointor. Thus, observers are not open to violation by a company of any statutory provisions as the observer's appointment is not statutory but emanates from a contractual obligation.

However, an observer does not have complete blanket protection from violations. For instance, where he has been appointed as an observer to a listed company, he may be privy to unpublished price sensitive information being discussed at a board meeting, and towards this end come within the definition of a 'connected person'. He thus needs to be mindful of the provisions of the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015.

A nominee director, unlike an observer, is exposed to statutory violations - a few of which are set out below. Towards this end, the nominee may keep an eye open to take steps to mitigate risks.

- **Companies Act, 2013:**

  Section 166 of the Act makes it mandatory for a nominee director to avoid a conflict of interest situation as he needs to act in the best interest of the concerned company where he is a director. Accordingly, it could be possible that an action taken by him furthering the cause of his nominator, for instance by exercising a veto right, may be challenged on the basis that the decision (while it may have been in the interest of the nominator) is detrimental to the company. Thus, it would be beneficial for the nominee to not blindly follow the decisions of his nominator in cases where there is a direct conflict with the interest of the concerned company. Not all actions taken by a nominee are open to challenge, they would depend on the facts and circumstances peculiar to each case.

  While it is important for a nominee to understand the repercussions of his actions, certain sections of the Act, besides penalizing the corporate entity, also penalizes 'officers in default'. On the face of it, a nominee being a non-executive director does not fall within the ambit of the aforesaid definition unless he did not object or explicitly consented to a contravention under the Act, or consented to fall under the definition of 'officer in default'.

It is further important for the nominee not to be appointed as key managerial personnel of the company as the statutory safeguard afforded to him by Section 149 (12) of the Act will wash away. In terms of the above section, a non-executive director, not being a promoter or a key managerial personnel cannot be made liable for acts pertaining to the company except in limited circumstances where such act had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.

The aforesaid statutory safeguard has also been recognized in a recent circular issued by the Ministry of Corporate Affairs which has clarified that non-executive directors, not being whole-time directors who are involved in the day to day activities of a company must not be unnecessarily arrayed in any civil or criminal proceedings unless the criteria under Section 149(12) is met.

- **Other laws**

  Directors may be liable to prosecution under other laws, including the Negotiable Instruments Act, 1881, Factories Act, 1948 and other labor laws, Income Tax Act, 1961, foreign exchange regime, and securities laws. While the courts have generally been cautious in interpreting the applicable provisions of the above laws to ensure that prosecution can continue only against directors who were in charge of the day-to-day affairs of the company or those who had committed the impugned act. There are judicial decisions that have stated that non-executive directors cannot be said to oversee the day to day affairs of the company. A nominee director, who is a non-executive director, will be exonerated if he is able to prove that the act was committed without his knowledge and had exercised all due diligence to prevent the exercise of such offence.

- **Resignation**

  While the above actions will help mitigate liability during the term of the nominee director, liability post-termination can also ensue. It is imperative that when he resigns from his office, he intimates the fact of his resignation to the company and the company does likewise to the statutory authorities. By doing this, the director, from the date of his resignation, may be protected from statutory violations where the cause of action has arisen post his resignation.

- **Indemnities and insurance**

  The nominee must consider obtaining an indemnity from the company for protecting such nominee for any liability arising out of default, negligence, malfeasance, etc. such director is accused of. The Act recognizes that every officer of the company may be indemnified out of the assets of the company against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favor or in which he is acquitted or in which relief is granted to him by the court or tribunal.

  Similarly, the nominee may also insist the Company to take a Directors and Officers Liability Insurance which may provide cover for the personal liability of directors and officers arising due to wrongful acts in their managerial capacity. Such insurances may also provide defense costs payable in advance of final judgment.

The Consumer Protection (E-commerce) Rules, 2020

Ministry of Consumer Affairs, Food and Public Distribution notified the provisions of the Consumer Protection (E-Commerce) Rules, 2020 (**Rules**) vide notification dated July 23, 2020 under Consumer Protection Act, 2019 (**Act**). The intention of notifying the Rules is to complement the Act by regulating all e-commerce transactions and activities. The primary objective of the Rules is to regulate all e-commerce entities and lay down duties and liabilities of e-commerce entities, marketplace e-commerce entities and sellers selling goods and services on such marketplaces.

- **Applicability**

  The Rules apply to all e-commerce transactions involving goods and services (including digital products), all types of e-commerce models (including marketplace, inventory, single brand retail, multi-channel single brand retail models). The Rules also extend to e-commerce entities that are not established in India, but systematically offers goods and services to consumers in India.

- **Duties/liabilities of E-commerce entities**

  An e-commerce entity is defined as any person who owns, operates, or manages digital or electronic facility or platform for electronic commerce, but does not include a seller offering his goods or services for sale on a marketplace e-commerce entity. An e-commerce entity should be registered as a company in India; or registered as a foreign company under the Companies Act, 2013; or an office, branch, or agency outside India owned or controlled by a person resident in India (as per Section 2(v)(iii) of FEMA. E-commerce entities are required to fulfil certain duties, as provided in Rule 4, which inter alia include the following:

  - **Nodal officer:** Every e-commerce entity is required to appoint a nodal person of contact or an alternate senior designated officer, who is an Indian resident, to ensure compliance with the Act and Rules.
  - **Display of information:** Every e-commerce entity should, on its platform, display in a clear and accessible manner its legal name, address of its headquarters and branch offices, name and details of its website and contact details of the customer care and grievance officer.
  - **Grievance redressal mechanism:** Every e-commerce entity is required to establish an adequate grievance redressal mechanism and appoint a grievance officer, who shall acknowledge all consumer complaints within 48 hours of receipt and redress consumer complaints within 1 month from the date of receipt thereof.
  - **Restrictions:** E-commerce entities are prohibited from:
    - Adoption of unfair trade practice, whether in course of business or otherwise
    - Levying cancellation charges on consumers after confirming purchase, unless similar charges are borne by the entity itself, if they cancel orders unilaterally
    - Manipulating the price of the goods or services offered on its platform so as to gain unreasonable profit by imposing any unjustified price on consumers
    - Discriminating between consumers of the same class or make any arbitrary classification of consumers which affects their rights under the Act
    - Recording the consent of its consumers for purchase of goods/services on its platform by automatically including these in the form of pre-ticked boxes

- **Liabilities of marketplace e-commerce entities**

  Marketplace e-commerce entity means an e-commerce entity which provides an information technology platform on a digital or electronic network to facilitate transactions between buyers and sellers. Such entities can reap the benefits of being an intermediary and avail exemptions granted to intermediaries from being liable in certain cases, by complying with the provisions of Section 79 of the Information Technology Act, 2000 and the

Information Technology (Intermediary Guidelines) Rules, 2011. Pursuant to Rule 5, marketplace e-commerce entities shall:

- Obtain an undertaking from its sellers to the effect that the descriptions, images, and other content pertaining to goods or services on their platform are accurate and corresponds directly with the appearance, nature, quality, purpose and other general features of such good or service
- Display on its platform, in a clear and accessible manner:
  - Details of the sellers
  - Ticket number for consumer complaints enabling consumers to track the status of such complaints
  - Information on refunds, returns, exchanges, warranty and guarantee, delivery and shipment, modes of payment, and grievance redressal mechanism
  - Information on secured payment methods, applicable fees and charges, procedure to cancel payments, charge back options and contact information of the payment service provider
  - Parameters used to determine the ranking of the goods or sellers on is platform
  - Information required to be provided by the sellers as specified in Duties of sellers
- Take reasonable efforts to maintain a record of relevant information on the identification of all sellers who have repeatedly offered goods or services that have previously been removed or access to which has previously been disabled under the Copyright Act, 1957 (14 of 1957), the Trade Marks Act, 1999 (47 of 1999) or the Information Technology Act, 2000 (21 of 2000).

- **Liabilities of inventory e-commerce entities**

  An inventory e-commerce entity means an e-commerce entity which owns the inventory of goods or services and sells such goods or services directly to the consumers, including single brand retailers and multi-channel single brand retailers. Inventory e-commerce entities are subject to similar duties as that of sellers on marketplaces as set out above under duties of sellers. Additionally, an inventory e-commerce entity which explicitly or implicitly vouches for the authenticity of the goods or services sold by it, or guarantees that such goods or services are authentic, shall bear appropriate liability in any action related to the authenticity of such good or service.

- **Duties and liabilities of sellers**

  As per Rule 6, sellers on marketplaces shall:

  - Not adopt any unfair trade practices
  - Not falsely represent themselves as consumers and post reviews or misrepresent the quality or features of any goods and services
  - Not refuse to take back goods, or withdraw or discontinue services purchased or agreed to be purchased, or refuse to refund consideration, if paid, in case the goods and services are defective in any manner or if the goods are delivered late (except on account of force majeure events)
  - Execute a prior written contract with the e-commerce entity before transacting on its platform
  - Appoint a grievance officer and establish a grievance redressal mechanism
  - Ensure that advertisements are consistent with actual characteristics of goods and services being sold
  - Provide to the e-commerce entity (to be displayed on its platform and website):
    - All contractual information to be disclosed by law
    - Total price of the goods and services, including a break-up of all compulsory and voluntary charges
    - All mandatory notices and information provided by applicable laws
    - Expiry date of the goods and details of guarantees and warranties, wherever applicable
    - All relevant details of the goods including country of origin
    - Name and contact details of the grievance officer
    - Details in relation to the import of goods, guarantee related to the authenticity of the import
    - Accurate details on terms of exchange, returns, shipment, refund and delivery of goods and services

Conclusion

The Rules aim to create a more robust and stringent framework for protection of consumer rights and interest of all stakeholders by regulating the activities of e-commerce entities. While the recognition of e-commerce entities and marketplace entities is a step forward, there are some provisions that require further clarity and reconsideration. Under the Rules, an e-commerce entity could be an office, branch or agency outside India owned or controlled by a person resident in India (as per Section 2(v)(iii) of FEMA), the said section in FEMA is worded differently and provides for an office, branch or agency in India owned or controlled by a person resident outside India. Further, the deliberate exclusion of a limited liability partnership from the definition and meaning of an e-commerce entity definitely raises questions on whether a limited liability partnership duly registered in India can operate an e-commerce platform or marketplace. It is also pertinent to note that these Rules have introduced various changes in the working and compliance requirements of e-commerce entities and imposed liabilities and duties on sellers on the marketplace, but there is no framework/timeline provided for existing e-commerce entities to adequately ensure compliance with the prescribed requirements.

Regulatory framework for non-personal data proposed

A draft Personal Data Protection Bill, 2019 (**Draft Privacy Bill**) is presently being considered by the Indian Parliament. In September 2019, the Ministry of Electronics and Information Technology (**MeitY**) constituted a committee of experts (**Committee**) to study and provide it suggestions on regulating non-personal data. The Committee released its report on Non-Personal Data (**NPD**) Governance Framework (**Report**) on July 12, 2020 and made substantive recommendations on the scope, classification, ownership and other issues related to non-personal data. It also made a clarion call for a comprehensive non-personal data regulation in India, to complement the future law dedicated to personal data.

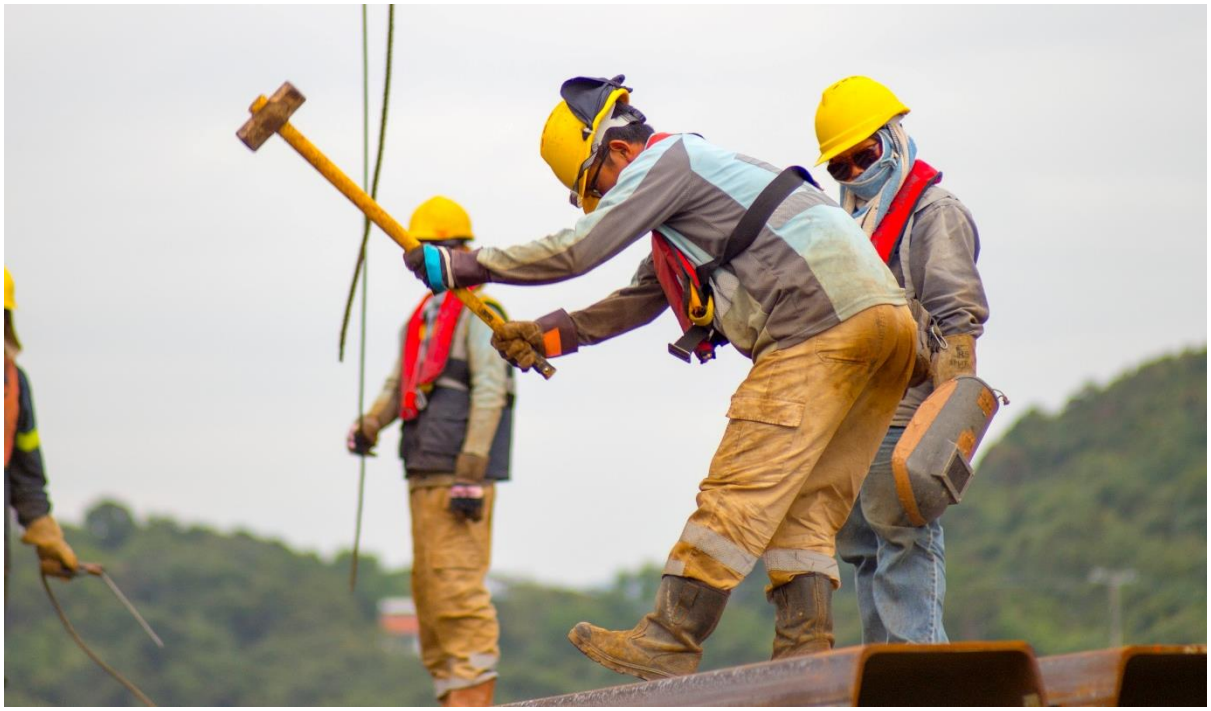
Key recommendations of the Report

- **Definition of NPD:** The report defined NPD as any data that is not personal data and classified into three categories, namely public, community, and private. Public NPD includes data collected or generated by government agencies, community NPD includes anonymized data and private NPD includes data related to privately owned assets of a person or entity or derives as a result of private effort.
- **Sensitive NPD:** The Report defined a new concept of 'sensitivity of Non-Personal Data', as even Non-Personal Data could be sensitive such as data relating to national interest, business interests, or confidential information and anonymized data which bears the risk of re-identification.
- **New regulatory mechanism and authority:** The report suggests the establishment of a separate regulatory authority to enforce underlying rules, undertake risk evaluations and ensure NPD is shared for spurring innovation in the country. The Committee has also recommended the formulation of a new law for the regulation and management of NPD.
- **Regulation of data business:** An organization that collects and provides services using NPD becomes a data business. Such entities have to disclose that they are a data business to the non-personal data regulator. The requirement for registration will be triggered by a threshold decided by regulators.
- **Stakeholders:** Data principal (the person to whom the NPD relates), data custodian (the person who collects/stores, processes, and/or uses the NPD), data trustees (rights based group/community of data principals) and data trusts (institutional structures, comprising specific rules and protocols for maintaining and sharing a given set of data) have been identified as stakeholders that are proposed to be regulated.
- **Consent for anonymized data:** The Report recommends that the data principal should also provide consent for anonymization and usage of the anonymized data while providing consent for collection and usage of his/her personal data. The appropriate standards of anonymization will also be defined to prevent/minimize the risks of re-identification.
- **Ownership of data:** The Report developed certain guiding principles for establishing legal rights over data. These include:
- **Data sovereignty:** Where data sets are considered a national resource, they will be owned by the State
- **Beneficial ownership/interest:** In case of community NPD, rights over the NPD would vest in a trustee and the community would be the beneficial owner
- **Origin:** NPD derived from personal data will be owned by the individual whose personal data is underlying the NPD
- **Data storage:** The principles for storage of personal data stated in the Draft Privacy Bill are suggested for NPD as well. Data storage should be in a distributed format so that there is no single point of leakage and sharing is to be undertaken using APIs only, so that all requests can be tracked and logged. Sensitive NPD may be transferred outside of India but shall continue to be stored locally and critical NPD, which is to be defined and notified by the Government, can only be stored and processed in India. General NPD may be stored and processed anywhere in the world.
- **Data sharing:** Data sharing refers to the provision of controlled access to private sector data, public sector data and community data to individuals and organizations for defined purposes and with appropriate safeguards in place. NPD may be requested by government agencies, citizens, start-ups, companies, NGOs, research institutes and universities for sovereign purposes, core interest public purposes and economic purposes. The report proposes the development of a data sharing mechanism for various purposes and the different categories of NPD.

Data is increasingly taking centre-stage across almost all economic sectors around the world. Data protection and information privacy have been gaining mainstream momentum in India with the forthcoming comprehensive regime for the protection of personal data. The ownership and use of NPD – which refers to data that lacks any personally identifiable information or is data that has been anonymized – is the second prong of the Indian Government's approach to 'data sovereignty.'

While the report is helpful in setting context for the forthcoming regulations for non-personal data and in proposing a data governance regime, the Government is likely to evaluate its content, hold wider consultations and consider other policy aspects prior to formulating a comprehensive data framework governing non-personal data in India.

The Occupational Safety, Health and Working Conditions Code, 2019



The Occupational Safety, Health and Working Conditions Code, 2019 (**Code**) was introduced in the Lok Sabha on July 23, 2019 and referred to the Standing Committee on Labor and Employment on October 9, 2019, which submitted its observations on the Code on February 11, 2020. The Code aims at regulating health and safety conditions of workers in various establishments, and repeals and subsumes 13 labor laws related to safety, health and working conditions of workers, prominently including the Factories Act, 1948 and the Contract Labor (Regulation and Abolition) Act, 1970.

Key aspects of the Code

- **Applicability**
  - The Code applies to establishments that have employed at least ten workers, and in all mines and docks irrespective of the number of employees. It does not apply to apprentices.
  - It provides special provisions for certain types of establishments and classes of employees, including factories, mines, docks, and building or construction workers inter alia.
- **Licenses and registration**
  - Establishments covered by the Code must mandatorily register themselves (within 60 days of the commencement of the Code) with registering officers, appointed by the Central or State government.
- **Safety and welfare provisions**
  - The employer is mandated to provide a hygienic work environment along with absolute care for conditions such as adequate ventilation, sufficient space to avoid overcrowding, potable drinking water, arrangements for separate washrooms for male, female, and transgender workers, etc.
  - The Code also provides for a uniform threshold of welfare provisions for all establishments such as a canteen, crèche, first aid, welfare officer, etc.
- **Duties of employers:** Certain duties of employers have been prescribed under the Code, such as:
    - Ensuring a workplace that is free from hazards that may cause injury or disease
    - Providing periodical health examination to employees in notified establishments
    - Issuing appointment letters to employees
    - Informing the relevant authorities in case an accident at the workplace leads to either death or serious bodily injury of an employee
    - There are other particular duties prescribed for employers in respect of mines, docks, factories, plantations and construction work which include instructing employees about safety protocols and provisioning for a risk-free work environment

- **Duties and rights of employees:** The Code also provides for rights and duties of employees, such as:
  - Right to obtain information from the employer related to employee's health and safety at work
  - Taking reasonable care of their own health and safety, as well as of other persons who may be affected by their acts or omissions at the workplace
  - Compliance with the safety and health requirements specified in the standards
  - Not willfully interfere with, or misuse, or neglect any appliance, convenience or other facility provided at the workplace to secure the health, safety, and welfare of other workers
  - Not act in such a way that is likely to endanger themselves or others
  - Bring any likelihood of imminent serious bodily injury, death or impending danger to health, to the notice of their employer
- **Duties of consultants:** Suppliers, designers, importers, and manufacturers must ensure that articles created or provided by them for usage in an establishment are safe. Information on their proper handling must also be provided to the establishments.
- **Working hours**
  - The appropriate government is empowered to notify working hours for various class of establishments and employees. For overtime, the prior consent of workers is required along with overtime wage, which should be twice the ordinary rate of wages.
  - Female workers may work past 7 pm and before 6 am only with their consent, as prescribed by the appropriate government.
  - Journalists can work a maximum of one hundred and forty-four hours during any period of four consecutive weeks.
- **Leaves:** No worker in an establishment will be allowed to work for more than six days a week, except as provided in the Code. Further, every worker shall be entitled to one day of leave for every 20 days of work per calendar year.
- **Relevant authorities**
  - An Inspector-cum-Facilitator appointed by the Central or State government can inquire into accidents and conduct inspections. They have been given special powers in respect of factories, mines, dock works and building or other construction works, prohibiting work in hazardous environment, and are empowered to reduce the number of employees working in any particular section of the establishment.
  - The Central and State governments are required to set up Occupational Safety and Health Advisory Boards at the national and state level, respectively. These Boards will be advising the Central and State governments on the standards, rules, and regulations to be framed under the Code.
  - Safety committees may also be formed in certain establishments, and for certain classes of workers, by the appropriate government. These committees will aim to function as a liaison between employers and employees.
- **Offences and penalties**
  - Any offence, either by the employer or the employee, that leads to serious bodily injuries or death of any person within the establishment, shall be punishable with imprisonment for a term which may extend to two years, or with a fine up to INR 5 lakh, or both.
  - The courts may also direct that at least 50% of such fine be given as compensation to the heirs of the victim.
  - For any other violation where the penalty is not specified, the employer will be punished with a fine between INR 2-3 lakh.
  - Employees violating any provision of the Code will be liable to a fine of up to INR 10,000.
  - First-time offences which are not punishable with imprisonment can be settled with up to 50% of the maximum fine.

MSMEs under Atmanirbhar Bharat Abhiyan Scheme

Micro, Small and Medium Enterprises (**MSMEs**) are categorized under the Micro, Small and Medium Enterprises Development Act, 2006 (**MSMED Act**). Statistically, the MSMEs comprise approximately 633.88 lakh enterprises, contributing between 28-30% of the country's annual GDP.

The Covid-19 pandemic has adversely impacted such companies and caused various impediments to the operations and functioning of various MSME enterprises. In order to revive the economy and stimulate financial activity, the Government has come with the 'Atmanirbhar Bharat Scheme' (**Scheme**), as a measure to make India self-reliant and independent. Some of the major changes as announced for the MSMEs as a part of the Scheme are the following:

- **INR 3 lakh crores collateral-free automatic loans for business**

  This move aims to provide financial assistance to MSMEs that are in dire need of working capital to meet operational liabilities and expenses, such as procuring raw materials and restarting business. MSMEs with outstanding loans up to INR 25 crore and INR 100 crore turnover are eligible to avail this scheme till October 31, 2020. The interest on these collateral free loans shall be capped and they shall have a tenure of four years with a moratorium of 12 months for repayment of principal amount. The Government shall provide a 100% credit guarantee to banks, NBFSs and other financial institutions on both the principal as well as the interest.

  This measure comes as a relief to over 45 lakh badly hit MSMEs and businesses, which can now safely resume business activity while safeguarding their jobs. The primary objective here is to boost financial activity by pushing banks, NBFCs and other financial institutions to provide access to funds to MSMEs, by providing 100% guarantee for non-repayment of loans by borrowers. Although this is a commendable measure in helping MSMEs secure loans, the ultimate discretion of granting loans rests with the banks, which are often reluctant to disburse loans to MSMEs.

- **INR 20,000 crore subordinate debt for MSMEs**

  With an aim to provide equity support to over two lakh stressed MSMEs, the Government of India shall facilitate the provision of INR 20,000 crore as subordinate debt. Subordinate debt is any type of loan that's paid after all other corporate debts and loans are repaid, in the case of liquidation or bankruptcy. Functioning MSMEs which have stressed account or NPAs will be eligible to avail this scheme. The Government shall also provide a financial support of INR 4,000 crore to Credit Guarantee Fund Trust for Micro and Small Enterprises (**CGFTMSE**), which shall further provide partial credit guarantee support to banks and financial institutions. Under this scheme, promoters of MSMEs will be given debt by banks and other financial institution, which will be used to infuse equity into the MSME.

  Although, unlike credit guarantees, government support in this scheme is only partial, it shall augment the stimulation of financial and economic activity in MSME sector. The scheme shall provide an incentive to banks, NBFCs and other financial institutions to provide debts to promoters of MSMEs for the infusion of equity and ensure financial support to stressed MSMEs.

- **INR 50,000 crore equity infusion through MSME Fund of Funds**

  This scheme aims to address the severe equity shortages faced by MSMEs. The Government has set up a 'Fund of Funds', with a corpus of INR 10,000 crores to provide equity funding for MSMEs with growth potential and viability. This Fund of Funds will be operated through a Mother Fund and few Daughter Funds. The fund will be structured in a manner that will help leverage INR 50,000 crore of funds at Daughter Funds level.

  This scheme addresses the most crucial and common challenge faced by most MSMEs and new businesses, i.e., getting sufficient funding to accelerate growth and scale operations. As this challenge has become worse because of the outbreak of Covid-19 pandemic, the Government, vide Fund of Funds, has undertaken the role of an investor. As an investor, the government aims financially and strategically assist the MSMEs to expand in size and capacity. The ultimate objective here is to encourage MSMEs to get listed on stock exchanges.

- **New definition of MSMEs**

  The Government has finally addressed the long-pending demand for revision of the definitions of Micro, Medium and Small enterprises. These revisions are threefold:

  - Existing investment limit has been revised upwards
  - An additional criterion of 'turnover' has been introduced, which shall be an additional requirement to the existing investment criterion
  - The distinction between manufacturing sector and service sector shall be done away with and both the sectors shall have the same investment and turnover limits

The following table present the existing and revised definitions:

Erstwhile MSME Classification **Criteria: Investment in Plant and Machinery/Equipment**			
Classification	**Micro**	**Small**	**Medium**
Manufacturing Enterprises	Investment not more than INR 25 lakhs	Investment not more than INR 5 crores	Investment not more than INR 10 crores
Enterprises rendering Services	Investment not more than INR 10 lakhs	Investment not more than INR 2 crores	Investment not more than INR 5 crores
Revised MSME Classification (w.e.f. July 1, 2020) **Composite Criteria: Investment in Plant and Machinery/Equipment and Annual Turnover**			
Classification	**Micro**	**Small**	**Medium**
Manufacturing Enterprises and Enterprises rendering Services	Investment in P&M/Equipment not more than INR 1 crore and Annual Turnover not more than INR 5 crores	Investment in P&M/Equipment not more than INR 10 crores and Annual Turnover not more than INR 50 crores	Investment in P&M/Equipment not more than INR 50 crores & Annual Turnover not more than INR 250 crores

Although these revisions have been made pursuant to financial crisis resulting from the outbreak of Covid-19 pandemic, they address a long-standing concern that was initially highlighted in the Micro Small and Medium Enterprises Development (Amendment) Bill, 2018. The parameters in the earlier definition caused the promoters to restrict their investments to small levels in order to ensure that they fall under the category of MSME, resulting in stunting of their growth. Low threshold limits in the MSME definition has killed the urge to grow as result of a fear of graduating out of the benefits of falling under the said category. Therefore, the new definition aims to bring more entities under the ambit of MSMEs and widen the scope of entry for businesses.

- **Global tenders to be disallowed up to INR 200 crores**

  By disallowing participation of global entities or global tenders in government procurement tenders up to INR 200 crores, the Government aims to address the unfair competition faced by MSMEs from foreign companies. This is in line with schemes such as 'Self-Reliant India' and 'Make in India'. The objective of this measure is to promote self-reliance and independence of the domestic sector in India. Although India has huge potential local and domestic industries, they are often overlooked in the face of foreign companies and global giants. Therefore, this measure will give opportunities to MSMEs to grow their business and ensure that the government is less dependent on international entities for their domestic work.

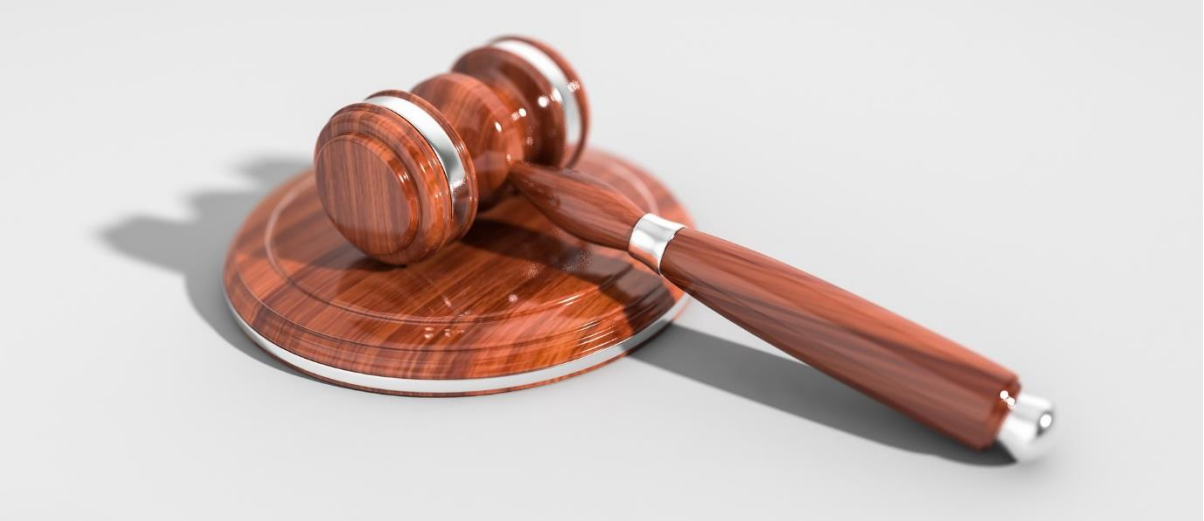
- **Other interventions for MSMEs**

  As a result of Covid-19 and social distancing norms, MSMEs currently face problems of marketing and networking, which are essential boosters to their growth. Therefore, the Government shall facilitate E-market linkage to replace trade fairs and exhibitions. Further, fintech will be used to enhance transaction-based lending using the data generated by the e-marketplace. The Government has also announced that it shall monitor pending settlement of dues to MSMEs and also issue an ultimatum to Government Central Public Sectors Undertakings to settle the dues within 45 days.

Conclusion

The Government has rightly identified the problems faced by the MSME sector and has formulated laudable measures to alleviate these problems. By providing financial support through various policies, like increase in credit guarantees, subordinate debts, clearing of outstanding dues and a broader definition of MSME, the Government is making significant attempts to revive this sector and provide incentives to financial institutions who are in a position to help the MSMEs. Although in theory the Scheme and the measures under the Scheme may seem effective, it cannot be denied that the practical applications may prove inadequate. Time will be the judge of that, but they would go a long way to stimulate the growth of MSMEs and boost the efforts to make the country self-reliant under the Atmanirbhar Bharat Abhiyan.

Telecom companies and the AGR dispute



The country's telecom sector has witnessed severe headwinds over the past several years, led by intense competition and pricing pressure that have adversely impacted revenue and profitability. The telecom companies reported record losses after making provisions towards the Supreme Court's ruling on the definition of adjusted gross revenue (**AGR**) which requires private telecom service providers to pay out higher sums towards license fee and spectrum usage fee. Telecom companies not only owed the government the shortfall in AGR for the past 14 years but also an interest on the amount along with penalty and interest on penalty. The Department of Telecommunication (**DOT**) in March 2020 had moved the Supreme Court recommending payments over a period of 20 years as it is believed that the lumpsum payment could result in possible bankruptcy and could be the final straw for the already distressed sector.

While the definition of AGR has been under litigation for over 15 years now, it is commonly a fee-sharing mechanism between the Government of India (**GoI**) and the telecom companies which are required to pay a license fee and spectrum charges in the form of revenue share to the government. While the government stated that AGR includes all revenues from both telecom as well as non-telecom services such as deposit interests and sale of assets, the telecom operators suggested that it should include only the revenue from core services and that non-telecom services should not be included. On October 24, 2019, the Supreme Court widened the definition of AGR to favor the government's view and included all revenues, except for termination fee and roaming charges.

In a significant move, the Supreme Court of India on July 20, 2020 reserved its order on the government's petition to permit telecom companies such as Vodafone Idea, Bharti Airtel and others to make staggered payments of the AGR over a period of 20 years. The apex court stated that there is no going back on the DoT's demand on the AGR issues, and it will only consider the payment timeline. In the subsequent hearing held on August 10, 2020 the Court ordered the government to prepare a plan for recovering AGR-related dues from bankrupt telecom operators and adjourned the case to August 14, 2020

In its hearing on June 18, 2020 the apex court directed the telecom companies to make a minimum payment to show their bona-fide and provide accounts for the last decade for assessment in order to create a staggered payment plan, if allowed. The court remained unconvinced that the telecom companies had sufficiently justified the timeline requirement and stated that there was no guarantee of what could happen over 20 years.

On July 20, 2020, the Supreme Court also directed the DoT to submit insolvency details of bankrupt telecom companies – Reliance Communications (**Rcom**), Videocon, and Aircel - within seven days. The Court further observed that Rcom has massive unpaid AGR dues and will examine if the insolvency proceedings are bona-fide as it can be wrongfully used to clear all AGR related debt. The Court also noted that there can be no going back on AGR dues and that the computation given by the DoT is to be considered as final, further adding that there is no chance for any re-assessment of the said dues. On September 1, 2020, the Supreme Court has given the telecom companies 10 years to repay their AGR. The companies are to pay 10% of the payment by March 31, 2021 and the remaining through annual instalments, failing which their CEOs will be held liable.

The AGR issue casts a significant degree of uncertainty on the telecom sector and will have a long-term bearing on structure and recovery of the sector. While the government has been deprived of the extra revenue, the financial implications for telecom companies, who now must pay the overdue amounts piled up for years, is at a crucial juncture with profits under pressure and the falling average revenue per user. India being the second largest consumer of mobile data globally, the way forward would be to leverage the strengths of the sector while navigating the potholes of regulation, changing technology, consumer dynamics and pricing.

Contributions by

Bharat Sharma
Partner

Dipti Lavya Swain
Partner

Gaurav Sahay
Partner

Jivesh Chandrayan
Partner

Sunando Mukherjee
Partner

Ankit Shah
Senior Associate

Anant Joshi
Associate

Ashni Gupta
Manager

Krishal Morjaria
Associate

Shreya Pola
Associate

Shruti Sundararajan
Associate

J R Ragini
Intern

Global Recognition

Pan-India Presence

New Delhi

81/1 Adchini
Sri Aurobindo Marg
New Delhi – 110 017

Phone: (+91) (11) 6638 7000
Email: newdelhi@hsalegal.com

Mumbai

Construction House, 5th Floor
Ballard Estate
Mumbai – 400 001

Phone: (+91) (22) 4340 0400
Email: mumbai@hsalegal.com

Bengaluru

Aswan, Ground Floor, 15/6
Primrose Road
Bengaluru – 560 001

Phone: (+91) (80) 4631 7000
Email: bengaluru@hsalegal.com

Kolkata

No. 14 S/P, Block C,
Chowringhee Mansions
Kolkata – 700 016

Phone: (+91) (33) 4035 0000
Email: kolkata@hsalegal.com

Stay connected

www.hsalegal.com

mail@hsalegal.com

HSA Advocates