REGULATORY FRAMEWORK FOR FOREIGN DIRECT INVESTMENT IN THE INDIAN TELECOM SECTOR AND ITS IMPACT ON THE TELECOM ECONOMY

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Abstract

This research paper discusses and analyzes the regulatory framework that govern Foreign Direct Investment in the Indian Telecom Sector with an objective to highlight its impact on the growth and development of the Telecom Economy thereby making it a Techno-Legal paper in nature. The success or failure of every sector is judged by its economic contribution towards the country and Telecom Sector is no exception. Hence the Researcher has made an honest attempt to present a comparative analysis of various performance indicators of the Telecom Sector so as to give an insight into the scope and significance of FDI in the sector. Technological Advancements and Regulatory Reforms in Telecom Sector go hand-in-hand and therefore the Researcher has discussed various Regulatory Issues and Challenges that surround FDI in the sector. Through this Paper, the Researcher emphatically emphasizes on the urgency to create a harmony between FDI Policies and Technological Advancements in order to make the Indian Telecom Sector lucrative for FDI in future.

Key words

FDI Policy in India, Mobile Economy, Doing Business in India, Digital India, Indian Economy, and National Telecom Policies of India.

I. INRODUCTION

The Telecommunication Sector drives the output of an economy in two ways: Direct as well as Indirect. Direct Support comprises capital investments, production of goods and services, job opportunities and cross- border trade and commerce inter alia. Indirect contribution to an economy is reflected through growth in business efficiency, improved speed and quality of information provided, smooth and easy reach in telecom markets, efficient management of manpower and processes and introduction of new innovations.[1]

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[1]Frontier Economics, Contribution To The Digital Communications Sector To Economic Growth And Productivity In The UK 6 (Sept. 2011), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/77464/FE-Full-Report_digitalcomms_economicgrowth.pdf (last visited June. 10, 2018).

The Indian telecommunications sector, driven by advanced technologies, rising consumer demands and business competition, provides a huge scope and ambience for investments to Network Operators and telecom service providers. With the second largest subscriber base in the world with 1,146.49 million wireless connections,[2] the telecom industry is accelerating towards growth.

India has trounced the United States of America by becoming the world's second largest smart phone subscriber base with 299.24 million smart-phone subscribers[3] and that too when only one- fourth of its population is using smartphones. Since September 2015, 38 new cell-phone manufacturing units have been established in India, and many more are in line, which have intensified the manufacturing of mobile phones in the Year 2015-16 by approximately 90%[4] and which is still surging by leaps and bound.

Currently, the Indian mobile industry contributes 6.5% ($ 140 billion) to country's Gross Domestic Products (hereinafter referred as GDP) and has provided job opportunities (direct and indirect) to over 4 million people.[5] These figures are likely to multiply in the coming years. The latest GSMA Report predicts that by 2020, the Telecom industry is likely to add 8.2% to India's GDP and provide 800,000 more employments.[6] Similarly, with regard to unique mobile phone subscribers, India is predicted to go beyond 1 Billion subscriptions by 2020.[7] India will also witness a significant rise in adoption of LTE Technology with the number of LTE/ 4Gconnections calculated to touch 280 million by 2020 from just 3 million in 2015.[8]

The above figures clearly show that Foreign Direct Investment [hereinafter referred to as FDI] in the Telecom sector has helped India to achieve financial stability and growth. According to the International Monetary Fund, the Indian economy is the third largest economies in the World, in terms of Gross Domestic Product (GDP) based on Purchasing Power Parity (PPP) with the annual rise in GDP of 7.36% from 2011- 18.[9]

II. FOREIGN DIRECT INVESTMENT IN THE INDIAN TELECOM INDUSTRY

Over the past two decades, India has transformed from an agrarian economy to a service and industry based economy. This paradigm shift in the economy has enabled India to emerge as a global hub for information technology and communications. In the last 17

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[2]Telecom Regulatory Authority of India, The Indian Telecom Services Performance Indicators April- June 2018, at 13 (Oct. 3, 2018), available at:

https://www.trai.gov.in/sites/default/files/PIRJune03102018.pdf (last visited Oct. 10, 2018).

[3]Statistica, The Statistics Portal, available at: https://www.statista.com/statistics/467163/forecast-of-smartphone-users-in-india/ (last visited Aug. 30, 2018).

[4]Invest India, available at: https://www.investindia.gov.in/sector/telecom (last visited Oct. 13, 2018)

[5]GSMA, The Mobile Economy India 2016, available at: https:// www.gsmaintelligence.com/research/?file=134a1688cdaf49cfc73432e2f52b2dbe&download (last visited Oct. 13, 2018).

[6]Id. at 5.

[7]Id. at 4.

[8]Id. at 2.

[9]International Monetary Fund, World Economic Outlook (October 2018), available at: https://www.imf.org/external/datamapper/PPPSH@WEO/OEMDC/ADVEC/WEOWORLD/IND (last visited Oct. 13, 2018).

years, the telecom industry has received a total of US $ 30,029.84 million[10] as FDI equity inflow, making it the third highest sector attracting foreign investments .[11]

Given below is Table 1, which shows the Financial Year- Wise FDI Equity Inflows in the Telecommunications Sector from April 2001 to September 2017 and the fluctuating FDI inflows reflect the impact of liberalization, privatization, technological advancements and policy and regulatory framework on foreign investments in the telecom sector in India.

Table 1: Statement on Financial Year Wise FDI Equity Inflows[12]

From April 2001 to December 2017

Telecommunications Sector

Year	FDI in Rs million	FDI in US$ million
2000- 01 (Apr- Mar)	7841.59	177.69
2001- 02	39,384.61	873.23
2002- 03	9,077.31	191.60
2003- 04	3,978.40	86.49
2004- 05	5,411.01	118.33
2005- 06	27,514.50	617.98
2006- 07	21, 495.77	476.51
2007-08	50,995.61	1,260.70
2008-09	116,848.11	2,548.63
2009-10	122,696.62	2,539.26
2010-11	75,420.44	1,664.50
2011-12	90,115.26	1,997.24
2012-13	16,543.04	303.87
2013-14	79,872.83	1,306.95
2014-15	173,718.22	2,894.94
2015-16	86,373.81	1,324.40
2016- 17	374,351.59	5,563.69
2017- 18 (Apr- Sep, 2017)	389,260.97	6,083.80
Grand Total	1,690,899.67	30,029.84

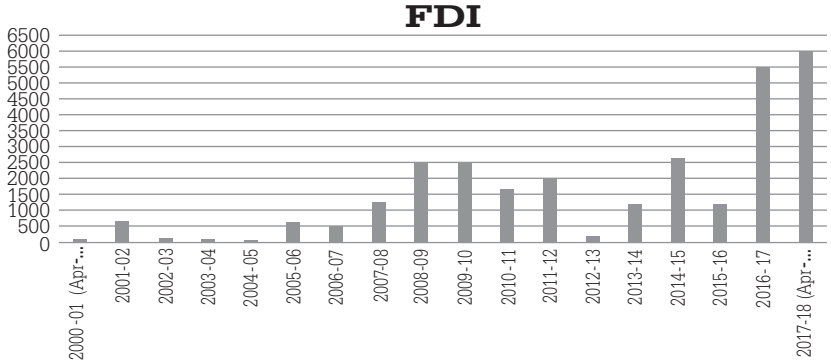
[10]Department of Telecom, Government of India, Statement on Financial Year Wise FDI Equity Inflows From April 2000 to September 2017, available at:

http://www.dot.gov.in/sites/default/files/2016_11%20FDI-%20Year-wise.pdf (last visited Oct. 13, 2018).

[11]Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, Fact sheet On Foreign Direct Investment From April 2000 To December 2017, at 9, available at: http://dipp.nic.in/sites/default/files/FDI_FactSheet_23August2018.pdf (last visited Oct. 13, 2018).

[12]*Supra* note 10.

Chart 1: FDI Equity Inflows
From April 2001 to December 2017
In the Telecommunications Sector



From the above table it is clear that the Telecom Sector had witnessed unprecedented growth during 2005-10 due to the entry of new operators, reduction in mobile tariffs, sudden rise of advanced cellular mobile phones and deployment of 2G network across the country. This is evident from the fact that the wireless subscriber base witnessed a compound annual growth rate of 70 per cent to reach 315 million in the quarter ended September 2008[13] from 65 million in the corresponding quarter in 2005.[14] With Foreign Equity Inflow of US$ 2539.26 Million in the Year 2009- 10,[15] seventeen Wireless Service Providers[16] and twelve Wireless Operators[17] by March 2009, India was seen as one of the biggest telecom markets in the world. Furthermore, the Government of India cleared the air for foreign investors who were planning to enter the Indian telecom market by increasing the FDI limit for basic cellular services from 49 per cent to 74 per cent in 2005.[18] This change in FDI Policy encouraged the investors to acquire majority shareholding in Indian operators, thereby providing them control over the latter's operations.This also paved the way for aseries of acquisitions by foreign players, starting from 2007 onwards, when the UK-based Vodafone Plc acquired Hutchison Whampoa's stakes in Hutchison Essar. Whereby, Vodafone Plc acquired a 67 per cent stake from Hutchison Telecommunications International Limited for $11.1 billion in an all-cash

[13]Telecom Regulatory Authority of India, Government of India, The Indian Telecom Services Performance Indicators July- September 2008, at 4 (Jan. 13, 2009), available at: https://www.trai.gov.in/sites/default/files/Report13jan09.pdf (last visited Oct. 5, 2018).

[14]Telecom Regulatory Authority of India, Government of India, The Indian Telecom Services Performance Indicators July- September 2008, at 4 (Dec. 2005), available at: https://www.trai.gov.in/sites /default/files/report27dec05.pdf (last visited Oct. 5, 2018).

[15]*Supra* note 10.

[16]Telecom Regulatory Authority of India, Government of India, The Indian Telecom Services Performance Indicators January- March 2009, at 25 (July 13, 2009), available at: https://www.trai.gov.in /sites/default/files/ReportQEMar09.pdf (last visited Oct. 5, 2018).

[17]*Id.* at 27.

[18]Department of Industrial Policy And Promotion, Ministry of Commerce and Industry, Government of India, Foreign Direct Investment Policy 10 (April 2006), available at: http://218.248.11.68/industries/PDF/fdi_policy_2006.pdf (last visited Oct. 5, 2018).

transaction. Subsequently, Russia's Sistema, Norway's Telenor, UAE's Etisalat, the Bahrain Telecommunications Company (Batelco) and Japan's NTT DOCOMO made acquisitions which resulted in FDI inflows of Rs 51 billion and Rs 117 billion in 2007-08 and 2008-09 respectively. This was despite the fact that developed economies were facing a slowdown and global companies were reducing costs, which showed the potential of the Indian telecom market. The acquisition of equity stake by international players provided domestic operators the much-needed capital to expand operations and bid for spectrum in the auctions. However, the deceleration of foreign investments in the telecom sector started in the year 2010-11 when 3G spectrum was auctioned for the first time in India because after paying a whopping sum of Rs 67,700 crore, the telecom operators lacked funds to deploy 3G network in the country.[19] The telecom industry was still struggling to recuperate from this loss when the 2G Scam came like a tsunami that did not give any opportunity to the wireless cellular mobile industry to stand firm. The cancellation of 122 licenses on February 2, 2012, by the Supreme Court of India in the 2G Spectrum case[20] created an uncertain and unpredictable environment thereby highlighting the issues of corruption and faulty regulatory framework which further reduced foreign investments in the industry in the year 2012- 13. This called for an urgent need to introduce a comprehensive telecom policy to accelerate the growth of the Telecommunications Sector in India and therefore the Government introduced The National Telecom Policy- 2012 in May 2012. The following objectives of National Telecom Policy- 2012 supported FDI in the telecom sector -[21]

i. Provide affordable access to good quality telecommunication services to all citizens.

ii. Increase rural tele-density to 70 by the year 2017 and 100 by the year 2020.

iii. Give broadband-on-demand by the year 2015 and to reach the target of 175 million broadband connections by 2017 and 600 million by the year 2020 at minimum download speed of 2Mbps and provide higher speeds of at least 100 Mbps on demand.

iv. Encourage research & development, technological innovation and manufacturing at the national level

v. Give priority to domestically manufactured telecommunication products.

vi. Provide a simplified Merger & Acquisition regime in telecom service sector while maintaining a business environment for adequate competition and fair- play.

The above mentioned objectives of National Telecom Policy 2012 created an environment in the Indian Telecom Sector for attracting a good amount of FDI in India. In order to achieve the above objectives of National Telecom Policy 2012, the government

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[19]R. Sukumar, "Policy lessons from the 3g Failure" (Apr. 11, 2012, 1:48 PM), available at:
https://www.livemint.com/Opinion/FRQGcvIClZDzCS6EK0Cq4I/Views--Policy-lessons-from-the-3G-failure.html, (last visited June 27, 2018).

[20]Centre for Public Interest Litigation & Ors v. Union of India & Ors, W.P. C No. 423/ 2010, SC (India), available at: http://www.indiaenvironmentportal.org.in/files/2G%20spectrum.pdf.

[21]Department of Telecom, Government of India, National Telecom Policy- 2012, at 5-7
http://www.dot.gov.in/sites/default/files/NTP-06.06.2012-final_0.pdf (last visited Aug. 23, 2018)

allowed 100 per cent FDI (FDI) in the telecom sector on August 22, 2013,[22] to satisfy the key demand of the fund-starved industry. The FDI Policy of 2013 decided to increase FDI cap in telecom to 100 per cent from 74, up to 49 through automatic route and beyond that.[23] The government removed the FDI cap for the telecom sector in 2013 to provide an opportunity to foreign investors to gain complete ownership and control of their telecom ventures in India, and hence not being restricted by the funding capacity of their local partners. The liberalization of FDI regulations propelled the Telecommunications Sector towards rapid growth and made it stand as the third largest sector to attract FDI equity inflows in the Indian economy.[24]

In order to attract further investments in the country, the government also initiated 'Make in India' Programme in 2014, followed by 'Digital India' and 'Start up India' Programmes in the year 2015 and 2016 respectively. The major policy developments in the sector included spectrum auctions that earned huge revenues; the introduction of spectrum sharing and trading norms that allowed operators to procure a greater quantum of spectrum to improve services; approval of active infrastructure sharing guidelines; grant of licenses to virtual network operators; speedy implementation of the BharatNet project; and grant of payments bank licenses. However, it is pertinent to mention here that despite the introduction of such promising policy initiatives, foreign investments in the telecom sector fell by 54 per cent in the year 2015-16.[25] This was the result of divestments by foreign players due to unreasonably high spectrum prices in 2016 spectrum auction and entry of Reliance Jio who offered 4G services at lowest tariffs in the world. While realizing the existence of complex and complicated procedure for establishing businesses, the Indian Government, through the Union Budget 2017-18, laid down provisions for ease of doing business in India and took steps to move India towards double digit growth by reducing cap on foreign investments, enabling early dispute resolution and simplifying taxation laws.[26]

III. THE CONSOLIDATED FDI POLICY, 2017

The Department of Industrial Policy and Promotion drafts the FDI Policy in India which enumerates the sectors in which foreign investment is permitted along with the attached conditions and limits on various sectors. It also enumerates the sectors in which FDI is Automatic and those in which it requires approval of the Government of India. The Policy defines FDI as an investment by non-resident entities in the capital of an Indian company under Schedule 1 of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000.[27]

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[22]Department of Industrial Policy And Promotion, Ministry of Commerce and Industry, Government of India, Press Note No. 6 (2013 SERIES), at 5 (Aug.22, 2013), available at: http://dot.gov.in/sites/default/files/pn6_2013.pdf (last visited Aug. 23, 2018).

[23]*Ibid.*

[24]*Supra* note 11.

[25]*Supra* note 10.

[26]Ministry Of Finance, Government Of India, Union Budget 2017-18, at 9, 14, available at:

http://indiabudget.nic.in/ub2017-18/bh/bh1.pdf (last visited Aug. 23, 2018).

[27]Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, Consolidated FDI Policy 6 (Aug. 28, 2017), available at:

http://dipp.nic.in/sites/default/files/CFPC_2017_FINAL_RELEASED_28.8.17.pdf (last visited July 2, 2018).

On August 28th, 2017, the Department of Industrial Policy and Promotion (DIPP) had issued the updated and revised FDI Policy, 2017 - 2018 (hereinafter referred to as the FDI Policy 2017). The FDI Policy 2017 incorporated various notifications issued by the Government of India over the past years. The Policy has introduced an improved and systematic procedure for Government approval for foreign investments through various amendments in the previous FDI Policy of 2016.

Given below is a list of various amendments introduced by the FDI Policy of 2017-

a. Abolition of the foreign investment promotion board (FIPB):The most significant amendment to the FDI policy has been the structural modification made through a notification dated June 5, 2017 issued by the Department of Economic Affairs confirming the abolition of the FIPB (the former government body authorised to approve proposals for foreign investments that sought government approval); and replacing it with the 'Foreign Investment Facilitation Portal' (FIFP), an administrative body to facilitate FDI applicants.

b. Specifying 'competent authorities' for various economic sectors: The FDI Policy 2017 defines and enumerates sector-specific administrative ministry / department as 'Competent Authorities,' empowered to grant government approval for foreign investments. The Department of Telecommunications (hereinafter referred as DoT) is the competent authority with regard to the Telecommunications Sector in India.

c. Establishing a 'standard operating procedure' (SOP) to process FDI proposals: The Policy has also introduced a Standard Operating Procedure that lays down a detailed procedure and time- limit for applications. The Policy also provided a list of 'competent authorities' for processing government approvals for foreign investments in India. Under this procedure, investors are supposed to make an application on the website of the Foreign Investment Facilitation Portal, along with the listed documents that include relevant charter documents, board resolutions, etc. The application is then forwarded to the concerned 'Competent Authority' and the Reserve Bank of India (for comments from a foreign exchange law perspective) within two days. Proposals requiring security clearance (in sectors such as telecommunication) shall also be forwarded to the Ministry of Home Affairs. The Competent Authority shall then process the complete proposal and convey the approval / rejection of such proposal to the applicant in the format prescribed under the SOP.

d. Provision for speedy approval to FDI proposals: In order to avoid unnecessary delay in approvals, consultation with the Department of Industrial Policy and Promotion has been made strictly need based so as to enable a systematic procedure and expeditious approval within 10 weeks. The FDI Policy 2017 also directs that the Competent Authority may only reject a proposal or stipulate conditions in addition to those listed in the FDI Policy 2017 / applicable sectoral laws with the concurrence of the DIPP.

e. Conversion of limited liability partnerships (LLPS): The FDI Policy 2017 also allows a Limited Liability Partnership, operating in those sectors where 100% FDI is allowed under the automatic route (i.e. without FDI-linked performance conditions), to convert into a company. Similarly, conversion of a company into a Limited Liability Partnership has also been permitted under the automatic route.

f. Issue of convertible notes by start-ups: The FDI Policy 2017 has introduced the issuance of: 'Convertible Notes' (instruments representing debt repayable at the option of the holder, or convertible into equity shares within 5 years from issue) by Start-ups to persons resident outside India; and Equity or Equity- linked / debt instruments by Start-ups to Foreign Venture Capital Investors.

Issuance of Convertible Notes is, however, subject to the following conditions: (a) Under automatic route, a Non-Resident may purchase Convertible Notes for approximately USD 39,500 or more in a single tranche and the consideration shall be received by inward remittance through normal banking channels or as otherwise permitted under the existing foreign exchange regulations applicable; (b) Start-ups established in sectors who seek government approval for FDI have been allowed to issue Convertible Notes only after an approval by the government; (c) Non-Residents can acquire or transfer Convertible Notes from or to persons residing in India or Non-Residents only by complying with the pricing guidelines under the Indian foreign exchange regulations; and (d) Start-ups issuing Convertible Notes must fulfil the reporting requirements as prescribed by the Reserve Bank of India.

IV. KEY INVESTMENTS IN WIRELESS MOBILE COMMUNICATION INDUSTRY IN INDIA FROM 2013- 2016

The decision of allowing 100 percent FDI in the Telecom Sector by the Government brought a new ray of hope for the sector and benefitting from this decision of the Indian Government, Vodafone Inc. was the first company to bring foreign investment in India. The British telecom major, Vodafone Plc on October 29, 2013 sought the Foreign Investment Promotion Board's (FIPB's) approval to bring in Rs 10,141 crore to raise its 64 per cent equity stake in Vodafone India to 100 per cent.[28] Vodafone's application to buy out its Indian subsidiary' partners came within two months of the government allowing 100 per cent foreign ownership in an Indian telecom company. It was the second foreign Telecom company to seek permission to do so, after Singapore's SingTel got the Foreign Investment Promotion Board's approval in October 2013, to buy Bharti Airtel's 9.9 per cent share in a joint venture for international long distance calls.[29]

During 2015-16, the major FDI deal took place between the U.S. based American Tower Corporation (ATC) and Viom Networks whereby the former acquired a 51 per cent share in the latter. Valued at Rs 76 billion, this was ATC's largest acquisition in India.

Earlier, in April 2015, ATC and KEC International entered into a deal whereby ATC acquired 381 telecom sites across Chhattisgarh, Meghalaya and Mizoram for $13 million. Another key deal in the telecom infrastructure segment was between E2 Energy Services and GTL Limited, in which the latter sold its operations, maintenance and energy management business for Rs 8.5 billion in a slump sale.

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[28]Business Standard Reporter, Vodafone to invest Rs 10,141 cr to raise stake in Indian arm to 100 %, Business Standard (Oct. 30, 2013, 2:17 IST), available at: https://www.business-standard.com/article/companies/vodafone-to-invest-rs-10-141-cr-to-raise-stake-in-indian-arm-to-100-113102901056_1.html (last visited July 1, 2018).

[29]Tele.net.in, Debt and Equity moves in the sector in 2013, Tele.net.in (Feb 12 2014), available at: http://www.tele.net.in/index.php?option=com_k2&view=item&id=14213:debt-and-equity-moves-in-the-sector-in- 2013&Itemid=61 (last visited Oct. 13, 2018).

In September 2015, UK-based New Call Telecom acquired public Wi-Fi provider Ozone Networks, which has the largest number of public and private Wi-Fi hotspots in India, for an undisclosed amount.

As on September 2016, Reliance Communications merged operations with telecom operator Aircel.

In April 2017, Japan- based NTT Communications acquired a Virtual Network Operator - International Long Distance (VNO-ILD) license in India. The license has enabled NTT Com to add Arcstar Universal One International Network Services in its brand. The company aims to use its ICT solutions to assist Indian enterprises and multinational corporations.[30]

Table 2 below presents the Key FDI Deals in India from 2013- 2018. The researcher has covered the deals from the Year 2013 because 100 percent FDI was allowed then that paved the way for new investments by foreign players.

Table 2: Important FDI Deals in India from 2013- March 2018.[31]

Foreign Collaborator	Country	Indian Company	FDI (USD/ Million)
Prime Metals Limited	Mauritius	Vodafone India	1,500.79
SingTel (2013)	Singapore	Bharti Airtel	660
Videocon Mauritius Energy Limited	Mauritius	Videocon International Electeonics Limited	719.76
Federal Agency For State Property Manage	Russia	Sistema Shyam Teleservices Limited	451.83
Telenor Asia Pte Limited	Singapore	Unitech Wireless Tamilnadu Private Limited	298.75
Telenor South Asia Investment Pet Limited	Singapore	Telewings Communication Services Private Limited	274.40
QIB Class	Mauritius	Bharti Infratel Limited	240.37
Axiata Investments 2 (India) Limited	Mauritius	Idea Cellular Limited	123.22
NTT Communications Corporation	Japan	Netmagic Solutions Private Limited	85.79
Qatar Foundation Endowment		Bharti Airtel	1260
Omega FII Investment Pvt. Limited	Singapore	Tata Sky Limited	53.89

[30]NTT Communications, NTT Com Acquires International Telecom License in India (Apr 25, 2017), available at: https://www.ntt.com/en/about-us/press-releases/news/article/2017/0425.html (last visited Oct. 13, 2018).

[31]IBEF, Telecommunications 29 (July 2018), available at: https://www.ibef.org/download/ Telecommunications-Report-July-2018.pdf,(last visited July 9, 2018).

Foreign Collaborator	Country	Indian Company	FDI (USD/ Million)
Tiger Global Eight Holdings	Mauritius	Hike Private Limited	50.80
Essel International Limited	Mauritius	Siti Cable Network Limited	48.17
International Finance Corporation	U.S.A	Tikona Digital Networks Private Limited	46.39
Anchor Investors (Total) 6 Investors)	Mauritius	Bharti Infratel Limited	32.59
Essar Telecom Limited	Mauritius	Agc Networks Limited	29.13
Network Digital Distribution Services FZ	UAE	Tata Sky Limited	23.77
Tower Vision Mauritius Limited	Mauritius	Tower Vision India Private Limited	23.71
EGN B.V	Netherlands	Orange Business Services India Network P, Global One (India) Private Limited	19.39
GS Investment Partnerrs (Mauritius) I Lim	Mauritius	Tikona Digital Networks Private Limited	16.17
South Asia Entertainment Holdings Limited	Mauritius	Sun Direct TV Private Limited	16.17
AGC Holdings Limited	Mauritius	Aegis Aspire Consultancy Services Limited	15.56
Bharti Softbank Holdings Pvt Limited	Singapore	Hike Private Limited	12.26
Droom Private Limited	Singapore	Droom Technology Private Limited	10.81
Vodafone International Holdings (2014)	U.K.	Vodafone India Limited	1,641
MTS (2015)	Russia	Reliance Communications	736.98
Augere Wireless (2015)	U.K.	Bharti Airtel	21.3
Orange S. A. (2016)	France	Bharti Airtel's operations in Burkina Faso and Sierra Leone	900
Telenor (2017)	Norway	Bharti Airtel	N/A (No Cash Deal)
Singtel (2018)	Singapore	Bharti Airtel	411.02

V. FDI IN WIRELESS MOBILE COMMUNICATION INDUSTRY- ISSUES & CHALLENGES

FDI in the Indian telecom sector dropped from $1.99 billion during April 2011-January 2012 to $93 million during the same period in 2012-13.[32] The industry, which was one of the major hubs for FDI, witnessed the biggest fall in such investments during this period. The uncertain regulatory environment regarding spectrum auctions and pricing, the one-time spectrum usage fee and retrospective amendments; intense competition; and low profitability inter alia, hindered the market growth around that period. Even the 'high subscriber base' factor of the telecom sector failed to attract investments.

According to the latest data from the Department of Industrial Policy and Promotion, the overall FDI (FDI) inflows into India rose by around 23 per cent, from Financial Year 2014-15 to 2015-16.[33] This was a result of stable macro-economic policy framework, a favourable investment climate and various initiatives taken by the government to improve the ease of doing business in the country.

However, the telecom sector including radio paging, cellular mobile and basic telephone services witnessed a 54 % decline in foreign investments, from Rs 2894.94 billion to Rs 1324.40 billion[34] during the same period. Despite a significant rise in the overall foreign investment equity, foreign investors have been reluctant in investing in the Indian telecom sector as there is still ambiguity on certain legal cases. For instance, the Vodafone retrospective tax issue has remained unresolved despite several discussions between the government and the operator. Second, the constant friction between the Telecom Regulatory Authority of India and operators over spectrum auction and pricing, quality of services, call- drops and net- neutrality inter- alia has created an uncertain and unpredictable policy environment.

The Indian Telecom Sector has been facing several issues and challenges with regard to FDI which have been discussed below:

High Corporate Taxation Regime

In India, the Corporate Income tax rate is a tax collected from companies incorporated in India. Its amount is based on the net income earned by the companies while running their businesses during a financial year. Revenues from the Corporate Tax Rate are an important source of income for the Government of India. Under the Income- Tax regime, a resident company is taxed on its worldwide income whereas a foreign company is taxed only on income that is received in India, or that accrues or arises, or is deemed to accrue or arise, in India.

Table 3 below shows the Corporate Income Tax (CIT) and other Taxes applicable to an Indian company as well as a Foreign Company for the Tax Year 2018- 19:

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[32] *Supra* note 10.

[33] Department of Industrial Policy and Promotion, Ministry of Commerce And Industry, Government of India, Factsheet on Foreign Direct Investment From April 2000- June 2018, at 4, available at: http://dipp.nic.in/sites/default/files/FDI_FactSheet_23August2018.pdf (last visited Oct 13, 2018).

[34] *Supra* note 10.

Table 3: Corporate Income Tax Rate for Indian and Foreign Companies for the Tax Year 2018/19.[35]

Income[36]	Rate of Corporate Income Tax%					
	For Turnover up to INR 2.5 Billion		Other Domestic Companies		Foreign Companies	
	Basic	Effective[37]	Basic	Effective	Basic	Effective
>10 Million INR	25	26.00	30	31.20	40	41.60
10 Million-100 Million	25	27.82	30	33.38	40	42.43
< 100 Million	25	29.12	30	34.94	40	43.68

Table 4: below shows the Corporate Income Tax (CIT) and other Taxes applicable to an Indian company as well as a Foreign Company for the Tax Year 2018- 19:

Table 4: Corporate Tax Rate by Country as in December 2018[38]

Country	Corporate Income Tax Rate (%)
India	34.61
China	25
Indonesia	25
United States	21
Russia	20
United Kingdom	19
Singapore	17.77

From the above Table it is clear that the Corporate Tax in India is the highest amongst G20 countries which discourages foreign investments. Apart from this, the Telecom Companies have to pay the cumulative levies (other than corporate tax) of around 33% in comparison to other countries like 22% in China, 20% in European Union and 17% in the United States. Such high taxations put immense pressure on cash flows and discourage telecom companies to invest further.[39]

[35] PWC, India:Corporate- Taxes On Corporate Income (July 2, 2018), available at: http://taxsummaries.pwc.com/ID/India-Corporate-Taxes-on-corporate-income (last visited Aug 23, 2018).

[36] Surcharge is payable when Total Taxable Income exceeds INR 10 million.

[37] Effective Tax Rates include Surcharge and Health and Education Cess.

[38] Trading Economics, List Of Countries By Corporate Tax Rate- G20, available at: https://tradingeconomics.com/country-list/corporate-tax-rate?continent=g20 (last visited Oct 14, 2018).

[39] Hemant Joshi, "Cumulative Levies Cumulative levies of 33% for Indian telcos putting operators under pressure: Deloitte, ET Telecom", (Jan. 24, 2018, 14:38 IST), available at: https://telecom. economictimes. indiatimes.com/news/cumulative-levies-of-33-for-indian-telcos-putting-operators-under-pressure-deloitte/62633690 (last visited Oct. 14, 2018).

Ambiguous Duties And Tax Regime

In addition to this, ambiguous, unreasonable and complex Basic Custom Duty (BCD) on telecom equipment contradicts the Make in India and Start-up India programmes of the government. For example, an import duty is charged for various products according to the 'Eight Digit HS Codes', which are universal codes. Since these codes have not been harmonized in India as per international standards, import of Telecom equipment becomes a highly complicated and tedious task. Import of 'Telecom Products' fall under Code 8517 which includes "Import duty on Telephone Sets including Telephones for Cellular Networks or for other wireless networks; Other Apparatus for the Transmission or Reception of Voice, Images or Other Data Including Apparatus for Communication in a Wired or Wireless Network (Such As A Local Or Wide Area Network), Other Than Transmission Or Reception Apparatus Of Heading 8443, 8525, 8527 or 8528."[40] However this definition does not include all telecom equipment within its purview. For example, a 'Diplexer' falls under HS Code 85177090 under 'Others Category'-on which no import duty was charged before 2018[41] but as per the new Tariff rules issued on February 2, 2018, a 15% import duty has been levied on the above code.[42] Such ambiguities in the provisions create hindrances in ease of doing business. Till the time the Government provides domestic manufacturing facilities, through strong supply chain for these equipment in India, such goods should be exempted from levy of Custom duties.

Furthermore, high GST rate that varies from 0 to 28% also adds on to the financial burden on telecom companies and since the rate of tax on inputs is higher than the rate on output services it creates blockage of credits and adds to the financial burden on telecom companies. Hence the Government should try to reduce the GST in telecom sector to 18 percent. Although the amalgamation of taxation regime across Central and State Governments and across sale of goods and services is a great step but one loophole in it is that the Central Government still withholds the residuary taxation powers. Entry 97 of List I of Schedule 7 to the Constitution provides for "Any other matter not enumerated in List II or List III including any tax not mentioned in either of those lists"[43] gives residuary taxation power to the Government. In order to make GST successful it is imperative that the Central Government resists from levying taxes through its residuary legislative powers in Entry 97 of List I.

To further reduce the tax levies the Government should clarify tax treatment of spectrum fee that has been charged for years prior to financial year 2016-17 to permit depreciation of tax thereon.

Since cellular mobile towers are fixed to the ground, they are often regarded as fixed assets and subjected to property tax. Property tax rate on cellular towers varies among State Governments, Municipal Corporations and Municipalities. The Central government should introduce uniformity in property tax rates amongst various States and municipal authorities.

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[40] Central Board of Indirect Taxes and Customs, Customs Tariff as on February 2, 2018, Chapter 85 Section XVI, at 771 (2018), available at: http://www.cbic.gov.in/resources//htdocs-cbec/customs/cst1718-010718/Chapter%2085.pdf (last visited Oct. 14, 2018).

[41] *Ibid.*

[42] *Ibid.*

[43] *Constitution of India,* 1950; Art. 246, Seventh Schedule, List I, Entry 97.

Low Average Revenue Per User (ARPU)

Despite consolidation that has brought down the number of Telecom operators from seventeen to just three to four major players, the Average Revenue Per User for wireless mobile services is still declining. According to the latest report by the Telecom Regulatory Authority of India, the Average Revenue Per User for Quarter ending June 2018 was the lowest in last seven years.

This is the result of Reliance Jio's entry into the wireless mobile industry with highly competitive pricing of mobile tariff plans into the Indian wireless mobile industry. It is an irony that despite a 120 percent rise in Data- Usage,[44] the ARPU has slumped to the floor with INR 69[45] in June 2018 as compared to INR 104 in December 2016.[46] In order to bridge this gap, it is imperative that the Government perceives Wireless Mobile Communication Industry as a Strategic Industry and provides monetary relaxation to Network Operators thereby creating a fine balance between Customer's satisfaction and Operators' Profits. The Government must set- aside multiple taxes and levies like spectrum usage charges to promote sustainable growth of the network operators.

Given below is Chart 2 which shows the Wireless Mobile ARPU for GSM Services from the year 2010 to June 2018.

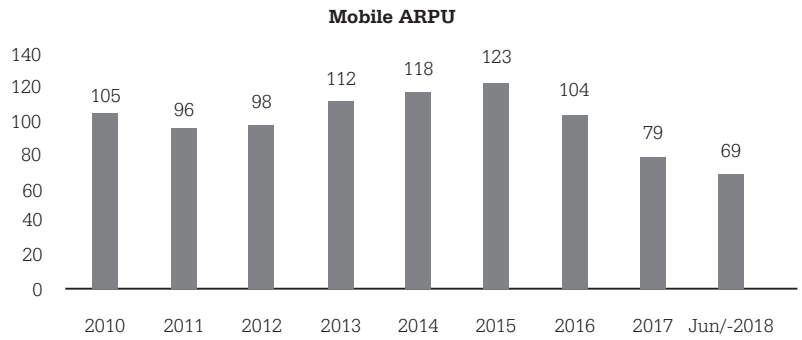

Chart 2: Wireless Mobile ARPU for GSM Services from 2010- 2018.

High Debts On Telecom Operators

The Indian wireless cellular mobile industry is price sensitive with a subscriber- base that is dominated by 94%prepaid subscribers[47] that too with the lowest voice and data rates in the world.[48] In addition to this, the entry of Reliance Jio, who is capable of

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[44]Cellular Operators Association Of India, COAI Annual Report 2017- 18, at 38

https://www.coai.com/sites/default/files/Annual%20Report%20COAI%202017-18.pdf (last visited Oct. 9, 2018).

[45]*Supra* note 2, at 49.

[46]Telecom Regulatory Authority Of India, The Indian Telecom Services Performance Indicators October-December 2016, at 44 (Apr. 7, 2017), https://www.trai.gov.in/sites/ default/files/Indicator_Reports_Dec_16_07042017.pdf(last visited Oct. 9, 2018).

[47]Hootsuite, *Digital In 2018,* at 101 (Jan. 2018), https://hootsuite.com/pages/digital-in-2018 (last visited Oct. 9, 2018).

[48]*Supra* note 44, at 25.

providing integrated wireless communication services at lower costs forced other Operators to reduce tariffs thereby putting pressure on their revenues. Apart from this, irrationally high spectrum costs, unreasonable penalties, and higher goods and services tax has put Indian Wireless Network Operators under an exorbitant debt of INR 4.6 Lakh Crore on revenues of under INR 1.8 Lakh Crore.[49] This has resulted into higher cost of doing business and has negatively affected the foreign investments into the industry.

High Spectrum Costs

Spectrum cost in India is one of the highest in the world. Price of spectrum in India runs around "25 times costlier than the countries such as U.S., France, Singapore, Germany, Spain and Sweden."[50] By issuing spectrum licenses to Network Operators for 20 years, government policies force them to bear heavy network roll-out costs without providing them sufficient time to earn revenue from the CAPEX and OPEX costs. From 2010 to 2016 the Indian government has earned around INR 3,51,200 crores through six spectrum auctions. However, the high cost of spectrum in India has led to a digital divide between urban and rural India thereby affecting the wireless mobile penetration in the country as the operators are reluctant to invest in network deployment resulting in underutilization as well as misutilization of the valuable spectrum.

No Ease Of Doing Business In The Wireless Mobile Communication Industry

According to the latest World Bank Report, India ranks 100th in Ease of Doing Business amongst 190 countries.[51] Although the Government has taken several steps to improve ease of doing business by enforcing the Indian Telegraph Right of Way Rules, 2016; simplifying grant of licenses/ approvals/ SACFA clearances issued by the Wireless Planning Commission through online portal;liberalizing Spectrum Trading and License Renewal/ Migration processesinteraliayet the Telecom Operators do not seem to be satisfied with the implementation of these rules because the local municipal bodies and Panchayats do not follow the rules framed by the Central Government and create obstruction in network roll- outs.

The non-implementation of Right of Way rules has also impacted the 'Digital India Programme' of the Government which aims at bridging the Digital- Divide through last mile connectivity in remote villages. At present, around 55,600 villages do not have an access to mobile communication services.[52] This was because network deployment in such areas was not commercially possible for the Operators as they were already under huge debts after paying exorbitant spectrum costs and unreasonably high penalties, taxes and levies.

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[49]KPMG, Accelerating Growth And Ease Of Doing Business, at 4 (Aug. 2017),

https://assets.kpmg.com/content/dam/kpmg/in/pdf/2017/08/Accelerating-growth.PDF (last visited Oct. 10, 2018).

[50]Gary Kim, "2000mhz Of India Mobile Spectrum Up For Auction In 2016", in Business Model, Internet Access, Mobile, News, Spectrum (May 22, 2016) http://spectrumfutures.org/2000-mhz-of-india-mobile-spectrum-up-for-auction-in-2016/

[51]World Bank, Doing Business Report 2018: Reforming To Create Jobs, 15th Edition, at 4,

http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2018-Full Report.pdf (last visited Oct. 10, 2018).

[52]Deloitte and Assocham India, Digital India: Unlocking The Trillion Dollar Opportunity 11(Nov. 2016), available at: https://www2.deloitte.com/content/dam/Deloitte/in/Documents/technology-media-telecommunications/in-tmt-digital-india-unlock-opportunity-noexp.pdf (last visited Oct. 10, 2018).

The Ease of Doing Business Policies of India also contradict the Start-Up India Programme of the Government because the Start-Up firms are deprived of the opportunity to participate in public projects as they fail to fulfil the pre-requisites of a Tender that asks for high turnover and experience which they are unable to meet. Furthermore, financial assistance should be provided to such firms at a low interest and the government should take steps to relax the financial compliance rules for them.

VI. CONCLUSION

Every cloud has a silver lining and the Indian wireless mobile communication industry is no exception because despite the above- discussed challenges, India is now the world's second largest smartphone market after the U.S. and aims to have nearly 674 million connections by 2020.[53] Over the coming four years, two- thirds of the global subscriber growth will be coming from Asia alone and it is note-worthy that India is going to account for nearly 40% of the total global subscriber- growth which calls for huge scope for foreign investments into the industry.[54]

Going forward, growth opportunities in the rural voice and data services will also drive future investments in the wireless mobile communication industry, provided the government addresses the regulatory challenges facing the sector. Given that network operators are struggling through falling revenues and high debt, the industry looks at FDIas a key contributor to meet the sector's investment targets of USD 100 billion as enshrined in the National Digital Communication Policy- 2018.[55] In coming years, the Global Telecom Market will be dominated by data and the wireless mobile industry will accelerate towards 5G, Internet of Things (IoT) and Artificial Intelligence (AI). The scope of FDI is also evident from the fact that India now ranks 1st in terms of mobile data consumption in the world i.e.1.5 billion GB mobile data/ month, which has placed it ahead of China & U.S.A put together.[56] The Indian wireless mobile communication market has witnessed a paradigm shift in data consumption with 4G traffic capturing 82% share of total data traffic with a Year on Year growth of 144% in mobile data usage in December 2017.[57] Moreover, Video Streaming contributes to 65- 75% of mobile data traffic which indicates towards a huge scope for new Over The Top (OTT) Players in India.[58] In the coming years, 5G will be able to support the development of 100 Smart Cities in India thereby fulfilling the vision of the Digital India Programme by creating a robust Digital Communication Infrastructure. Hence, by bringing policy reforms on key issues, FDIs can spearhead the wireless mobile industry in achieving the objective of socio- economic empowerment of the citizens of India as envisioned in the National Digital Communication Policy- 2018.[59]

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[53]GSMA, India's Digital Promise 4 (February 2017), available at: https://www.gsmaintelligence.com/research/?file=3028cb1c974129780e058bef9d640a02&download (last visited Oct. 10, 2018).

[54]*Id.* at 5.

[55]Department of Telecom, National Digital Communication Policy- 2018, at 10, available at:

http://www.dot.gov.in/sites/default/files/Final%20NDCP-2018_0.pdf (last visited Oct. 10, 2018)

[56]Nokia, India Mobile Broadband Index 2018, at 5 https://onestore.nokia.com/asset/202016, (last visited Oct. 10, 2018).

[57]*Id.* at 4.

[58]*Id.* at 3.

[59]*Supra* note 55.