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INSOLVENCY OF A TELECOMMUNICATION COMPANY UNDER THE DRAFT INDIAN TELECOMMUNICATION BILL, 2022

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The Department of Telecommunications (**DoT**) has on 21 September 2022 released the Indian Telecommunication Bill, 2022 (**Bill**) which consolidates and amends the Indian Telegraph Act 1885, Indian Wireless Telegraphy Act 1933, and The Telegraph Wires, (Unlawful Protection) Act 1950. In Chapter 5 (Restructuring, Defaults in Payment and Insolvency), the Bill addresses situations wherein payment defaults or insolvency proceedings have been initiated against a telecommunication company (**Telco** or **Corporate Debtor**). The summary of the provisions is captured herein below- (emphasis supplied by way of italicising):

(I) **Section 20: Specific conditions in the event of insolvency and bankruptcy of licensees or assignees**

- (a) This section shall be applicable on the licensees or assignees of the spectrum in the event of their insolvency, bankruptcy or winding up. It has been incorporated with the view to attain larger public interest by facilitating the availability of telecommunication services throughout India.
- (b) Section 20(2) specifies cumulative conditions for an insolvent Telco to hold its licenses or rights under the assignment agreements. Such conditions are to be in addition to the terms and conditions specified under the allotted license or assignment and include:
- continuation of supply or operation of telecommunication services and network respectively or the utilisation of the assigned spectrum;
 - adherence to any additional or modified terms and conditions; and
 - *absence of default in payment of any dues under the allotted license or assignment agreement including of any fees, charges and other payable amounts.*

A licensee or assignee shall be considered to be subject to insolvency proceedings from the 'insolvency commencement date' or 'pre-packaged insolvency commencement date' as defined in the Insolvency and Bankruptcy Code 2016 (**IBC**).

- (c) As per section 20(3) of the Bill, if the insolvent Telco fails to comply with the abovementioned conditions, then the assigned spectrum shall automatically revert to the control of the central government (**Central Government**). It shall then be to the discretion of the Central Government to allow the continuation of usage of the allotted spectrum by the Telco, *subject to placing its revenue in a designated account with the applicable license fee and charges being paid first in priority during the corporate insolvency resolution process (CIRP) period.*
- (d) The Resolution Professional (**RP**) vide section 20(4) of the Bill is mandated to ensure compliance with section 20(3) above. In the event the RP expects to not be able to comply with conditions specified in section 20(3) of the Bill; or it intends to either wholly or in part shut down or suspend the telecommunication services, availability of telecommunication network or use of spectrum by the Telco; it shall provide a prior notice of 30 (thirty) days to the Central Government in regard of such actions.
- (e) Upon receipt of the RP's notice, the Central Government in terms of section 20(5) of the Bill, may by notification *direct the management of the license, assignment agreement, or any identified business or property of the Corporate Debtor to any person or entity.* This may be done with the view to ensure national security, consumer interest, or security, reliability and continued supply of telecommunication services or availability of telecommunication network in India or any part of it.

(II) **Section 21: Special framework governing defaults in payment by licensees, registered entities or assignees**

The provision stipulates that in the event the Telco defaults in any payment under the proposed act; and if the Central Government determines the existence of extra ordinary circumstances to such default including financial stress; consumer interest; maintenance of competition in the sector; reliability and continued supply of telecommunication services or availability of telecommunication network or telecommunication infrastructure in India or any of its part, then the Central Government may, notwithstanding any other law for the time being in force, by notification take such measure as it may deem fit. Such measures may include the following:

- (a) deferment of payment;
- (b) conversion of part or all amounts due into shares of the Telco;
- (c) writing off amounts due or part thereof; or
- (d) relief from payment of the amount due or part thereof.

(III) **Section 22: Power to waive fee, interest, additional charges, penalty or grant exceptions**

The Central Government in its discretion and with a view to protect the interest of the consumers, ensure competition, reliable and continued supply of telecommunication services or availability of telecommunication network or infrastructure in India or any part, or to safeguard public interest or national security, may by notification:

- (a) waive fee with respect to entry, license, registration or any charges, interest, additional charges, penalty or damages in part or full; and/or
- (b) grant exceptions from provisions of the act or corresponding rules.

Comments

Per the 'Explanatory Note' dated 21 September 2022, the stated aim of the Bill is to ensure spectrum continuity during the insolvency of a Telco and build upon the existing framework of the IBC. However, it could be contended that the proposed Bill transgresses into the field occupied by the IBC and the provisions proposed under Chapter 5 could lead to a conflict between the IBC and the Bill, on account of *inter alia* the following:

- I. time and again, courts including the Apex Court in *Innoventive Industries Ltd. v. ICICI Bank* (Civil Appeal Nos. 8337-8338 of 2017) have held that the IBC is a complete code in itself. The primary objective of the IBC is to cover the length and breadth of all processes relating to reorganization and insolvency resolution of a corporate debtor (which would include Telcos) in order to ensure effective and timely resolution. However, if the present Bill is approved as is, Telcos undergoing insolvency shall now be governed by arguably 2 (two) conflicting statutes;
- II. section 20(2) of the Bill stipulates payment of 'any dues' for the retention of license by the Telco. The term 'any dues' has not been defined and may arguably include within its ambit past payable dues. Any such interpretation may run the risk of being contrary to the provisions of the IBC. This is on account of the fact that for any past dues a claim has to be filed (in a specific form), payment of which is dealt with in the manner provided under the IBC including by way of a resolution plan and not by the RP. Accordingly, a clarification may be required / provided regarding the ambit of 'any dues' to avoid any such conflicting interpretation with the IBC;
- III. further, section 20(3) of the Bill stipulates the payment of license fee and applicable charges in priority during the CIRP period. It is unclear if the same shall include both past and current dues under such license or assignment agreement. As per section 25 of the IBC, it is only the current dues which can be part of the CIRP costs and paid in priority. The Bill also does not clarify if the priority envisaged would be a super priority over other CIRP costs, which if envisaged cannot be achieved without a related amendment to the IBC. Moreover, if past dues are also to be paid then any such payment runs the risk of being a preferential payment;
- IV. the commencement of insolvency vests the control and management of the corporate debtor along with its assets with the IRP and subsequently the RP in terms of sections 16 and 17 of the IBC. The alternative management of any license or identified business of the Corporate Debtor in terms of section 20(5) of the Bill shall have the effect of segregation of assets of the Corporate Debtor under multiple processes, inadvertently resulting in unnecessary delays and litigations by creditors intending to bring such notified assets under the CIRP process; and
- V. in its essence, the Bill attempts to create a special category of companies, being Telcos, which would be governed by special provisions even during insolvency, while there exists the IBC which is a complete code for insolvency and reorganisation of Indian companies. Any such accommodation for Telcos may

lead to a cascading effect of similar demands being raised by entities in other sectors and each may have reasons to justify their demands on lines similar to the reasons elaborated for Telcos in the Bill.

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