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January 31, 2006

Dear Readers,

This issue of the **International Journal of Civil Society Law** comes to you at a time of increasing scrutiny of and by the civil society sector in many countries. Some of this scrutiny has led to new legislation that has attracted public attention, as in Russia (the new legislation on “NGOs” is discussed in the latest issue of IJCSL-N). Other situations have seen sector-led efforts result in the development of better disclosure by public bodies, which aims to increase public oversight of governance, as in the Cayman Islands (referred to below). All the attention being given to the sector – whether good or bad – seems finally to have raised public and government awareness of the issues this **Journal** considers.

The issue you are about to read considers some of the pertinent questions with regard to the role the sector plays in promoting good governance, the ways in which it is regulated, and its relationship with the state in terms of providing social services that the state cannot offer in as sensitive a manner. Our feature articles cover a wide range of subjects:

- In her article about delegation of child care services to non-commercial organizations in Moldova, Caroline Loussouarn Newman deals with a timely topic – how to best provide child care in a situation in which government would like to outsource provision of the care.
- In her article on the accountability of the World Bank and the International Monetary Fund, Namita Wahi discusses a well-developed thesis for why those institutions should have human rights accountability.
- Hari Prasad takes a different tack in his article about India and its regulation of telephony, where he concludes that the interests of India’s citizens in protection of their privacy are not met by current regulations.

Other and widely disparate issues are addressed in the Country Notes in this issue – the one for Germany discusses the proposed changes in the regulatory framework for NPOs as does the one for Japan. The Country Note for the Cayman Islands deals with the Freedom of Information Bill, recently introduced in the Parliament, while the Country Note for China considers the ways in which the Chinese government keeps its secrets secret under the document classification system applicable to government documents. Finally, Dr. Otmar Oehring deals with two important issues in Turkey, both of which concern the sector and non-Muslim religions.

The staff and I wish you a pleasant read,

Karla W. Simon
Editor-in-Chief

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IJCSL EDITORIAL POLICY

January 2006

Dear Reader

CONTENT—IJCSL PUBLISHES ARTICLES ON A VARIETY OF TOPICS, seeking to provide a venue for an international readership to learn about and express opinions on developments in law affecting civil society. These topics and the array of opinions on them are complex and sometimes controversial. The opinions expressed do not necessarily reflect the views of IJCSL or its editorial staff.

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ARTICLES

PROSPECTS FOR DELEGATION OF CHILDCARE SERVICES BY PUBLIC AUTHORITIES TO NON-COMMERCIAL ORGANIZATIONS –AN ASSESSMENT OF THE REPUBLIC OF MOLDOVA

BY CAROLINE LOUSSOUARN NEWMAN*

INTRODUCTION

The Republic of Moldova is today facing a situation where services provided by state institutions hosting children in difficulty are no longer appropriate while alternative social services for children in difficulty have been introduced essentially by Moldovan “non-commercial organizations” (NCOs)¹. These alternative service providers are making available essential services to the families of these children, thus enabling them to avoid institutionalization of the children. Although these services are currently paid for essentially out of foreign donor funds, they do provide a public service. Such public benefit services should not be discontinued with the withdrawal of foreign funding, and their continuity should be secured by the Moldovan public authorities.

Various public funding mechanisms are available for public authorities to finance social services provided by NCOs including public procurement practices, subsidies, or the granting of “personal budgets” to the children who are beneficiaries. In Moldova, procurement mechanisms are regulated in the Law on Procurement of Goods, Works and Services for Public Needs and subsidies are authorized to certain types of NCOs. However, mechanisms for the award or monitoring of subsidies to NCOs providing childcare services is not regulated and “personal budgets” have not been introduced. Each of these three mechanisms will be reviewed in this paper under the relevant Moldovan law and related public policies.

I. Procurement mechanisms

Procurement mechanisms are transactional relationships under which the government is in the position of a consumer selecting an adequate supplier, who will satisfy the demand in terms of price and quality of service (or goods) and will offer the most advantageous bid.² The duty of the government is to identify through a tender the most competitive provider of the required services in order to responsibly allocate budget resources. Therefore, the procurement should be open to any person able to provide the needed service, whether it is a for-profit, a not-for-profit entity, or an individual.

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¹ The Moldovan Civil Code provides for three organizational legal forms of not-for-profit organizations, referred to as “non-commercial organizations”: public associations, foundations, and institutions. The establishment of institutions is not implemented, the necessary secondary legislation not having been adopted to this day.

² Articles 43 and 44 of the Law on Procurement of Goods, Works and Services for Public Needs.

Because entering into a transaction resulting from a procurement process is similar to a purely commercial transaction and the legal or the tax framework for NCOs in New Independent States (NIS) countries do not usually authorize NCOs to engage in a direct economic activity, it is almost impossible in these countries for NCOs to participate in a procurement process. Fortunately, Moldova is one of the rare exceptions, having modeled its legal framework and tax legislation affecting NCOs on good international practice. Moldovan law provides that an NCO can directly engage in a commercial activity when the activity is related to its statutory purpose or it can establish a commercial subsidiary in order to carry out unrelated economic activities.³ Further, in accordance to article 52 (6) of the Moldovan Tax Code, related economic activities of NCOs which have been certified as public benefit organizations (PBOs), in compliance with article 19 of the Law on Foundations and articles 34 through 37 of the Law on Public Associations, are exempt from income tax. Therefore, transactions resulting from a procurement process for child welfare services would be exempt for PBOs engaging in the tender. This would provide PBOs with a relative advantage in comparison to commercial entities or other NCOs engaged in the same bid, which do not benefit from the tax exemption.⁴

For all procurement procedures, with an estimated contract cost is above 10,000 Lei (about € 830), open tenders are generally mandatory under the procurement legislation; alternative mechanisms, such as restricted procedure or single source procurement may be used where appropriate.

The Moldovan procurement legislation, while very well suited for the participation of business entities, is, however, to a certain extent problematic for the effective participation of NCOs. Security bonds – in the form of a bank guarantee, other forms of security, “stand by” letters of credit, bank checks, cash deposits, bills of exchange, or promissory notes –⁵ are required from tendering parties. The amounts required are no more than 3% of the estimated tender cost at the time of submission of tenders, and no more than 15% at the time of conclusion of the contract.⁶ Given their generally tenuous financial footing, it will be difficult for many NCOs to advance funds for the purpose of providing the required security bond. Whereas it is clear in the law that security requirement is mandatory for the procurement of goods and works above 100,000 lei (about € 6,500), it is not clear whether this requirement also applies to the procurement of services. Flexibility in respect to this requirement is desirable in order to enable NCOs to participate in procurement process. It is recommended that in the case of procurement of social services, only symbolic security bonds be required from bidders and contractors. Ideally, the law could be amended to specify that security requirements will always be waived in cases of procurement of certain services, such as social, medical, recreational, cultural, and employment

³ Article 188 of the Civil Code, article 28 of the Law on Public Associations, article 23 of the Law on Foundations, article 13 of the Law on Charity and Sponsorship.

⁴ The Law on Charity and Sponsorship also provides that “Charities” can benefit from tax exemptions. However, the purpose of this law is not clear as its provisions are redundant with provisions of the Civil Code, the two afore mentioned framework laws and the Tax Code. It seems to create a parallel registry of legal entities in the Ministry of Finance for which the loss of the charity status, status granting tax and other public benefits, would entail the loss of legal personality as well. Therefore providing no reasonable grounds for choosing to register as a “charity” instead of an association or a foundation. According to ICNL’s *Survey of Tax Laws Affecting NGOs in Newly Independent States*, (ICNL, Washington DC, October 2003, p 69) it seems that the Law on Charity and Sponsorship, while formally in force, is not implemented in Moldova. Further, this survey also provides the information that in practice some non-certified NCOs manage to be listed as “exempt organizations” for the purpose of corporate income tax exemptions. Such practice would then be in violation of the Law on Public Association and the Law on Foundations.

⁵ Article 1 of the Law on Procurement of Goods, Works and Services for Public Needs.

⁶ Articles 34 and 35 of the Law on Procurement of Goods, Works and Services for Public Needs.

services, which are services typically provided by NCOs. It would be good public policy for such waivers of security bonds when the social services are contracted out by public entities.⁷

At the present time, restricted procedures, including single source procedures, are most likely to be used in the case of procurement of social services in Moldova. Moldovan law provides that restricted procedures are authorized if the estimated cost of the contract is below 225,000 Lei (about € 15,000) or if there are a very limited number of existing providers.⁸ Given that the cost of social services may be rather low or the number of existing providers still rather limited, even to the point that only one provider may be supplying a given service, restricted procedures are likely to take place for the procurement of social services. In cases where only one provider exists in a given market, the single source method of procurement would be authorized by law.⁹

In both single source and restricted procedures, it is important for the State to know which providers exist in the market. Typically, procurement bodies can conduct a restricted procurement procedure only if they invite all providers of a given service invited to participate in the tender. The Law on Procurement of Goods, Works and Services for Public Needs makes a reference to “suppliers selected in advance” in such cases, indicating that they must be known in advance.¹⁰ My understanding is that at the current time there is no comprehensive nor centralized information available to State bodies with regard to services provided by NCOs in Moldova. It is important that systematized information on NCOs providing services affecting children, including detailed information on the types of services they provide, be gathered and centralized in order to enable these mechanisms to take place in a reasonable manner, which is consistent with good public policy. The Moldovan civil society has an interest in developing such a database for future use by the public authorities.

II. Subsidy mechanisms (Grants)

Subsidies are support mechanisms provided by public authorities to NCOs in order to assist them in providing their services to the population. Subsidies can be provided in the form of financial or in-kind support. Of the traditional types of subsidies encountered in international practice, in-kind subsidies, project-based subsidies, minor subsidies, and national budget line subsidies have all been identified by my study as among the types of subsidies awarded to Moldovan NCOs.¹¹

In-kind subsidies are a common practice in transition countries and therefore it is not surprising that such subsidies are currently awarded to Moldovan NCOs. For example, these can take the form of transfer of property title of municipal property to NCOs providing social services or in the form of preferential rental rate for office space.¹²

⁷ The proposed list of services for which waivers would be permissible complies with the list of services which procurement proceeds can be simplified in relation to the requirements of EU council directive N92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts.

⁸ Article 21 of the Law on Procurement of Goods, Works and Services for Public Needs.

⁹ Article 24 of the Law on Procurement of Goods, Works and Services for Public Needs.

¹⁰ Article 21 of the Law on Procurement of Goods, Works and Services for Public Needs.

¹¹ Another major type of subsidy existing in the international practice but not encountered in Moldova at the current time are “operational subsidies”, usually granted by central authorities to organizations carrying out specific activities often on the basis of an accreditation which principle consist of funding the administrative costs of an NGO for the upcoming fiscal year based on the costs foreseen and calculated in function of the estimated number of beneficiaries for the given year.

¹² An earlier study of this form of subsidy to social and cultural organizations in Central and Eastern Europe was identified in Karla W. Simon “Privatization of Social and Cultural Services in Central and Eastern Europe: Comparative Experiences”, Boston University Law Review, 1995.

Project-based subsidies are allocated to a specific project or activity. The NCO sends to the relevant public authority a solicited or an unsolicited proposal describing the project it wishes be funded, along with a justified detailed budget exclusively related to the activities carried out under the project. This is done in the same manner used when NCOs apply to foreign donors for project grants. Such subsidies are currently awarded by the Moldovan national and local ecological funds. The funds provide subsidies on a-competitive basis to projects of local public authorities, natural and legal persons¹³ who send in their applications. Projects funded out of the funds have to meet the purposes of the fund, such as environmental protection. An agreement is then concluded between the ecological fund and the grantee. The grantee must provide financial and narrative reports demonstrating compliance with the terms of the agreement and the ministry of ecology monitors the implementation of the project.¹⁴

It is curious that commercial organizations are also eligible for state support under this system. This has the potential to create unfair competition between commercial entities and is not a recommended practice. Further, in relation to NCOs, the fact that the support is not limited to PBOs and in practice has been awarded to NCOs without the PBO status, such a practice violates the Law on Public Associations.¹⁵

It is interesting to note, and a practice that is worthy of emulation, that civil society is involved in the selection process for both the national and local ecological funds.¹⁶ The administrative bodies of the funds, which are competent for selecting the winning projects, are each composed of five members, of whom one is a representative of the “non-governmental” sector. I could not find a definition of “non-governmental-organizations” in the reviewed legislation and therefore assume that the term refers to NCOs and commercial entities. This deserves to be clarified. The establishment by the Ministry of Ecology of special funds in order to finance ecological projects is an interesting precedent, which deserves further consideration by the Ministry of Health and Social Protection for financing social projects of Moldovan NGOs.

Minor subsidies are usually not awarded on a competitive basis and their purpose is to complement activities funded through another source and to stimulate an organization to pursue a particular activity. As a usual practice, such subsidies are awarded to organizations whose sources of funding are highly diversified, for example, that subsist mainly from the profits from their ancillary economic activities or who have funding from various donors. These subsidies are to be used only to supplement the total budget of a project and are to amount to a small portion of the total project cost, for example no more than 20%. It appears that the current practice in Moldova under which local authorities contribute to the utility expenses of NCOs carrying out activities in the field of childcare is a type of minor subsidy.

National budget-line subsidies. It seems that in Moldova, as in many transition countries, direct government allocations out of the state budget are provided to certain NCOs (creative unions such as the “society for the handicapped”) specifically named in the budget. I assume that these are granted according to the same principles encountered in other transition countries when, annually, the budget act grants subsidies to such NCOs. Usually the funds allocated to these organizations

¹³ Article 15 of the Regulation on Ecological Funds.

¹⁴ *Ibid.*

¹⁵ Article 36 of the Law on Public Associations.

¹⁶ Article 14 of the Regulation on the Ecological Funds.

may be used only to cover expenses related to their not-for-profit activities. This type of national budget line subsidy raises important concerns over the transparency of the process and the criteria used for granting the support. As a result there is little opportunity for other organizations to seek this type of support.¹⁷

Summary and discussion. Up until this time, subsidies granted to NCOs carrying out activities in the area of childcare were awarded in a very informal and un-transparent manner. It is a good practice for any type of subsidy, including in-kind subsidies, to be allocated to NCOs in a transparent manner and, when appropriate, on a competitive basis. Further, it could be argued that the fact that these benefits were granted on an *ad hoc* basis currently violates Moldovan law, indeed, article 11 of the Law on Public Associations provides that benefits in the form of preferential rental rates or other-benefits granted to PBOs are to be granted in compliance with the established procedure and cannot be granted on an individual basis.

In addition, Moldovan law provides that only PBOs are eligible for Moldovan state support,¹⁸ which would mean support received through any kind of subsidy mechanism. This requirement, which complies with good international practice, seems to have been infringed on several occasions; many NCOs, which are currently granted minor subsidies, have not been certified as PBOs by the Certification Commission. It is desirable that the NCOs which are currently benefiting from such subsidies correct the violation of the law by seeking the PBO certification at the earliest possible time.

Moldovan NCOs are certified by the Certification Commission as PBOs provided that they engage exclusively in a public benefit activity such as the defense of human rights, education, health care, social assistance, culture, arts, amateur sports, environment.¹⁹ This list is not exhaustive and it is the role of the commissioners to determine whether the activities an NCO engages in do serve the public good. NCOs which carry out public benefit activities but support a political party or candidate in an election cannot be certified.²⁰ These requirements are important but not sufficient in relation to good international practice, in particular for PBOs that are beneficiaries from subsidies. It is important that, in addition to these requirements, PBOs benefiting from public support be required to (i) have their financial and narrative statements open to the public, (ii) carry out audits of their accounts, and (iii) in case of liquidation of the organization, provide that the remaining assets after the discharge of all debts and liabilities be distributed to another PBO to be used for purposes similar to those of the liquidated PBO. While all Moldovan foundations do have to comply with such requirements,²¹ public associations are not required to do so under the law as it is currently written. Therefore, such requirements will have to be stipulated either by amending the law or by requiring that subsidized public associations insert such provisions in their articles of association. .

¹⁷ The so-called “percentage laws” in countries like Hungary or Slovakia have allowed a “democratization process” in the awarding of national budget line subsidies to NCOs. It is the tax-payer himself who designates the NCO of his choice to be subsidized. In Hungary, salaried employees can make a request through their employer that up to 1% of their income tax withheld at the source be earmarked to the NCO of their choice. If a taxpayer does not allocate 1% of their taxes to an NCO of their choice, then the allocation will be made by the parliament as part of the budget process.

¹⁸ Article 36 of the Law on Public Associations and article 19 of the Law on Foundations.

¹⁹ Article 2 of the Law on Public Associations.

²⁰ Article 39 of the Law on Public Associations.

²¹ The Law on Foundations stipulates that:

- Foundations which assets are superior to 1 million Lei must establish an independent revision commission which function include carrying out annual audits of the accounts (article 29).
- Once a year foundations must publish their annual report including narrative and financial statements. Further any interested person should be granted access to these reports (article 33).
- at liquidation, remaining assets of a foundation are transferred to another foundation with similar purposes (article 36(7)).

Article 11 of the Law on Public Associations stipulates that support to NCOs is to be carried out in compliance with the procedure established by the government. To our knowledge no regulation has been adopted permitting the implementation of this provision of the law. It is important that the issues raised in the previous paragraph be addressed in the norms that will regulate the award of subsidies to PBOs.

Other issues would benefit from being regulated by law or by regulations adapted and adopted by each level of public administration. These include:

- How should selections of PBOs for subsidies be carried out and by whom?
- In which cases should the award of a grant be the result of a competition?
- What type of reporting should be required from grantees?
- How should the monitoring of allocated funds and of activities be carried out and by whom?
- What should be the sanctions in case of misuse of funds.
- What should be done with unused funds?

III. “Personal budgets” (vouchers)

The ultimate goal for public authorities to delegate the provision of social services to the non-governmental sector is to ensure that beneficiaries are receiving the assistance they are entitled to. It seems that some public authorities have been hesitating to support the activities of certain NCOs providing much-needed services to disabled children because these NCOs also provide services to non-disabled children. The public authorities want some guarantee that only the activities related to the disabled children will be supported from allocated public funds because the priority target group of the support is to be exclusively disabled children. While it would be possible to verify this information by requiring that NCOs adopt specific accounting standards, another option would be to provide “personal budgets” in the form of vouchers to the legal representative of the disabled children, enabling them to redeem the voucher with any provider of their own choice. This mechanism would guarantee that the public funds are used for the intended beneficiaries only. The provider having provided the service against the payment by the voucher would then be able to reclaim the fee for the service provided to the public authorities.

The adoption of such a mechanism would require that a proper assessment and follow up of the children and the care they have received would need to be carried out by the authorities that provide the vouchers. The project of child-care commissions at the raion level being developed under the TACIS project “Capacity Building in Social Policy Reform in Moldova” could effectively serve this purpose. Further, it is important that the voucher be redeemed by the beneficiaries by using them with appropriate service providers. In this case, the accreditation of service-providers where the vouchers can be redeemed would be necessary to guarantee that the services provided comply with minimum established standards. The Law on Social Assistance stipulates that the Ministry of Labor and Social Protection is responsible for developing mechanisms of accreditation of social assistance providers,²² but this provision is yet to be implemented.²³ The mechanism provided for in the Law on Licensing of Several Types of Activities could also serve as a basis for elaborating accreditation mechanisms for social services in the same manner that educational and health care services are covered by the licensing law.

Compliance with minimum standards could at this stage be required from entities that have entered into a procurement contract or a subsidy agreement with public authorities but in the case

²² Article 12 (2) of the Law on Social Assistance.

²³ At the time of elaboration of this report, a draft regulation was reported to exist. However the draft was never communicated to us.

of public funding through vouchers, the accreditation mechanism would be the only mechanism guaranteeing that the State is funding a service complying with minimum standards.

CONCLUSION

The Moldovan law does not present major obstacles for the public authorities to be able to delegate the delivery of childcare services to NCOs. In many respects it provides a good basis for the development of such mechanisms.– Nonetheless, for the implementation of the mechanisms described in this paper each level of public authority should have a clear understanding of its responsibility in relation to childcare services. Each level of public administration should be contracting out or supporting only those services the provision of which it must secure.

At present, the Moldovan Law on Local Public Administration (LPA) does not, however, provide for a clear picture of the responsibility of local public administrations at the first and second levels. For example the Law on LPA provides that the responsibility of “social protection of the population, including of the unemployed” have been delegated to both the second level and first levels of public administration.²⁴ Both levels are also responsible for providing social assistance to the population,²⁵ but the law does not provide for a distribution of responsibilities between the two levels in relation to the types of social assistance or beneficiaries. The Law on Social Assistance also fails to provide a clarification on the distribution of responsibility. This issue needs to be addressed and clarified. The current practice in budget formation at the local levels may provide a basis to determine how to distribute these responsibilities.

LAWS AND NORMATIVE ACTS REVIEWED IN THIS ASSESSMENT

Laws:

- Civil Code of July 6, 2002
- Law n. 837 on Public Associations of May 17, 1996
- Law n. 581-XIV on Foundations of July 30, 1999
- Law n. 1420-XV on Charity and Sponsorship of October 31, 2002
- Tax Code of June 16, 2000
- Law n. 1166-XIII on Procurement of Goods, Works and Services for Public Needs of April 30, 1997
- Law n. 123-XV on Local Public Administration of March 18, 2003
- Law n. 547-XV on Social Assistance of December 25, 2003
- Law n. 451-XV on Licensing on Several Types of Activities of July 30, 2001

Normative acts:

- Regulation on Working Group for Procurement of Goods, Works and Services of March 5, 2003
- Regulation n. 952 on Single Source Procurement of August 4, 2003
- Regulation n. 988 on Ecological Fund of September 21, 1998.

²⁴ Articles 12 and 13 of the Law on Public Administration.

²⁵ Articles 10 and 11 of the Law on Public Administration.

A LEGAL PERSPECTIVE ON TELECOM GROWTH IN INDIAN SUBCONTINENT

BY HARI PRASAD K. V.*

Introduction

India became independent in the year 1947 after a protracted rule of 200 years by the British Empire. Post independence, slow growth was witnessed for almost five decades. The Government of India (GoI) initiated Liberalization & Privatization policies in the year 1991 during the tenure of the then Finance Minister Dr. Manmohan Singh,¹ who is incidentally the present Prime Minister of India under the leadership of the Congress Party. World-wide, developed countries have digested the idea of ‘Global Business’ stretching out from their respective domestically confined cocoons. Developing countries have started inculcating this idea with a refinement that is suitable to their respective countries.

The growth of a civil society in developing countries experiences the impact of the availability or non-availability of “Basic Needs.”² In the present era, one such need, rather more a necessity, is ‘Communication’ among people. Telephony has become the essential medium for communicating among people utilizing tools like basic landline phone, mobile phone (Cellular phone), VoIP (Voice-over-Internet), Video Bridge, etc., for voice communication and tools like Internet, Electronic mail (E-mail), Mobile messaging, etc., for Data communication. E-commerce is another such growing area utilizing the telephony segment for doing business in cross-border international trade. Further, Telecommunication companies are thriving towards seamless mobility (connectivity on the move) with emerging tools like Wireless Fidelity (WiFi - hotspots), Wireless Internet on Laptops, etc. Against this backdrop, different countries have drafted and implemented varied strategic policies and diversified legislation to promote and regulate the telecommunications industry suitable to their countries. One such attempt was made in India during the last one and half decades and its purpose was in part to encourage social and economic development throughout India.

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¹ Dr Manmohan Singh was the then Finance Minister under the Congress Prime Ministership of P V Narasimha Rao, to bring in the concept of privatization under the liberalization policies. Slashing subsidies, partial privatization of state-run companies, inviting foreign investors, dismantling license raj (calling for government approval on every single decision of businessmen) were the key features of the economic reforms in 1991.

² Abraham Maslow propounded (between 1940-1950s) the five-tier ‘Hierarchy of Needs’ theory namely, Biological & Physiological needs, Safety needs, Belongingness and Love needs, Esteem needs and Self-Actualization needs. In the present era, communication can also be viewed as an extension of the need-based theory.

This paper chronicles the development of the telecom legislation in India following independence, and it discusses the new regulatory scheme set-up, with its independent regulator and an appellate tribunal to sort out disputes. It then proposes reforms that will grant more access to telephony and related new technologies for India's people, while at the same time recognizing the enormous potential of current data-gathering mechanisms for invasions of the right to privacy.

Policy Making Initiative

The National Telecom Policy³ (NTP) was introduced in the year 1994, with the following stated intention.

“The new economic policy adopted by the Government aims at improving India's competitiveness in the global market and rapid growth of exports. Another element of the new economic policy is attracting foreign direct investment and stimulating domestic investment. Telecommunication services of world- class quality are necessary for the success of this policy. It is, therefore, necessary to give the highest priority to the development of telecom services in the country”.

The objectives⁴ of NTP 1994 were quite generic. The striking feature was the inclusion of Cellular Mobile Telephone (CMTS) in Valued Added Services (VAS) without visualizing the growth of mobile phone segment over landline telephones. It can be acknowledged, on the other hand, that this second National level policy document was designed to promote telecommunications throughout the country. Until the 1994 policy document, the incumbents, BSNL and MTNL⁵ were running the show and providing telephony service in the country in a leisurely pace. Nevertheless, the NTP 1994 might have benefited from a dip stick survey and an estimate of needs prior to its enactment, which would have given a sense of customer perspective on what was needed.

The National Telecom Policy 1999 moved more towards creating an environment which “enables continued attraction of investment in the sector and allows creation of communication infrastructure by leveraging on technological development”. The striking feature of NTP 1999 was to demarcate the licenses based on services⁶ and removing CMTS from VAS and making it a

³ In line with the economic reforms, Government of India recognized the importance of telecommunications sector in the socio-economic development and had introduced the first National policy of its kind named ‘The National Telecom Policy – 1992’. Please refer to <http://www.dot.gov.in/ntp/ntp1994.htm> for details.

⁴ NTP 1994 was set up with the following objectives:

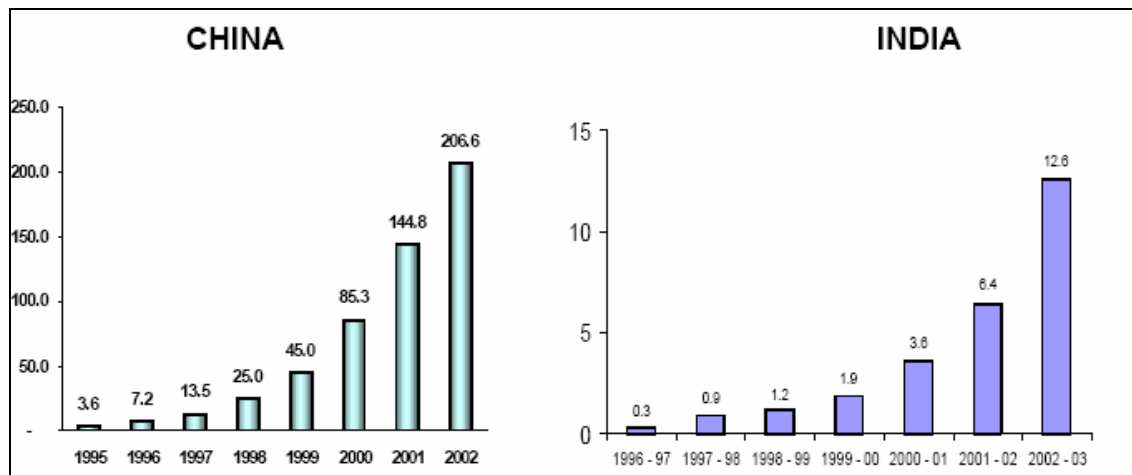
- a) The focus of the Telecom Policy shall be telecommunication for all and telecommunication within the reach of all. This means ensuring the availability of telephone on demand as early as possible.
- b) Another objective will be to achieve universal service covering all villages as early as possible. What is meant by the expression “universal service” is the provision of access to all people for certain basic telecom services at affordable and reasonable prices.
- c) The quality of telecom services should be of world standard. Removal of consumer complaints, dispute resolution and public interface will receive special attention. The objective will also be to provide widest permissible range of services to meet the customer's demand at reasonable prices.
- d) Taking into account India's size and development, it is necessary to ensure that India emerges as a major manufacturing base and major exporter of telecom equipment.
- e) The defence and security interests of the country will be protected.

⁵ MTNL (Mahanagar Telecom Nigam Limited) operates in Delhi and Mumbai. BSNL (Bharat Sanchar Nigam Limited) operates in the entire country except Delhi and Bombay.

⁶ The New Policy Framework (NTP 1999) has looked at the telecom service sector as follows:

separate licensed service. Specific targets set by the NTP 1999 were to make the telephone available on demand by the year 2002 and sustain it thereafter so as to achieve a tele-density⁷ of 7 by the year 2005 and 15 by the year 2010. However, the reality surpassed the expectation. The present tele-density exceeded 10 by July 2005. Interestingly, the number of mobile telephones became greater than the number of land-lines in early 2005. Further, statistics reveal that the average annual growth of the telephone customer base during the 1948-1998 is 0.37 million/year as against 11.5 million/year during the period 1998 to 2005.

Witnessing the growth in these eight years, it is quite evident that the growth appetite in telecommunications industry in India was not recognized at an early stage, which resulted in putting itself in a back-seat compared to its regional competitor China. Growth of mobile phones (in millions) in China and India the chart below⁸ are self-explanatory to prove this. Has improper handling of policy matters by think tanks resulted in delayed growth? It is clearly a debatable issue in the Indian context.



The Litigation Period

Interestingly, the GoI introduced a new concept called ‘Limited Mobility’⁹ which is mobile service within an SDCA.¹⁰ This license was granted to Fixed Service Providers (FSPs are also called Basic Service Operators),¹¹ which has created a great deal of confusion in the industry and has ultimately landed up in the Courts of Law. Cellular Mobile Service Providers (CMSPs) have challenged the decision of the Central Government in the Department of Telecommunications (DoT) dated 25 January 2001, allowing FSPs to provide mobility to its subscribers with Wireless Access Systems limited within local area i.e. SDCA. It was not clear whether it was mooted with a *mala fide* intention by DoT or TRAI.

(a) Cellular Mobile Service Providers, Fixed Service Providers and Cable Service Providers, collectively referred to as ‘Access Providers’ Radio Paging Service Providers (b) Public Mobile Radio Trunking Service Providers (c) National Long Distance Operators (NLDO) (d) International long Distance Operators (ILDO) (e) Other Service Providers (f) Global Mobile Personal Communication by Satellite (GMPCS) Service Providers and (g) V-SAT based Service Providers.

⁷ Teledensity is the unit to measure the number of customer per hundred of the total country’s population.

⁸ Adapted from TRAI consultation paper titled “Recommendation on Unified License”. Full text can be referred at <http://www.traai.gov.in/recom.htm>

⁹ Limited Mobility is offered in CDMA technology by Fixed Service Providers as against the GSM technology used by Cellular Mobile Service Providers.

¹⁰ SDCA - Short Distance Charging Area is app. 50 kms coverage with a specified telephone exchange.

¹¹ DoT Guidelines issued on 25.01.2001 and in pursuance of which the FSPs licenses were amended.

