

Competition Commission of India V. Bharti Airtel Limited and Ors. Civil Appeal No(S). 11843 of 2018 (Arising Out of SLP (C) No. 35574 of 2017)

Through this quarterly publication, CUTS International intends to undertake independent examination of relevant competition cases in India (on-going as well as decided). The objective is to provide a brief factual background of the facts of relevant cases, followed by an analysis of the predominant issues, therein. This publication will expectantly help readers to better comprehend the evolving jurisprudence of competition law in India.

The issues have been dealt in a simplistic manner and important principles of competition law have been elucidated in box stories, keeping in mind the broad range of viewership cutting across sectors and domains. The purpose of this publication is to put forward a well-informed and unbiased perspective for the benefit of consumers as well as other relevant stakeholders. Additionally, it seeks to encourage further discourse on the underlying pertinent competition issues in India.

Executive Summary

From enjoying natural monopolies to witnessing tough competition for services, the telecom sector in India has come a long way. It is now characterised by one of the fastest growing sectors of deploying latest technology and driving the economic growth in India. With the rapid intervention of innovation and competition redefining the sector dynamics, there are new emerging challenges that force the telecom and competition authorities to rethink their role and function, and adopt a collaborative approach in deciding intersecting issues.

In 2017, Reliance Jio Infocomm Limited (RJIL), a new entrant in the telecommunications market approached Competition Commission of India (CCI) against the incumbents for forming a cartel to deny market entry. Prior to that, it approached the Telecom Regulatory Authority of India (TRAI) against the incumbents for denying adequate points of interconnection. CCI passed an order in favour of the informant, which was challenged in the Bombay High Court and later appealed in the Supreme Court of India. The case that breathed fresh air at every level of Court in the country is a landmark decision in settling the role of CCI with respect to telecom sectoral regulators, particularly in issues that simultaneously fall within the jurisdiction of both the bodies.

The present case analysis aims to analyse the decision of the Supreme Court of India in terms of its far-reaching effects on CCI, while touching base on developments in the case at every level of proceedings through the lens of optimal regulation and competition.

FACTS

In December 2016, RJIL filed a case with CCI under Section 19(1) (a) of the Competition Act, 2002 (**'the Act'** hereinafter) against three major Cellular Operators namely Bharti Airtel, Vodafone and Idea Cellular (**'Incumbent Dominant Operators' or 'IDO'** hereinafter) for cartelisation. It further asserted that the Cellular Operators' Association of India (COAI) – an industry association of mobile telecom operators, was aiding the IDOs in formation of the alleged cartel.

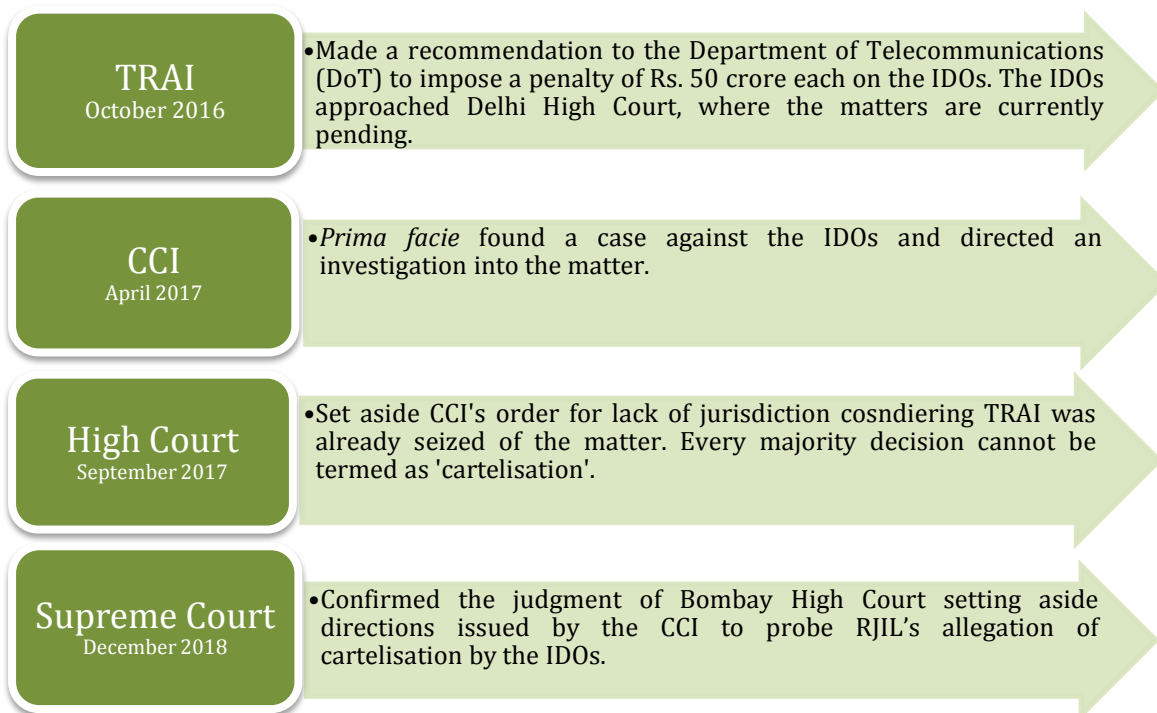
RJIL alleged that the IDOs were colluding against the new entrant by:

a) Denying point of interconnections (PoIs, physical interfaces between two different carriers), which is a mandatory requirement for offering telecommunication services. Further, the IDOs were consciously attempting to downgrade the services of RJIL by

only offering one way POIs (from incumbents to RJIL) instead of giving two-way POIs and preventing RJIL subscribers from making calls across different service providers; and

b) Denying requests for mobile number portability (MNP) so their customers do not switch to RJIL's network.

PROCEDURAL HISTORY



➤ Telecom Regulatory Authority of India

Prior to filing information with the CCI, RJIL approached TRAI with the grievance of being denied the requisite number of Point of Interconnections (POIs) by the IDOs. TRAI found the IDOs in violation of (Licence Agreements and the Standards of Quality of Service [QoS] of Basic Telephone Service [Wireline] and Cellular Mobile Telephone Service Regulations, 2009). Consequently, it made a recommendation to the DoT for imposing a penalty of Rs 50 crore (US\$7,048,500) per licence service area against the three IDOs. While the DoT asked TRAI to reconsider its recommendations, the telecom regulator remained firm on its stance. Ultimately, Vodafone India and Idea Cellular have separately moved the Delhi High Court against the fine imposed on them. Both the matters are currently pending before the court.

➤ **Competition Commission of India**

Under Section 26(1), the Commission, with a 3:2 majority, found a *prima facie* case against IDOs and directed a probe into the 'cartelisation' charge levelled against them by RJIL. The dissenting members opined that facts before the Commission were insufficient to support conclusions of anti-competitive practices. The CCI observed that the primary grievance of informants concerning cartelisation amounted to a violation of Section 3 of the Act, thereby falling within the mandate of the Commission and beyond TRAI's jurisdiction.

*'The Commission is a market regulator and has the jurisdiction to look at those issues which affect competition in markets in India, including that of an alleged cartelisation amongst enterprises/ associations. The nature of the proceedings before TRAI involving ITOs, on the other hand, different and related to whether interconnection norms and quality of service regulations are complied with or whether the contractual terms of ICAs have been breached or met.'*¹

Since the IDOs conducted 'separate trunk groups' to give only one way POIs and deny adequate points of connectivity to the informant, denied MNP to their customers to purposely obstruct RJIL's entry in the telecom market, and also violated technical development norms. Their conduct amounted to have an anti-competitive effect on the market, thus violating the provisions of the Act.

➤ **Bombay High Court**

The order of CCI was challenged by the IDOs and the Cellular Operators Association of India (COAI) in the Bombay High Court. The High Court set aside CCI's order passed under Section 26(1) of the Act and all consequential notices issued by the Director General under Section 41 of the Act for lack of CCI's jurisdiction considering TRAI was already seized of the matter.

The High Court noted that the Telecommunications Sector/Industry/Market is governed, regulated, controlled and developed by authorities under the Telegraph Act, the TRAI Act and related regulations, rules, circulars, including all government policies. Thus, all issues pertaining to development of Telecommunications Market, such as interpretation or clarification of contract clauses, interconnection agreements, and quality of service regulations are to be settled by the telecom authorities/ Telecom Disputes Settlement and Appellate Tribunal (TDSAT), not any authority under the Competition Act.

The court observed that the Competition Act and the TRAI Act are independent statutes and should exercise their functions in the light of the objects for which they were established.

*"The Competition Act governs the anti-competitive agreements and its effect -- the issues about 'abuse of dominant position and combinations'. It cannot be used to interpret the contract conditions/policies of the Telecom Sector/Industry/Market, arising out of the Telegraph Act and the TRAI Act."*²

Conclusively, the court held that every majority decision cannot be termed as 'cartelisation' and the IDOs as well as the COAI have not committed any breaches of any provisions of the Competition Act.

THE APEX COURT'S DECISION

Aggrieved by the High Court's judgment, CCI filed a special leave petition with the Apex Court for its determination. The Supreme Court dismissed the appeals while largely affirming the findings of Bombay High Court which had set aside direction issued by the CCI to probe RJIL's allegation of cartelisation by the IDOs. Through this decision, the Court largely settled the matter on the jurisdiction of the CCI with respect to telecom regulators.

The court observed that the obligation on IDOs to provide interconnectivity flowed from the unified licence and the interconnection agreements entered into by the telecom operators as per the Telecommunication Interconnection (Reference Interconnect Offer) Regulations, 2002, which fell with the specialised domain of TRAI.

*"TRAI being a specialised sectoral regulator and also armed with sufficient power to ensure fair, non-discriminatory and competitive market in the telecom sector, is better suited to decide the aforesaid issues"*³

The Supreme Court opined that the functions of TRAI and CCI are distinct from each other. The CCI is entrusted with duties, powers and functions to deal with anti-competitive practices that have an adverse effect on market competition to protect the interest of consumers and ensure freedom of trade. TRAI, on the other hand, is entrusted with regulation of telecom services for orderly and healthy growth of telecommunication infrastructure apart from protection of consumer interest. Since the case at hand pertains to the telecom market which is specifically regulated by the TRAI Act, the court held that 'balance' will be maintained by permitting TRAI in the

first instance to decide the jurisdictional aspect. However, the Court did not altogether oust the jurisdiction of CCI and made its investigation subject to the findings of TRAI by stating as follows:

*"Once that exercise is done and there are findings returned by the TRAI which lead to the prima facie conclusion that IDOs have indulged in anti-competitive practices, the CCI can be activated to investigate the matter going by the criteria laid down in the relevant provisions of the Competition Act and take it to its logical conclusion"*⁴

ANALYSIS

- Interface Between Sector Regulation and Competition

Sector regulation and competition enforcement, both, work towards a common goal of ensuring the functioning of a healthy market. While sector regulation is aimed at fixing different types of market failures, ensuring safety and quality of products and services, ensuring consumer interest, and furthering special public interests such as redistribution, competition law is aimed at safeguarding consumer welfare against the anticompetitive conduct of enterprises.⁵ To that end, sector-specific regulation has an *ex ante* application in checking the performance of enterprises and competition law has an *ex post* function in checking anti-competitive agreements and abuse of dominance by enterprises.⁶

Running on the common objective of consumer welfare, the role of sectoral regulators and competition authorities seems to be clearly defined at the outset. However, there can be cases with issues that fall within the domain of both the sectoral regulator and competition authorities, an example being the case at hand.

As per Section 11(1) (iv) of the TRAI Act, 1997, the functions of the authority shall be to make recommendations on *'measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services.'*⁷ While this provision does not mandate TRAI to undertake the role of competition regulator, it enables TRAI to take steps towards promoting competition in the telecom sector. Under the Competition Act, Section 21 and Section 21 A permit a statutory body to make reference to the CCI and empowers it to make reference to a statutory body in a case.⁸ However, neither of the provisions is binding on either authority. Similarly, the laws under TRAI or the Act do not clarify boundaries of potential overlaps between the roles of two authorities. They also do not spell out a sequence of jurisdiction in the event an issue falls at the intersection of sectoral regulation and competition. These ambiguities pave the way for concurrent

application of regulation and competition, which may lead to conflicting decisions, legal uncertainty (when the two bodies come to separate conclusions) and forum shopping by the incumbents.⁹

Therefore, there is a need for clear demarcation of roles and seamless distribution of powers of the sectoral regulator as well as the market wide regulator, while preserving the *raison d'etre* of both the authorities. Suggested measures would include a common provision of mandatory consultation between sectoral regulator and competition authority under their respective laws.¹⁰ Another solution could be for the authorities to themselves come to an understanding on jurisdiction in such matters.¹¹ That is, if the parties approach the sectoral regulator and/or the CCI first, then the other body should wait for its decision and only intervene if the decision fails to account for consumer welfare or any other regulatory objective (public interest) respectively.

- Maintaining Comity between TRAI and CCI

In its judgement, the Supreme Court recognised the distinct duties, powers and functions assigned to TRAI and CCI with respect to maintaining healthy competition and ensuring consumer interest in the market. In its order, the Court deferred the investigation by CCI to a later stage and subject to the findings of TRAI by giving the sectoral regulator jurisdiction in the first instance to decide on the technical aspects of the matter that are solely covered by the Act. Thus, only after TRAI finds a violation of the terms of its Act, the CCI can look into whether such violation amounted to a concerted agreement between the IDOs that can be held anti-competitive within the provisions of the Competition Act.

The order of the Supreme Court sends mixed signals. On one hand it seems to be deciding a logical flow of jurisdiction in matters involving specialised regulation as well as the CCI, on the other it seems to be abridging the authority of the CCI. Through this order, while the Court emphasised on maintaining 'comity' between the sectoral and market regulator, in principal it seems to have taken the approach of institutional deference.¹² Further, the presence of mere collusion in itself is punishable under the Act (Section 3). However, the *prima facie* view of the CCI is now subject to findings of TRAI.¹³

The CCI plays an overarching role as a market regulator across all sectors to correct competition distortion in markets. It acts as a competition watchdog to eliminate anti-competitive practices that harm market equilibrium. Accordingly, the Competition Act provides that CCI shall have jurisdiction in addition to and not in

derogation of other laws. While TRAI too is entrusted with promoting a fair market, in doing so its knowledge and expertise on the matter should not be confused with that of the CCI. For instance, interconnection regulation, which forms the root of the present dispute, is indeed a useful instrument of checking market competition. While TRAI can mandate interconnection between parties and punish them for violating the interconnection agreements, only CCI can look into anticompetitive conducts, such as cartelisation amongst service providers to deny adequate points of interconnection.

Therefore, while the verbose order of the Supreme Court is commendable in spirit, in principle it may lead to undermining the authority of the CCI, particularly when applied to jurisdictional turfs between the CCI and other sectoral regulators. It misses a useful opportunity to institutionalise cooperation between sectoral regulators and the CCI by utilising their respective knowledge and expertise in harmoniously coming to a conclusion. In cases like the present one, where issues at hand intersect elements of competition and technical regulations, a collaborative process will not only ensure efficient decision making but will also save on resources of the deciding bodies as well as the pleading parties.

Conclusion

As innovation and technology is rapidly penetrating in all sectors, policymakers and regulators are grappling with how to contain their growing might and influence. Thus, it is important that going forward regulators adopt a collaborative approach in order to effectively tackle the novel issues brought forth by them that blur the lines of regulatory jurisdiction.

With this order, the Supreme Court settled the issues of jurisdiction with respect to telecom regulators and the CCI settling the age-old dispute between the two on who is best suited to rule on anti-competitive behaviour in the telecom sector. However, by subjecting the jurisdiction of the CCI to the findings of TRAI, the order gives the sense of weakening the authority of CCI. At the same time, the Court may have opened the pandoras box of similar jurisdictional issues between other sectoral regulators and the competition authority.

As indicated in this edition, perhaps this order was an opportunity with the Apex Court to formalise the principles of cooperation and coordination within the working dynamics of sectoral and competition regulators to ensure constructive decision making. Alas, it was missed.

Endnotes

- 1 Case No. 81 of 2016 and Case No. 83 of 2016
- 2 <https://indiankanoon.org/doc/25856636/>
- 3 https://www.sci.gov.in/supremecourt/2017/40072/40072_2017_Judgement_05-Dec-2018.pdf, p. 105.
- 4 *Ibid* p. 114.
- 5 <https://www.epw.in/journal/2018/38/market-power-and-competition-policy/conflict-between-regulation-and.html>
- 6 *Ibid*
- 7 <http://ijlt.in/wp-content/uploads/2015/09/TRAI-Act-1997.pdf>
- 8 https://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf
- 9 <https://www.epw.in/journal/2018/38/market-power-and-competition-policy/conflict-between-regulation-and.html>
- 10 <https://thewire.in/business/cci-trai-promoting-competition-anti-competitive-practices>
- 11 *Supra* Note 9
- 12 <https://thewire.in/business/did-the-sc-solve-the-impasse-between-indias-competition-and-telecom-regulators>
- 13 *Ibid*

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