

C Shanmugam and Manish Gandhi vs. Reliance Jio Infocomm Ltd, DoT, TRAI and BSNL

Through this monthly 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. The purpose of this publication is to put forward a well-informed and unbiased perspective for the benefit consumers as well as other relevant stakeholders. Additionally, it seeks to encourage further discourse on the underlying pertinent competition issues in India.

Executive Summary

“The explosion of Information and Communication Technologies (ICT) driven by digitisation has created rapid technological progress and growth. Prices for digital services are falling rapidly, and the mobile revolution is bringing connectivity to millions of people in most remote areas”.¹ The deployment of 4G connectivity was one such technological advancement, and companies are fiercely competing with each other to capture the large Indian market.

The focus of this month’s publication is on the disruption caused by Reliance Jio Infocomm Limited (Jio), which entered the market of wireless telecom services, and challenged the incumbents with its aggressive marketing and pricing strategy owing to its deep pockets.

The Indian telecom market is characterised by a high level of price competition within the markets for the benefit of consumers. Therefore, high consumer incentives and loyalty are required to remain relevant in the market. As a new entrant, Jio had to follow a competitive pricing model and offer heavy discounts in order to penetrate the market and gain market share.

Notably, the ‘free’ services of voice calls, mobile data, etc. offered by Jio to their new customers, resulted in corresponding losses for incumbents, who have subsequently questioned the legality of such pricing strategies, and raised anti-competitive concerns against Jio. With addition to Telecom Regulatory Authority of India (TRAI), the Competition Commission of India (CCI) has also been approached by relevant stakeholders.

The main issue raised by the informants (C Shanmugam and Manish Gandhi) was that of abuse of dominant position, in the form of predatory pricing by Jio. Upon detailed investigation into the allegations of the informants, the Commission was of the view that, Jio being a non-dominant player in the relevant market with the *provision of wireless telecommunication services to end users in each of the 22 circles² in India*, did not engage in predatory pricing.

Competition Commission of India's Order

Background

The present case³ relates to the allegation of contravention of Section 4 (abuse of dominant position) of the Competition Act 2002 (Act), by Jio, the new entrant in the Indian telecom sector. Apart from the informants of this case, similar allegations were also levied against Jio by Bharati Airtel Limited (previous case).⁴

The basic contention of the informants in both the cases was that the by offering free voice, mobile data and roaming services; apart from other freebies, such as music and video streaming, to customers – Jio had resorted to predatory pricing, which amounted to abuse of its dominant position in the relevant market. Relying on the detailed investigation undertaken by CCI in the previous case, the Commission ruled in favour of Jio, as it found no *prima facie* case of contravention of Section 4 of the Act. Consequently, the matter was closed without further investigation.

Findings of the Investigation in the Previous Case

There were two major issues, which needed detailed investigation:

- Whether Jio held a dominant position in the relevant market or not and
- If it held a dominant position, whether its conduct amounted to an abuse within the meaning of Sections 4(2)(a)(ii), 4(2)(c) and 4(2)(e) of the Act. Section 4(2) lists the actions/conduct of dominant enterprises, which might be held to be an abuse. It is important to note that these provisions of abuse of dominant position require proving a dominant position of the enterprise in the relevant market as a prerequisite.

Box 1: Allegation of Contravention of Relevant Provisions of the Act

Section 4(2)(a)(ii)

This sub-section of the Act states "directly or indirectly, imposes unfair or discriminatory price in purchase or sale (including predatory price) of goods or service". Predatory price is further explained to be "the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors".⁵

Section 4(2)(c)

Box 1: Allegation of Contravention of Relevant Provisions of the Act

This sub-section of the Act states “indulges in practice or practices resulting in denial of market access in any manner”.⁶

Section 4(2)(e)

This sub-section of the Act states “uses its dominant position in one relevant market to enter into, or protect, other relevant market”.⁷

Relevant Market

Proving a dominant position in the relevant market is a prerequisite for determining the contravention of the above sub-sections. Therefore, it is necessary to first define the relevant market, to assess whether the defendant holds a dominant position in the same. CCI’s judgement in the present case was based on its judgement on the complaint filed by Bharati Airtel Limited previously on similar lines. Therefore, the relevant market identified by the Commission was ‘provision of wireless telecommunication services to end users in each of the 22 circles in India’. Given below is the explanation:

Relevant product market

The Commission in the previous case analysed the Indian Telecom industry and defined the relevant product market as “*the market for provision of wireless telecommunication services to end users*”.⁸ While doing so, the Commission considered the informant’s (Airtel) contention that the relevant product market should be 4G Long Term Evolution (LTE) telecommunications service as well as the defendant’s claim of there being no difference between telecom services offered through 4G, 3G or 2G technologies. The selection of relevant product market was based on three factors as mentioned below:

1) Data services and voice services⁹

Even though telecom service providers bundle voice and data services together in their tariff plans, data consumption can also be on a standalone basis, i.e. separate from voice services through various devices such as mobile routers, broadband dongles, etc. This implies that data-only services can be purchased independent of any voice services.

Further, all telecommunication service providers were considered to be similarly placed to offer a variety of services designed for data-only device

users and voice-enabled device users. Therefore, distinction between these services was not found to be necessary under the given circumstances of the case.

2) 4G and 3G technology¹⁰

The Commission noted that 4G technology will be operative only in a 4G compatible device and not in a 3G compatible handset. However, a 3G network will be operative in a 4G compatible handset. This signifies that technology evolution is backward compatible, i.e. between a new generation handset and an old generation network.

Moreover, the Department of Telecommunications (DoT) grants uniform licences to all telecommunication service providers i.e. Unified Access Licence (UAL) and it does not differentiate between service providers based on the technology deployed by them.

3) Price and cost¹¹

Although consumers have to incur additional cost towards buying new mobile instrument to avail 4G telecommunication services, considering the relatively lesser life span of mobile handsets and the on-going technological innovation, constant migration of existing subscribers to upgraded ecosystem is natural and inevitable over a period of time.

In addition, it is to be noted that, the cost of 3G and 4G compatible mobile handsets and the tariff for 3G and 4G telecommunication services are largely similar.

Relevant Geographical Market¹²

The relevant geographic market in the case was determined to be *'each of the 22 telecommunication circles in India'*, based on the following reasoning:

Spectrum, which is the primary input required for offering wireless mobile communication services, are allocated to service providers through an auction process. India has been divided into 22 circles for such purpose and separate auctions have been conducted for each circle. A consumer is likely to choose amongst the different options of telecommunication services available in his locality, and is not likely to avail telecommunication services from any other territory.

Further, a user calling another user located within the same telecommunication circle, irrespective of the physical distance between the two, is treated as a local call, and any call terminating in another circle is considered to be a long-distance call, i.e. Subscriber Trunk Dialling (STD). In light of these factors, each of the said circles appear to constitute distinct and separate geographic market.

Dominant Position

Next, the commission was to determine whether Jio had attained a dominant position in this relevant market. To ascertain the same, the Commission relied on the following factors:

Competitors competing in the market¹³

Ever since the telecommunication market was opened to private players, the market witnessed the entry of a large number of players competing with each other, resulting in decreasing tariffs and constant improvements in quality and variety of services.

Besides, the introduction of Mobile Number Portability (MNP), was a pro-competitive move by the government, resulting in consumers having sufficient choice to shift from one service provider to another with ease. Therefore, consumers were not dependent on any single telecom operator.

Market shares of the Defendant and its competitors¹⁴

As per the TRAI press release dated 17th February, 2017, the market is led by the Informant (Airtel) with a market share of 23.5 percent followed by Vodafone (18.1 percent), Idea (16.9 percent), BSNL (8.6 percent), Aircel (8 percent), RCOM (7.6 percent), Jio (6.4 percent), Telenor (4.83 percent), Tata (4.70), Sistema (0.52 percent), MTNL (0.32 percent) and Quadrant (0.27 percent). The Commission did not find it appropriate to hold Jio dominant in a scenario where its customers constitute less than 7 percent of the total subscriber base at pan-India level.

It is notable here that the CCI uses data provided/released by TRAI, which means the relevant market, as determined by the CCI in this specific case, is the same as the market determination through a general regulatory process by the telecom regulator.

Financial strength¹⁵

As discussed above, the market comprises of several players ranging from established foreign telecom operators to prominent domestic business houses, who are comparable in terms of economic resources, technical capabilities and access to capital. The Commission noted that financial strength is relevant but not the sole factor to determine dominant position of an enterprise. Considering comparable investments and financial strengths of competitors, the success of Jio in managing large scale investments does not suggest dominant position being enjoyed by it.

Technical expertise/infrastructure¹⁶

The extant regulatory requirements of Department of Telecommunications (DoT) appear to cap the overall and band-wise spectrum holding by telecom operators, which to a large extent takes care of undesirable concentration of spectrum in the hands of few operators.

Assumption of narrower relevant product market¹⁷

Even if one were to consider 4G LTE services as the relevant product market, Jio is not likely to hold dominant position in such market on account of the presence of the Informant, Vodafone, Idea, etc., who derive commercial and technical advantages due to their sustained and sound business presence in telecom services. It needs to be appreciated that Jio is a new entrant, who has commenced its business recently i.e. from September 05, 2016. Hence, Jio was not held to be in a dominant position.

Abuse of Dominant Position

The chief allegation against Jio was with respect to its predatory pricing strategy. As the precursor to predatory pricing, i.e. a dominant position was not proved; the Commission concluded that the question of abuse would not arise.

Order of the Commission¹⁸

The Commission observed that the Informant has not demonstrated any reduction of competition or elimination of any competitor, nor has any intent to that effect been demonstrated. Also, providing free services cannot by itself raise competition concerns unless the same is offered by a dominant enterprise and shown to be tainted with an anti-competitive objective of excluding competition/competitors, which does not seem to be the case in the instant matter as the relevant market is

characterised by the presence of entrenched players with sustained business presence and financial strength.

In a competitive market scenario, where there are already big players operating in the market, it would not be anti-competitive for an entrant to incentivise customers towards its own services by giving attractive offers and schemes.

Such short-term business strategy of an entrant to penetrate the market and establish its identity cannot be considered to be anti-competitive in nature, and as such cannot be a subject matter of investigation under the Act.

Further, the Commission did not find it appropriate to hold Jio dominant in a scenario where its customers constitute a mere 6.4 percent of the total subscriber base at pan-India level. In the absence of any dominant position being enjoyed by Jio in the relevant market, the question of examining the alleged abuse did not arise and the complaint was subsequently dismissed.

Analysis by CUTS

The Commission's order seems to be sound, especially considering the contours of the provisions of the Act. However, at this crucial stage, it is also important to discuss some underlying issues with regard to the Act, which might be relevant to the general application of Indian competition law principles in the near future.

Monitoring Quick Market Inroads until the Market Matures/Stabilises

The 'Commission rightly went as per the Act', and could not analyse the possibility of predatory pricing before establishing the dominant position of Jio. The Commission held Jio not to be dominant due to a low market share of 6.4 percent. However, it must be duly noted that such market share was captured in a short span of time, i.e. four months only.

The competition watchdog must maintain a close watch on the developments of the market, and ensure continuous competition within it so as to maximise consumer benefit. The main issue posed by this is that new age businesses based on evolving technologies, are employing strategies like bundled offerings, cross subsidies and discount pricing.

Therefore, appropriate elements of market abuse might need to be identified and provided for in the Act for the future, while at the same time ensuring not to hamper innovation and using such provisions for intervention sparingly. This could be put into effect with close collaboration with various sectoral regulators like Telecom Regulatory Authority of India (TRAI) in this case.

Other Factors Determining a Dominant Position

In order to determine a dominant position, the Commission compared the market share of Jio (which has crossed 10 percent in June 2017)¹⁹ with the incumbents based on the number of subscribers. Other factors could also be considered for this, such as: Jio catering to 85 percent mobile data usage in India and becoming the world's largest mobile data network,²⁰ with sharp and steady growth in Jio's net additions to wireless subscribers each month²¹. Another important aspect is that Jio is not catering to the 2G and 3G consumer market.

The Act could take a more 'economics' based approach in determining a dominant position of an enterprise, instead of restricting its reliance on only legalistic reasoning as such.

The Commission held the view that Jio and the incumbents had access to similar financial resources and no enterprise had exited the market due to the new entrant. However, following the zero pricing strategy adopted by Jio, 'the sector encountered many mergers and acquisitions, such as mergers between Idea-Vodafone, Airtel acquiring Telenor and Tikoma, etc. Moreover, several small telecom players are either going for outright sale or exiting the market by just selling off their spectrum'.²²

Though such developments may also be considered to be bringing in efficiency in the market, the Commission should not be overwhelmed with the small market share of Jio and the introductory consumer benefits brought forth by it. Caution needs to be maintained with respect to a possible market failure in the wake of Jio's disruptive entry, since drastic structural changes of the market is a consideration in the assessment of market power in many jurisdictions.

Due consideration needs to be given to the broader market dynamics and overall profitability of the industry. There seems to be no discussion on market power/significant market power, which could result from Jio's ability to grab quick market share irrespective of competition, due to its abundant financial resources.

Contravention of Section 4(2)(e)

Since a dominant position of Jio in the relevant market was not established, the Commission could not examine the contravention of Section 4(2)(e). However, the move by Jio of selling 4G compliant mobile devices could be considered an exercise of market power to enter a new product market. Does the prerequisite of establishing a dominant position for further investigation into market abusive conduct; need to be replaced with establishing adequate market power?

In light of the accelerating pace of innovation, competition authorities might often make the mistake of not considering several markets at the same time and the hidden links amongst them, or the overall eco-system in which different firms compete, therefore, not being able to see the anti-competitive intent/strategies.

Considering the emerging trends in abusive practices and inability of traditional enforcement tools to tackle them, the Act may provide for restricting abusive market conduct which might lead to a dominant position. This could be an appropriate *ex-ante* measure for checking attempts of attaining a dominant position through market abuse.

CCI's Turf War with TRAI

The entry of Jio has sparked a turf war between CCI and the Telecom Regulatory Authority of India (TRAI). 'Market incumbents had approached TRAI for relief against the aggressive pricing strategy adopted by Jio, before approaching CCI'.²³ 'TRAI floated a Consultation Paper on predatory pricing in the telecom sector to address the issue.

In response to the same, CCI has argued that being a market regulator, it is better placed to look into matters related to predatory pricing than TRAI, which is a sectorial regulator'.²⁴ It is time for the two regulators to set aside their differences and the notion of '*ex-ante* competition matters falling in the domain of TRAI, and *ex-post* matters like predatory pricing being a part of CCI's turf'.

As the telecom market continues to experience dynamic competition from the perspective of all relevant stakeholders, it becomes imperative for the CCI and TRAI to harmonise their efforts in achieving the common goal of consumer welfare through maintaining optimum market conditions in the sector.

Conclusion

The Indian telecom sector continues to be in a state of flux, and regulatory regimes will constantly be tested in the future as the market matures. With falling prices of telecom services are being seen as an indicator of consumer welfare, competition regimes would need to be mindful of the corresponding effect on the overall market conditions of the sector.

This might require redefining the scope of their enforcement tools and policymakers would need to readjust the ethos of competition law provisions in order to keep up with market advancements.

As pointed out in this edition, while adhering to the provisions of the Act in determining a case is important, competition agencies also need to be cautious about anti-competitive practices adopted by enterprises, which try to circumvent the Act, such as abusive market conduct to attain a dominant position.

CCI and TRAI need to harmonise their efforts to maximise consumer welfare, and frame policies, which act as *ex-ante* measures of avoiding market failure, apart from an optimal *ex-post* regulatory regime.

Endnotes

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- ¹ https://www.gsma.com/publicpolicy/wp-content/uploads/2016/09/GSMA2016_Report_NewRegulatoryFrameworkForTheDigitalEcosystem_ExecSummary_English.pdf
 - ² Spectrum is the primary input required for offering wireless mobile communication services and the same is allocated to service providers through an auction process. India has been divided into 22 circles for such purpose and separate auction has been conducted for each circle. Also, telecommunication service providers determine circle wise tariff. <http://www.cci.gov.in/sites/default/files/98%20of%202016.pdf>
 - ³ CCI Case No 98 of 2016, delivered on 15.06.2017 available at <http://www.cci.gov.in/sites/default/files/98%20of%202016.pdf>
 - ⁴ CCI Case No 3 of 2017, delivered on 9.06.2017 available at <http://www.cci.gov.in/sites/default/files/3%20of%202017.pdf>
 - ⁵ The Competition Act, 2002, available at http://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf
 - ⁶ The Competition Act, 2002, available at http://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf
 - ⁷ The Competition Act, 2002, available at http://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf
 - ⁸ CCI Case No 98 of 2016 available at <http://www.cci.gov.in/sites/default/files/98%20of%202016.pdf>
 - ⁹ CCI Case No 98 of 2016, Page 6
 - ¹⁰ CCI Case No 98 of 2016, Page 7
 - ¹¹ CCI Case No 98 of 2016, Page 7
 - ¹² CCI Case No 98 of 2016, Page 7 & 8
 - ¹³ CCI Case No 98 of 2016, Page 8

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- ¹⁴ CCI Case No 98 of 2016, Page 8
- ¹⁵ CCI Case No 98 of 2016, Page 9
- ¹⁶ CCI Case No 98 of 2016, Page 8
- ¹⁷ CCI Case No 98 of 2016, Page 9
- ¹⁸ CCI Case No 98 of 2016, Page 9
- ¹⁹ http://www.trai.gov.in/sites/default/files/PR_60_TSD_Jun_170817.pdf
- ²⁰ <http://gadgets.ndtv.com/telecom/news/reliance-jio-mobile-network-data-consumption-india-world-1726195>
- ²¹ http://www.trai.gov.in/sites/default/files/PR_60_TSD_Jun_170817.pdf
- ²² <http://www.financialexpress.com/industry/reliance-jio-impact-after-idea-vodafone-merger-3-more-ma-deals-coming-says-industry/596202/>
- ²³ <https://thewire.in/163410/cci-trai-promoting-competition-anti-competitive-practices/>
- ²⁴ <http://www.dnaindia.com/business/report-cci-and-trai-should-resolve-turf-wars-by-talking-to-each-2517026>

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