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Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM

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Subhrajit Chanda

BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

CRITICAL ANALYSIS OF THE PIVOTAL ROLE PLAYED BY THE COMPETITION ACT IN THE TELECOMMUNICATIONS SECTOR

AUTHORED BY - PRIYANK RANA¹ & MEGHA JAGNANI²

KEYWORDS: Competition Commission of India (CCI), Tele Communication, Telecom Regulatory Authority of India (TRAI), Reliance Jio Infocom Limited (RJIL)

Abstract

India, being the second largest telecom market in the world, has witnessed significant growth in competition law. The Competition Act of 2002 aims to promote and maintain competition in the Indian market. At the same time, the Telecom Regulatory Authority of India (TRAI)³ is focused on ensuring orderly growth in the telecom sector. This paper examines the delicate balance between competition law and the telecom industry, highlighting the Objective of the Competition Act, of 2002. The Competition Act aims to eliminate anti-competitive practices. It empowers the Competition Commission of India (CCI)⁴ to investigate agreements and dominant positions of companies. This paper will further analyse the role of the TRAI whose objective is to promote and regulate the telecom sector. It plays a crucial role in shaping policy and ensuring fair competition. The Supreme Court has grappled with defining the boundaries between the CCI and the telecom sector. The Case studies in this study will illustrate the need to harmonize competition law and sector-specific regulations.

¹ Priyank Rana is an accomplished legal scholar specializing in Constitutional law. I hold the degree of LLM from the *National University of Study and Research in Law, Ranchi*, and degree of LLB from the *University of Delhi*. He has Qualified for the UGC-NET in Law Subject.

² Megha Jagnani is an accomplished legal scholar specializing in Corporate law. She holds the degree of LLM and was awarded a Gold medal in fundamental papers from the *National University of Study and Research in Law, Ranchi*, and a degree of LLB from the *Amity Law School, Noida*.

³ The Telecom Regulatory Authority of India (TRAI) was, thus, established with effect from 20th February 1997 by an Act of Parliament, called the Telecom Regulatory Authority of India Act, 1997, to regulate telecom services, including fixation/revision of tariffs for telecom services which were earlier vested in the Central Government.

⁴ The Competition Commission of India, which has been established by the Central Government with effect from 14th October 2003. The Commission must eliminate practices having adverse effects on competition, promote and sustain competition, protect the interests of consumers, and ensure freedom of trade in the markets of India.

INTRODUCTION

The telecommunication sector has come a long way in India, from enjoying organic monopoly to experiencing fierce competition. This industry is India's most distinguished sector and is growing with all the cutting-edge technology. The swift advent of competition and innovation is transforming sector dynamics, presenting challenges that compel telecom and competition commission authorities to reassess their roles and functions. Consequently, they are adopting a coordinated strategy to address intersecting issues.

Over the past ten years, India's telecom industry has experienced fierce rivalry. Two instances of Jio's entry into the Indian market and the Vodafone-Idea(VI) merger serve to highlight the intense rivalry that already exists in this industry, and it forced the businesses to constantly improve their capabilities and gain an advantage over rivals. Against this backdrop, I will examine two recent court rulings where actors in the telecom industry leveled accusations of predatory pricing and cartelization against each other. In *Bharti Airtel v. Reliance Jio*⁵, the Competition Commission of India (CCI) determined that Reliance Jio did not hold a dominant position in the market and was not engaging in predatory pricing. This judgment will be the first one I analyze.

The second decision I'll highlight is the SC's ruling in *CCI v. Bharti Airtel*⁶. Here the Court attempts to strike a balance between the CCIs and the TRAI (Telecom Regulatory Jurisdiction of India's regulatory authority). In their lawsuit, Jio said that Vodafone, Idea, and Bharti Airtel had formed a cartel. In reference to section 26⁷, the Director General was required to launch an inquiry; however, the Supreme Court nullified the CCI decision that had done so. It criticized these two decisions and took into account how they would have an impact on future disputes brought up by stakeholders in the telecom industry.

In 2017, a new player in the telecom industry, Reliance Jio Infocom Limited (RJIL)⁸, filed a complaint to the CCI accusing them of organizing a cartel to prevent entry into the market. In the past, it filed a

⁵ *Bharti Airtel Limited vs Reliance Industries Limited & Other* on 9 June, 2017

⁶ *Competition Commission of India v. Bharti Airtel & Ors.*, (CIVIL APPEAL Numbers 11843 OF 2018) before Hon'ble Supreme Court of India

⁷ Section 26, Competition Act 2002

⁸ Reliance Jio Infocomm Limited (RJIL), a subsidiary of Reliance Industries Limited (RIL), India's largest private sector company, is the first telecom operator to hold a pan-India Unified License. This license authorizes RJIL to provide all telecommunication services except Global Mobile Personal Communication by Satellite Service.

complaint with the Telecom Regulatory Authority (TRAI) that the incumbents had refused to provide sufficient ports of interconnection. An order favoring the informant, issued by the CCI, was challenged in the Bombay High Court before being escalated to the Supreme Court of India. A case that revitalized every court level in the nation was a pivotal ruling concerning the CCI's role among telecom sector regulators, especially in issues that overlap the jurisdiction of both entities. The overarching aim of both legislative measures is to create an environment conducive to fair competition. There is a convergence in the mandates of TRAI and CCI towards this common end. Despite sharing similar objectives, the watchdogs, CCI and TRAI, operate with distinct missions and methodologies. Jurisdictional conflicts arise from their divergent strategies to achieve the same end. The researcher intends to scrutinize the Supreme Court of India's decision for its extensive consequences on CCI, while monitoring the case's progression at each judicial level, through the lens of optimal competition.

Conflicts emerge when the lines between fostering competition and regulating anti-competitive behavior are blurred, as demonstrated by the recent demand from the Competition Commission of India (CCI) for the resignation of the Telecom Regulatory Authority of India (TRAI). Vodafone India, Bharti Airtel, and Idea Cellular have been charged with exploiting their dominant position against Reliance Jio through predatory pricing. The most prudent action would be for the PMO⁹ or the NITI Aayog¹⁰ to bring together both regulators to settle the jurisdictional disputes definitively, rather than permitting one to dominate the other.

BHARTI AIRTEL V. RELIANCE JIO¹¹

In September 2016, Bharti Airtel instituted a complaint against Reliance Jio, alleging that the company's predatory pricing violated section 4(2)(a)(ii) of the Competition Act. RJIL made a splash in the market with its 'Jio Welcome Offer,' which from September 5 to December 31, 2016, provided free data, voice, video, and app services to customers. As the new year began, Reliance Jio continued

⁹ The Prime Minister's Office (PMO) (*Pradhānamantrī Kāryālaya*) consists of the immediate staff of the Prime Minister of India as well as multiple levels of support staff reporting to the Prime Minister. The PMO is headed by the Principal Secretary

¹⁰ The NITI Aayog is the apex public policy think tank of the Government of India and the nodal agency tasked with catalyzing economic development, and fostering cooperative federalism, and moving away from bargaining federalism through the involvement of State Governments of India in the economic policy-making process using a bottom-up approach

¹¹ *Ibid* note 5

its aggressive promotion strategy by introducing the 'Happy New Year' offer, which gave customers access to unlimited internet data. Bharti Airtel claimed that offering free services was a breach of Section 4(2)(a)(ii) of the Competition Act¹², amounting to predatory pricing. However, a company is only culpable under Section 4¹³ for predatory pricing if it holds a dominant position in the relevant market. Section 4¹⁴ addresses the Abuse of Dominant Position. "Predatory pricing" involves selling goods or services below production cost, as set by regulations, with the aim to reduce competition or remove competitors. The Competition Commission of India (CCI) defined the "relevant market" as the "provision of cellular telecommunication services to end customers in each of the 22 circles and then evaluated if RJIL was in such a dominant position.

The market is competitive, with several companies boasting similar financial and technological strengths. Reliance Jio holds no more than a 7% market share in any of India's 22 telecom circles. With ample choices available, customers are not reliant on any single service provider. Consequently, the Competition Commission of India (CCI) concluded that Reliance Jio does not hold a dominant position. Without a dominant market position, the argument for abuse of dominance through predatory pricing does not stand.

This pivotal decision made on June 9, 2017, has been a turning point for Reliance Jio, which has seen a significant increase in its market share, surpassing competitors like Vodafone-Idea(VI) and Airtel in terms of revenue market share in the last fiscal year's third quarter. This growth prompts a critical inquiry: does Jio now occupy a "dominant position" within the telecom sector, and has the concept of "dominance in the relevant market" changed since 2017.? Section 4(2)¹⁵ of the Act says that a dominant position is a company's advantageous status in the market, allowing it to operate independently of competitive forces or to exert influence over competitors, customers, or the market for its benefit. While Section 19(4)¹⁶ includes market share as a criterion for determining dominance, the mere fact that Jio holds the largest or disproportionately large market share does not automatically equate to dominance, as this is only one of several factors that must be evaluated.

¹² Section 4(2)(a)(ii) , The Competition Act 2002

¹³ Section 4, The Competition Act 2002

¹⁴ *Supra note 13*

¹⁵ *Supra note 12*

¹⁶ Section 19, The Competition Act 2002

COMPETITION COMMISSION OF INDIA V. BHARTI AIRTEL¹⁷

RJIL initiated a lawsuit against Vodafone, Bharti Airtel, and Idea, accusing them of cartelization and anti-competitive practices. The Competition Commission of India (CCI), after reviewing the complaint, found a prima facie case and give directions to the Director General to investigate the case as per section 26(1).¹⁸ However, the High Court of Bombay set aside the decision of CCI, stating that the TRAI being the sectoral regulator for telecom, should have had the initial jurisdiction over the dispute. Consequently, it was ruled that the CCI's jurisdiction would come into play only after the completion of proceedings under the TRAI Act, of 1997.

Then Reliance Jio and CCI contested the Bombay High Court's decision before the Supreme Court, contending that TRAI and CCI have distinct regulatory entities. They posited that the CCI's concern was that if the respondents breached the condition of section 3(3)¹⁹ forming an anti-competitive agreement to impede Reliance Jio's market entry. Conversely, the issue before TRAI pertained to a possible violation of the licensing agreement's terms, along with other interconnection and quality of service regulations. The contention was that the CCI's jurisdiction was inapplicable, as the TRAI Act of 1997 and the Competition Act of 2002 govern separate spheres.

The respondents countered by asserting that the existence of a dedicated regulator for the telecom industry negates the CCI's jurisdiction and that TRAI should govern all aspects related to the sector. They endorsed the Bombay High Court's ruling, contending that only TRAI possesses the necessary expertise to conduct such an investigation and that the CCI cannot address the challenges of the telecommunication sector.

To reconcile the regulatory jurisdictions between the TRAI and the CCI, the Supreme Court has partially dismissed the arguments presented by both. The Court by referring to section 21 of the Competition Act, acknowledges the roles of other statutory bodies. It emphasized the necessity of an interpretation that avoids conflicting stances by the TRAI and the CCI on identical matters. As a result, the TRAI was appointed as the primary authority to examine complaints. Following the TRAI's resolution, the CCI is authorized to initiate an investigation as per section 26. The court clarified that

¹⁷ *Ibid* note 6

¹⁸ Section 26, The Competition Act 2002

¹⁹ Section 3(3), The Competition Act 2002

the CCI's jurisdiction remains intact but is postponed until the TRAI has concluded its assessment. Sec. 60 of the Competition Act, stipulates that its provisions override any inconsistencies with other Indian statutes, an interpretation upheld by the Court. The Court dismissed the argument that the Competition Commission of India (CCI) did not have jurisdiction over the telecommunications sector. Given the wording of section 60²⁰, the Court determined that while the CCI has authority, it cannot exercise it until the Telecom Regulatory Authority of India (TRAI) has made a decision. This ruling harmonizes the objectives of the TRAI Act of 1997 and the Competition Act of 2002.

Resulting Effects of Both Decisions

The Indian telecom sector is witnessing escalating competition, leading to inevitable confrontations over various issues among market competitors. Utilizing the Competition Act of 2002 to file a complaint has become a strategic move for these rivals, as this criminal statute allows for punitive damages. A significant insight from the CCI's decision in the case of Bharti Airtel versus Reliance Jio²¹ is that telecom entities may find it challenging to file successful claims under section 4 of the Act, which deals with the abuse of a dominant position, especially since there has been a precedent of sanctions for violating this particular provision. The Supreme Court of India's decision in the case CCI v. Bharti Airtel²², requiring that the parties who need to settle the disputes are required to approach the TRAI to assert their jurisdictional claims before intervention of the CCI in the dispute. This is because agreements between telecom providers fall within the regulatory scope of the TRAI. Consequently, the CCI is barred from exercising its authority or initiating an investigation until the TRAI has made a decision. These precedents must be considered by telecom sector market participants before engaging in future litigation.

Sections 21 and 21A of the Competition Act of 2002 establish an inter-regulatory consultation framework, ensuring that the Competition Commission of India (CCI) maintains effective communication with various sectors to promote fairness and consumer welfare. Since the economic liberalization and deregulation of the 1990s, many emerging nations like India, have adopted independent economic regulatory bodies with a separate competition authority. The latter aims to curb anti-competitive behavior across the economy, while the former encourages competition within

²⁰ Section 60, The Competition Act 2002

²¹ *Ibid note 5*

²² *Ibid note 6*

regulated sectors. However, conflicts emerge when the lines between fostering competition and regulating anti-competitive behavior blur, as evidenced by the Competition Commission of India's (CCI) recent call for the resignation of the Telecom Regulatory Authority of India (TRAI). This was in response to allegations against Bharti Airtel, Vodafone India, and Idea Cellular for predatory pricing against Reliance Jio. The most prudent solution would be for any arbitral competitive Authority to bring together the two regulatory authorities to settle their jurisdictional disputes definitively, rather than allowing one to overpower the other. These regulators are tasked with overseeing service standards, pricing, and interconnections while promoting consumer interests and competition. Previously, when these services were solely provided by the public sector, the government regulated them by setting tariffs and standards. To prevent anti-competitive practices across all economic sectors, competition laws were established concurrently with the creation of market-controlling organizations. This often leads to conflicts between sector regulators and competition authorities. Sector regulators, established before the broader competition authorities, often overshadow them. A notable instance is the rate conflict between TRAI and the CCI. Jurisdictional disputes and regulatory overlaps between the CCI and sector-specific regulators harm the market. TRAI, as a sector regulator, concentrates on systematic growth and service quality, whereas the CCI, as an economy-wide regulator, is dedicated to tackling market misconduct..

The Competition Commission of India (CCI) is mandated to promote and sustain competition in the economy, as articulated in its preamble and Section 18 of the act. The CCI primarily regulates competition in the Indian market. In contrast, the Telecom Regulatory Authority of India Act, of 1997 aims to foster conditions favorable for the telecommunications sector's growth. Empowered by Section 11 of the TRAI Act, it stimulates competition and increases the efficiency of telecommunication services, thus aiding their advancement. The goals of both statutes converge on fostering a competitive environment. Consequently, the jurisdictions of TRAI and CCI intersect in achieving this objective. Despite sharing a common goal, the CCI and TRAI differ in their mandates and approaches, leading to jurisdictional conflicts as they pursue the same end through different means. The following example will help you to understand how the two approaches differ. For the advantage of the consumer, TRAI tries to maintain acceptable tariff rates while enforcing them. However, the CCI may consider this as an instance of predatory pricing, closing the door to the market for a future competitor.

Parties often seek the jurisdiction of a body that is easy for them under the current circumstances. The jurisdictional issue was clarified in *Star India v. Sea T.V. Network*²³, where it was determined that although the TRAI Act section in question addresses monopolies and restrictive trade practices, the Monopolies and Restrictive Trade Practices (MRTP) Commission²⁴, which preceded the CCI, did not have the authority to exercise jurisdiction over the case. Additionally, Dish TV challenged the CCI's authority in *Consumer Online Foundation v. Tata Sky*²⁵ (para. 27), arguing that the Telecom Disputes Settlement and Appellate Tribunal and Telecom Regulatory Authority of India already had jurisdiction over the matter. On this, the CCI expressed the opinion that, Even though the Telecom Regulatory Authority of India (TRAI) regulates the market, the Competition Commission of India (CCI) holds exclusive jurisdiction over the market competition. It appears from reading the judgment that the CCI did not express a firm opinion on the subject of jurisdictional dispute.

ANALYSIS AND FINAL THOUGHTS.

The Researcher believes that, despite the fact that the judgment resolves the dispute over jurisdiction and establishes a balance between the two bodies, it has generated its own set of difficulties. The issues listed below should have all been addressed to prevent ambiguity soon. According to the ruling, the CCI will always have a follow-on jurisdiction in matters relating to the telecommunications industry, whereas TRAI shall be the first body to exercise jurisdiction. Furthermore, until TRAI has made its "final determination," the CCI's jurisdiction cannot be invoked. The author believes that section 21 of the Competition Act's legislative objective is incompatible with the aforementioned premise. This is due to the fact that the aforementioned provision enables statutory agencies to submit a case to the CCI if it is against any of the provisions of the Act. In light of section 21, TRAI is therefore permitted to mention the CCI before the "final determination" is made. According to the aforementioned judgment, "jurisdictional fact" must be determined by TRAI and must be unconditionally recognized by the parties and the CCI. According to the author, the Competition Act gives the Director General investigative authority to resolve several jurisdictional issues that are essential for the CCI to perform its authority. The judgment deserves praise for its pragmatic approach and for moving the nation closer to certainty, both of which are necessary for the development of any

²³ AIR 2007 SUPREME COURT 1538, 2007 AIR SCW 2163, 2007 (3) AIR BOM R 543, (2007) 4 MAD LJ 528, 2007 (4) SCC 656, (2007) 5 SCALE 301

²⁴ A commission known as the Monopolies and Restrictive Trade Practices Commission was established under MRTP act, 1969

²⁵ COMPETITION COMMISSION OF INDIA Case No. 2 / 2009

economic regulation. The author, however, believes that the battle for regulatory dominance is not resolved by the ruling. Only if the CCI and TRAI work together to coordinate and consult on issues that entail concerns about competition and telecom legislation can a resolution be reached. For instance, in Canada, the relevant sectoral authority and the competition authority sign memoranda of understanding that essentially define their respective functions. Additionally, the Competition Act's Section 21 is quite helpful in this regard. After taking all relevant factors into account, TRAI may decide to refer the case or request the CCI's view.

CONFLICT IN JURISDICTION

The Competition Commission of India (CCI) has the mandate to "promote and sustain competition" within the Indian economy, particularly in its preamble and Section 18. The CCI's main function is to regulate competition in the Indian marketplace. The Telecom Regulatory Authority of India Act, 1997. The TRAI Act is designed to create favorable conditions for the growth of the telecom sector. The Telecom Regulatory Authority of India (TRAI) is authorized by Section 11 of the TRAI Act to "promote competition and improve the efficiency of telecommunication services to aid their growth." Both statutes share the objective of promoting a competitive environment. However, the TRAI and CCI jurisdictions overlap in achieving this goal, leading to potential conflicts due to their distinct mandates and approaches. For instance, while TRAI aims to protect consumers by ensuring fair tariff rates, the CCI might consider such pricing strategies as anti-competitive, possibly hindering market entry for new competitors. As a result, stakeholders may prefer to approach the authority that aligns with their interests in specific scenarios.

CONCLUSION

Undoubtedly, CCI's market research provides a comprehensive analysis of various underexplored issues across multiple industries. With the pandemic, the telecommunications sector has become a pivotal aspect of our daily lives. CCI serves as a regulatory watchdog, ensuring that these critical segments do not exploit their market position. Through the inter-regulatory consultation framework established under Sections 21 and 21A of the Competition Act of 2002, CCI ensures the maintenance of effective communication with these sectors, promoting fairness and consumer welfare.

As competition intensifies in the Indian telecom sector, market rivals will likely continue to confront

each other with similar disputes. Given that the Competition Act of 2002 allows for severe penalties, complaining about its breach becomes an attractive strategy for market players. The challenge arises from the lack of clear demarcation between fostering competition and curbing anti-competitive practices. This ambiguity stems from the legislature's oversight in defining the roles and powers of the competition commission and sectoral regulators within the framework of the Telecom Regulatory Authority of India Act, 1997, and the Competition Act, 2002. These entities must establish clear boundaries and collaborate toward nurturing a consumer-centric and business-friendly telecom industry.

