

# A Study on Influence of Competition Law on Telecom Sector in India

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## ABSTRACT:

The Competition law is a law that promotes or seeks to maintain market competition by regulating anti-competitive conduct by various enterprises and companies. In India, Competition Act 2002 was implemented to prevent practices from having an adverse effect on competition and to promote and sustain competition in the markets.

The Monopolies and Restrictive Trade Practices Act, 1969 is currently not in force as it was repealed and replaced by The Competition Act, 2002 and The MRTP Commission was replaced by the Competition Commission of India.

The telecom sector in India has witnessed intense competition over the past decade. The arrival of Reliance Jio and the Vodafone-Idea merger reinforce the steep competition that exists in this sector – which forces the market players to continuously enhance their performance and gain an edge over their competitors. To understand, I shall refer to two judicial decisions delivered in recent years where the telecom market players have initiated complaints against each other for predatory pricing and cartelization. The first decision that I shall be analyzing is the Competition Commission of India's (CCI) decision in *BhartiAirtel v. Reliance Jio*, where the CCI held that Reliance Jio was not in a dominant position in the market and was not indulging in predatory pricing.

This paper consists of introduction, definitions, related case laws, suggestions and conclusions.

**Keywords:** Competition Act 2002, Predatory Pricing, Cartelization, Telecom Sector.

## I. INTRODUCTION:

The Competition law is the law that promotes or seeks to maintain market competition by regulating anti-competitive conduct by companies. In India, Competition Act 2002 was enacted to prevent practices from having an adverse effect on competition and to promote and sustain competition in the markets.

The Monopolies and Restrictive Trade Practices Act, 1969 is repealed and replaced by The Competition Act, 2002 and The MRTP Commission was replaced by the Competition Commission of India.

### Abuse of Dominance<sup>1</sup>:

Abuse of dominance occurs when a dominant business (or group of businesses) engages in activity that stops or substantially reduces competition in a market. These anti-competitive activities may be:

- predatory (incurring short-term losses to eliminate a competitor and gain future market power);
  - exclusionary (trying to prevent a business from operating in a market); or
  - disciplinary (trying to punish a business).
- Section 4 of the Competition Act prohibits the dominant position in Indian Market.

### Predatory Pricing:

Predatory pricing is a phenomenon of driving other players out of the market, by offering goods or services at a price lower than the cost<sup>2</sup>.

Explanation (b) of Section 4(2) of the Competition Act explains the term predatory pricing which means 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<sup>3</sup>.

<sup>1</sup> "Abuse of Dominance", Government of Canada, [https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00511.html](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00511.html) (Last Visited on 9 May 2022)

<sup>2</sup> Suryansh Singh, "THE PREDATORY PRICING CASE AGAINST RELIANCE JIO: DID CCI MISS AN OPPORTUNITY TO REJUVENATE INDIAN TELECOM SECTOR?", CCLE.

<sup>3</sup> Competition Act of India 2002

### **Cartelization:**

Cartel is the common concept which refers to anti-competitive agreements and/or concerted practices among competitors including (i) price fixing, (ii) market allocation, (iii) collective refusal to supply/deal (group boycotts), (iv) imposing quotas or (v) collusive bidding in tenders. Such agreements and concerted practices have consistently been deemed to be per se illegal. Cartels are accepted as the most severe competition restriction<sup>4</sup>.

Section 2(c) of the Act gives the definition of cartel.

### **Telecom Sector:**

The Indian Telecom sector in has observed the tremendous change in the last ten years. The Arrival of Reliance Jio in the telecom market in 2016 and the Vodafone-Idea merger in 2018 reinforce the steep competition in this sector. To understand, I shall refer to two judicial decisions where the telecom market players have initiated complaints against each other for predatory pricing and cartelization.

### **BhartiAirtel V. Reliance Jio<sup>5</sup>:**

In this case, a complaint was filed by BhartiAirtel against Reliance Jio. BhartiAirtel alleges three basic contentions as follows:

- Reliance Industries are using their financial strength to enter into the telecom market through Reliance Jio, alleging the abuse of Dominant Position by Reliance Industries, in contravention to section 4(2)(e) of the Competition Act, 2002.
- The free services provided by Reliance Jio which are amounted to predatory pricing in contravention to section 4(2)(a)(ii) of the Competition Act, 2002.
- alleging an anti-competitive agreement between Reliance Industries and Reliance Jio in contravention of Section 3 (1) of the Act, 2002 whereby Reliance Jio had unfettered access to the funds and resources of Reliance Industries to cause an appreciable adverse effect on competition in the telecom industry.

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<sup>4</sup>Turkey: Definition of “Cartel” and Recent Cartel Cases’, mondaq – connecting knowledge and people,”<https://www.mondaq.com/advicecentre/content/1552/Definition-of-Cartel-and-Recent-Cartel-Cases>”, (Last Visited on 9 May 2022)

<sup>5</sup>BhartiAirtel v Reliance Jio, COMPETITION COMMISSION OF INDIA (Case No. 03 of 2017)

The services granted by Reliance Jio right after its entry into the telecom market included a ‘Jio Welcome Offer’ under which data, voice, video, and a full bouquet of applications were granted free of cost to the purchasers which attracted the consumers and gave an impact on their mind to switch to Reliance Jio and to not use any other network as it was pocket friendly to the consumer.

The Competition Commission of India started the proceeding with a preliminary conference with both the parties and then further went on to examine each allegation to the facts as provided by BhartiAirtel and Reliance Jio. The Competition Commission has limitedly interpreted the term ‘relevant market’ in the context of the present matter. The Commission has sufficed the wireless telecom services to be the relevant geographical market and focused on the dominance of Reliance Jio in its individuality.

The Competition Commission of India went on to note that, according to market data, Reliance Jio does not have a market share of more than 7% in each of the 22 telecom circles in India, and the market consists of several players (such as Vodafone, Idea, Tata, MTNL, etc.) who have similar financial and technical capabilities. There existed sufficient choice in the market and the consumers were not in any way dependent on a single service provider. In light of this, the CCI held that Reliance Jio cannot be said in the dominant position in the relevant market. As it was not in the dominant position, there does not arise any case of abuse of the dominant position through predatory pricing in the relevant market. Also, while Jio may have witnessed the largest rise in market share, Vodafone-Idea and Airtel continue to remain significant market players, and there exists a three-way split in the market. Furthermore, Jio no longer provides services that are absolutely free of cost, and has begun pricing its services in a competitive manner. Hence, it can be argued that, even as of today, Jio cannot be held to be in a dominant position in the telecom market.

### **Competition Commission of India V. BhartiAirtel<sup>6</sup>:**

In this dispute, Reliance Jio filed a complaint against BhartiAirtel, Vodafone, and Idea, contending that these three telecom operators had formed a cartel and were indulging in anti-

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<sup>6</sup>Competition Commission of India V. BhartiAirtel, CIVIL APPEAL NO(S). 11843 OF 2018 (ARISING OUT OF SLP (C) NO. 35574 OF 2017).

competitive practices. On receipt of this case, the CCI held that a prima facie case had been made out and directed an investigation to be conducted by the Director General under section 26(1) of the Act. This order of the CCI was quashed by the Bombay High Court, on the ground that the TRAI should initially have jurisdiction over this matter as it was the sectoral regulator of the telecom sector. It held that the CCI could exercise jurisdiction in this scenario only after proceedings under the TRAI Act, 1997 had concluded.

Before the Supreme Court, counsel for the CCI and Reliance Jio assailed the Bombay High Court's decision by arguing that the CCI and TRAI are regulators that operate in entirely different fields. It was argued that the issue before the CCI was whether the respondents had entered into an anti-competitive agreement to derail the entry of Reliance Jio, in violation of section 3(3)(b) of the Act. On the other hand, the dispute that was pending before TRAI was with respect to a possible violation of the terms of the license agreement, and violation other interconnection regulations and the quality of service regulations. As both the TRAI Act, 1997 and the Competition Act, 2002 operate in separate fields, it was argued that the CCI would have the jurisdiction to determine whether there existed an 'agreement' that was anti-competitive in nature, and violated section 3 of the Competition Act. Hence, it was submitted that the CCI could proceed with its investigation even before the TRAI renders its decision.

The respondents on the other hand supported the Bombay High Court decision and contended that TRAI shall have the jurisdiction to regulate all issues with respect to the telecom sector and that, as a specific regulator exists, the CCI shall not have any jurisdiction. They submitted that the CCI was ill-equipped to deal with the issues that face the telecom sector, and TRAI is the only regulator which has the expertise to conduct this inquiry.

The Supreme Court here rejected the arguments of both the parties to a certain extent, and sought to harmonize the regulatory powers of the TRAI and the CCI. The Court referred to section 21 of the Competition Act to highlight that the Act does take into account the role played by other statutory authorities. It noted that it must give an interpretation that prevents the TRAI and the CCI from taking conflicting views on the same subject matter. It was hence held that, at the first instance, the TRAI shall have the sole jurisdiction to examine the complaint filed by the parties. Once the TRAI renders its decision, the CCI shall have

the authority to commence an investigation under section 26. The Court here holds that while the CCI's jurisdiction cannot be ousted, it shall only exercise its jurisdiction at a later stage, once the TRAI renders its decision.

The Court held that this interpretation was in line with section 60 of the Competition Act, 2002, which states that the provisions of the Competition Act shall have overriding effect, notwithstanding any inconsistency with other Indian statutes. The Court also rejected the respondents' argument that, with respect to the telecom sector, the CCI lacks jurisdiction. Keeping in mind the wording of section 60, the Court held that the CCI shall have the jurisdiction, but can exercise it only at a later stage once the TRAI renders its decision. Through this judgment, the Court has sought to harmonize the objectives of the Competition Act, 2002 on the one hand and the TRAI Act, 1997 on the other. The Court makes it very clear that the TRAI cannot oust the CCI's jurisdiction, and can only delay the CCI from commencing an investigation till the time the TRAI is seized of the matter.

## II. SUGGESTIONS AND CONCLUSIONS:

As competition in the Indian telecom sector continues to rise steeply, the market players are bound to raise similar disputes against each other in the future. Also, as the Competition Act, 2002 is a penal statute that allows imposition of significant penalties, raising a complaint about a violation of this statute turns out as an attractive option for the rival market players. The significant implication of the CCI's decision in *Bharti Airtel v. Reliance Jio* is that in the future it may not be possible for the market players in the telecom sector to successfully make allegations that fall within the ambit of section 4 of the Act with respect to abuse of dominant position. This is because, for a section 4 violation, the enterprise must be in a 'dominant position' in the relevant market.

To overcome this problem, the Government should make an effort for uplifting the public telecom sectors like BSNL, MTNL etc.

To control the cartelization and abuse of dominant position, it can be suggested that unbundling of services and infrastructure will bring in healthy competition in the telecom sector. In my view, segregation of services in different layers will reduce the outsourcing cost and will allow more players to enter the market. This will also help to reduce the situation of abuse of dominant position by any single operator.