

Competition Commission of India v. Telecom Regulatory Authority of India: A Case study of CCI v. Bharti Airtel & Ors.¹

BACKGROUND:

- Reliance Jio Infocomm Limited ('RJIL') alleged that Bharti Airtel Limited, Vodafone India Limited and Idea Cellular Limited ('service providers') are not giving it Points of Interconnection('POIs').
- In terms of Clause 27.4 of Part I of the Schedule to the Unified Licence, and in accordance with Telecom Regulatory Authority of India's ("TRAI) Direction dated 07 June, 2005, under Section 13 read with sub-clause (i) to (v) of sub-clause (b) of Section 11 of the TRAI Act, service providers are mandated to provide interconnection to the interconnection seeker.
- RJIL filed a complaint with TRAI in this regard, and TRAI seized with the matter.
- The contention of the service providers was that the RJIL was still in its test phase, and was seeking full POIs without starting its commercial operation. Further, it was also alleged that RJIL was running full-fledged operations in the guise of test phase.
- RJIL alleged that service providers are taking advantage of their dominant position, and are acting against it by using the platform of COAI.
- Thus, RJIL and some other individuals approached Competition Commission of India ('CCI') under Sec. 19(1) and filed information under Sec. 19 of CCI Act against the service providers that they have formed cartel to the prejudice of RJIL.

RELEVANT PROVISIONS OF THE COMPETITION ACT, 2002 :

- **Section 2(b)**

“agreement” includes any arrangement or understanding or action in concert,—

- (i) *whether or not, such arrangement, understanding or action is formal or in writing; or*
- (ii) *whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;”*

¹ Competition Commission of India v. Bharti Airtel & Ors.,(CIVIL APPEAL Numbers 11843 OF 2018) before Hon'ble Supreme Court of India.

- **Section 3(3)(b)**

Anti-competitive agreements:

“(3) Any agreement entered into between enterprises or associations of enterprises² or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in 9aidentical or similar trade of goods or provision of services, which—

(a)[.....]

(b) limits or controls production, supply, markets, technical development, investment or provision of services;”

- **Section 19(1) & (3)**

Inquiry into certain agreements and dominant position of enterprise

“19.(1) The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—

(a) receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or

(b) a reference made to it by the Central Government or a State Government or a statutory authority.

(2)[.....]

(3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:—

(a) creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market;

(c) foreclosure of competition by hindering entry into the market;

(d) accrual of benefits to consumers;

(e) improvements in production or distribution of goods or provision of services; or

² COAI may amount to association of enterprises or persons.

(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.”

- **Section 21(1)**

Reference by statutory authority

“21. (1) Where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take is or would be, contrary to any of the provisions of this Act, then such statutory authority may make a reference in respect of such issue to the Commission:[...]”

- **Section 21A(1)**

Reference by Commission

“21A. (1) Where in the course of a proceeding before the Commission an issue is raised by any party that any decision which, the Commission has taken during such proceeding or proposes to take, is or would be contrary to any provision of this Act whose implementation is entrusted to a statutory authority, then the Commission may make a reference in respect of such issue to the statutory authority:[...]”

- **Section 26(1)**

Procedure for inquiry under section 19

“26. (1) On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter:[...]”

- **Section 41(1)**

Director General to investigate contravention

“41. (1) The Director General shall, when so directed by the Commission, assist the Commission in investigating into any contravention of the provisions of this Act or any rules or regulations made thereunder.”

- **Section 60**

Act to have overriding effect

“60. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.”

RELEVANT PROVISION OF THE TRAI ACT:

- **Section 11(1)(a)(iv)**

11 Functions of Authority

“(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 , the functions of the Authority shall be to –

(a) make recommendations, either suo motu or on a request from the licensor, on the following matters, namely: -

[.....]

(iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;”

CASE IN SUPREME COURT:

- CCI vide its order dated 21.04.2017 held that there exist prima facie case against service providers, and thus, directed Director General to cause investigation.
- This decision of CCI was challenged by service providers in Bombay High Court.
- Bombay High Court vide its order dated 21.09.2017 opined that CCI cannot rule upon the concepts such as “subscriber”, “test period”, “reasonable demand”, “test phase and commercial phase rights and obligations” etc. and they are matters within the jurisdiction of TRAI/TDSAT.
- Consequently, Bombay High Court set aside order of the CCI and investigation ordered by it. In challenge to this order of Bombay High Court, present appeal³ was filed.

IMPORTANT POINTS IN JUDGMENT OF SUPREME COURT:

- Judgment of Supreme Court, as far as interplay of TRAI’s and CCI’s powers are concerned, was based on answering the following two questions:
 - 1) *Whether TRAI or CCI would have jurisdiction when relevant market is telecom market and case may involve anti-competitive practices?*

Answer:

- Supreme Court ruled that TRAI is constituted as an expert regulatory body which specifically governs the telecom sector, thus, the aspects of dispute involving

³ Competition Commission of India v. Bharti Airtel & Ors.,(CIVIL APPEAL Numbers 11843 OF 2018) before Hon’ble Supreme Court of India.

interpretation of terms such as “test phase”, “contract clauses”, “unified license”, “interconnection agreements”, “quality of service regulations”, “rights and obligations of TSP between and related to the above provisions” etc. are to be decided by the TRAI in the first instance. These are jurisdictional aspects. Unless the TRAI finds fault with the on the aforesaid aspects, the matter cannot be taken further even if we proceed on the assumption that the CCI has the jurisdiction to deal with the complaints/information filed before it. It would be at the stage when TRAI decides aforementioned jurisdictional issues, the CCI can go into the question as to whether violation of the provisions of TRAI Act amounts to ‘abuse of dominance’ or ‘anti-competitive agreements’. That also follows from the reading of Sections 21 and 21A of the Competition Act, as argued by the respondents.

- Further, when the sectoral authorities i.e. TRAI is seized of the matter, 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.
- Therefore, Supreme Court ruled that TRAI would have first instance jurisdiction in the matter.
- Having answered the first question in favour of TRAI, Supreme Court proceeded to deal with the second question.

2) *Whether TRAI has the exclusive jurisdiction to deal with matters involving anticompetitive practices to the exclusion of CCI altogether because of the reason that the matter pertains to telecom sector?*

Answer:

- Supreme Court ruled that CCI has been entrusted with powers to decide upon questions involving anti-competitive agreements, abuse of dominant position, and combinations. To this extent, the function that is assigned to the CCI is distinct from the function of TRAI under the TRAI Act. The CCI is supposed to find out as to whether the service providers were acting in concert and colluding, thereby forming a cartel, with the intention to block or hinder entry of RJIL in the market in violation of Section 3(3)(b) of the Competition Act. Also, whether there was an anti-competitive agreement between the service providers, using the platform of COAI. The CCI, therefore, is to determine whether the conduct of the parties was unilateral or it was a collective action based on an agreement. Agreement between the parties, if it was there, is pivotal to the issue. Such an exercise has to be necessarily undertaken by the CCI.
- Moreover, it is within the exclusive domain of the CCI to find out as to whether a particular agreement will have appreciable adverse effect on competition within the relevant market in India.

- It is also to be borne in mind that if the activity undertaken by some persons is anti-competitive and offends Section 3 of the Competition Act, the consequences thereof are provided in the Competition Act. Section 27 empowers the CCI to pass certain kinds of orders, stipulated in the said provision, after inquiry into the agreements for abuse of dominant position.
- Obviously, all the aforesaid functions not only come within the domain of the CCI, TRAI is not at all equipped to deal with the same. Even if TRAI also returns a finding that a particular activity was anti-competitive, its powers would be limited to the action that can be taken under the TRAI Act alone. It is only the CCI which is empowered to deal with the same anti-competitive act from the lens of the Competition Act.
- Thus, Supreme Court ruled that once jurisdictional issues are decided by TRAI as far as decision on telecom specific issues are concerned, it is only CCI which would have jurisdiction to decide upon the competition aspect of the issue.

TAKEAWAY FROM THE JUDGMENT:

- It has been a long established trend in the Supreme Court decisions that whenever case is concerned with the conflicting jurisdiction of the two regulatory bodies, the Apex court attempts, as far as possible to harmoniously construct, to balance the powers of two regulators.
- Thus, the decision of the Supreme Court was to give primacy to the respective jurisdictions of the two regulators under the two Acts. At the same time, since the matter pertains to the telecom sector which is specifically regulated by the TRAI Act, balance is maintained by permitting TRAI in the first instance to deal with and decide the jurisdictional aspects which can be more competently handled by it. Once that exercise is done and there are findings returned by the TRAI which lead to the prima facie conclusion that the service providers 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. This balanced approach in construing the two Acts would take care of Section 60 of the Competition Act as well.