

Interplay of Competition Law and Telecom Regulatory Regime In India

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Brief History of the Telecom Sector in India

- TILL 1994 THE CENTRAL GOVERNMENT EXERCISED MONOPOLY OVER THE TELECOM SECTOR.
- IN 1994, NTP OPENED THE DOORS TO PRIVATE PLAYERS INTO THE TELECOM SECTOR.
- THE ENTRY OF PRIVATE PLAYERS NECESSITATED INDEPENDENT REGULATION WHICH LED TO THE BIRTH OF TELECOM REGULATORY AUTHORITY OF INDIA IN 1997 BY A PARLIAMENTARY STATUTE AND AS AN INDEPENDENT REGULATOR FOR THE TELECOM SECTOR.
- ONE OF THE MAIN OBJECTIVES OF THE TRAI ACT IS TO MAKE "ARRANGEMENTS FOR PROTECTION AND PROMOTION OF CONSUMER INTEREST AND ENSURING FAIR COMPETITION...".

Brief History of Competition Law in india

- Monopolistic and Restrictive Trade Practice Act, 1969 was the first major legislation in the field of Competition Law in India.
- However, post liberalization it was felt that a new robust statutory regime is required to take care of the needs of the present day.
- This necessity prompted the Parliament to come out with a new Act on the subject and the Competition Act, 2002 was passed by the Parliament.
- Under this Act, the CCI is constituted as a statutory body which is to ensure healthy competition in markets thereby preventing the practice of having adverse effect on competition; to promote and sustain the competition in markets; to protect the interest of consumers and to ensure freedom of trade,

Comparison between the objectives of the two legislations

Competition Act	TRAI ACT
<ul style="list-style-type: none">• An Act to provide, keeping in view the economic development of the country, for the establishment of a Commission to “prevent practices having adverse effect on competition• to promote and sustain competition in markets• to protect interests of consumers and• to ensure freedom of trade carried on by other participants in the markets, in India for matters connected therewith or incidental thereto”	<ul style="list-style-type: none">• An Act to provide for the establishment of the Telecom Regulatory Authority of India and the Telecom Dispute Settlement and Appellate Tribunal (“TDSAT”) to [-]• [for protection and promotion of consumer interest and ensuring fair competition (Statement of Object and Reasons)]• to protect the interest of the service providers and consumers of the telecom sector (Preamble)• to promote and ensure orderly growth of the telecom sectoral For matters connected therewith and incidental thereto

The National Competition Policy 2011 has also observed as following:

"8.3 The objective of a sectoral regulator is to provide good quality service at affordable rates, but the promotion of competition and prevention of anti-competitive behaviour may not be high on its agenda or the laws governing the regulator may be silent on this aspect. Besides, a sectoral regulator may not have an overall view of the economy as a whole and may tend to apply yardsticks which are different from the ones used by the other sectoral regulators. In other words, there is a possibility of the lack of consistency across sectors as regards competition issues. On the other hand, the CCI, which is expected to have developed the core competence, expertise and capacity in competition related issues, will be able to apply uniform competition principles across all sectors of economy. Besides, enforcement and penalizing violations of Competition Act is the exclusive area of the CCI. Even otherwise, the general principle for economic efficiency would be, whoever can do a thing in best and most professional manner should do it."

Landmark Judgment :

COMPETITION COMMISSION OF INDIA v. BHARTI AIRTEL LIMITED AND OTHERS

[2018] 14 S.C.R. 489

- **Brief Facts:-** There were allegations of Anti competitive practices against the existing players by the new entrant such as denial of augmentation of Point of Intersection [POI]. CCI took cognizance of the issue on information instituted against the existing players and passed an order taking a view that prima facie case exists and an investigation is warranted into the matter. It, accordingly, directed the Director General to cause investigation in the case. The Aggrieved parties approached the Bombay High Court which set aside the Order passed by the CCI on the ground of lack of jurisdiction. The matter went to appeal before the Supreme Court.

- MAIN ISSUE BEFORE THE HON'BLE SUPREME COURT

What is the width and scope of the powers of the CCI under the Competition Act, 2002 pertaining to the telecom sector i.e. in respect of the companies in telecom industry providing telecom services is to be defined vis-a-vis the scope of the powers of TRAI under the TRAI Act, 1997 ?

MAIN SUBMISSION OF THE PETITIONER

- The TRAI Act as well as the Competition Act are both special statutes and hence, the rule of statutory interpretation of special law prevailing over the general law will be inapplicable in the present dispute.

MAIN SUBMISSIONS OF THE RESPONDENTS :_

(i) The TRAI Act, being a special law, ousts the jurisdiction of CCI to examine the telecom sector. In that sense, exclusive jurisdiction vests in TRAI to regulate the telecom sector, including competition related issues, thereby ousting the jurisdiction of the CCI altogether

- The TRAI Act is a complete code.

- Exclusive jurisdiction vests in TRAI to regulate the telecom sector including competition related issues.

- The TDSAT has the exclusive jurisdiction to examine the disputes between licensees including the one raised by the aggrieved party before CCI.

- CCI has no jurisdiction to decide disputes pertaining to the telecom sector

(ii) Even if the CCI has the jurisdiction, TRAI's jurisdiction will prevail.

(iii) In the alternative, the jurisdictional facts, in any case, had to be determined by the TRAI in the first place.

Findings of the Hon'ble Supreme Court

- *“ We are of the opinion that as the TRAI is constituted as an expert regulatory body which specifically governs the telecom sector, the aforesaid aspects of the disputes are to be decided by the TRAI in the first instance. These are jurisdictional aspects.”*
- *“We, therefore, are of the opinion that the High Court is right in concluding that till the jurisdictional issues are straightened and answered by the TRAI which would bring on record findings on the aforesaid aspects, the CCI is ill-equipped to proceed in the matter. Having regard to the aforesaid nature of jurisdiction conferred upon an expert regulator pertaining to this specific sector, the High Court is right in concluding that the concepts of “subscriber”, “test period”, “reasonable demand”, “test phase and commercial phase rights and obligations”, “reciprocal obligations of service providers” or “breaches of any contract and/or practice”, arising out of TRAI Act and the policy so declared, are the matters within the jurisdiction of the Authority/TDSAT under the TRAI Act only. Only when the jurisdictional facts in the present matter as mentioned in this judgment particularly in paras 56 and 82 above are determined by the TRAI against the IDOs, the next question would arise....”*

- Whether TRAI has 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?
- *“Insofar as the nuanced exercise from the stand point of Competition Act is concerned, the CCI is the experienced body in conducting competition analysis. Further, the CCI is more likely to opt for structural remedies which would lead the sector to evolve a point where sufficient new entry is induced thereby promoting genuine competition. This specific and important role assigned to the CCI cannot be completely wished away and the ‘comity’ between the sectoral regulator (i.e. TRAI) and the market regulator (i.e. the CCI) is to be maintained.”*

RATIO:-

“The conclusion of the aforesaid discussion is to give primacy to the respective objections 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 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.”

Establishment of Appellate Tribunal.

¹[The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to--

(a) adjudicate any dispute--

(i) between a licensor and a licensee;

(ii) between two or more service providers;

(iii) between a service provider and a group of consumers:

Provided that nothing in this clause shall apply in respect of matters relating to--

(A) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969);

(B) the complaint of an individual consumer maintainable before a Consumer Disputes Redressal Forum or a Consumer Disputes Redressal Commission or the National Consumer Redressal Commission established under section 9 of the Consumer Protection Act, 1986 (68 of 1986);

(C) the dispute between telegraph authority and any other person referred to in sub-section (1) of section 7B of the Indian Telegraph Act, 1885 (13 of 1885);

(b) hear and dispose of appeal against any direction, decision or order of the Authority under this Act.

²[(c) exercise jurisdiction, powers and authority conferred on—

(i) the Appellate Tribunal under the Information Technology Act, 2000 (21 of 2000); and

(ii) the Appellate Tribunal under the Airports Economic Regulatory Authority of India Act, 2008 (27 of 2008).]

Suggestions

- The Telecom Sector has consolidated in the last decade.
- More legislative clarity would be required as the penal consequences of a particular act have to be certain in order to promote healthy competition and ensure a better growth of the telecom sector.
- The legislature would have to ensure that a mechanism is laid down that the promotion of competition and prevention of anti competitive behaviour always remains high on the agenda of the sectoral regulator and it is not prone to 'regulatory capture'.

THANK YOU!