TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 13th December, 2018

Telecommunication Appeal No. 1 of 2018

Bharti Airtel Ltd. & Anr. ... Appellants

Vs.

Telecom Regulatory Authority of India & Anr. ... Respondents

Telecommunication Appeal No. 2 of 2018

Idea Cellular Ltd. ... Appellant

Vs.

Telecom Regulatory Authority of India & Anr. ... Respondents

Telecommunication Appeal No. 3 of 2018
With M.A. No. 230 and 231 of 2018

Vodafone Mobile Services Ltd. & Anr. ... Appellants

Vs.

Telecom Regulatory Authority of India & Anr. ... Respondents

BEFORE:

HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON
HON'BLE MR. A.K. BHARGAVA, MEMBER

For Appellant (in T.A. No. 1 of 2018)	:	Mr. Aspi Chenoy, Sr.Advocate Mr. Gopal Jain, Sr.Advocate Mr. Harsh Kaushik, Advocate Mr.Abhay Chattopadhyay, Advocate
For Appellant – (in T.A. No. 2 of 2018)	:	Mr. Soli Cooper, Sr. Advocate Mr. Jayant K. Mehta, Advocate Mr. Angad Duggal, Advocate Ms. Sneha Jaisingh, Advocate Mr. Nistha Chaturvedi, Advocate Mr. Karan Kapoor, Advocate Mr. Ankit Pathak, Advocate Mr. Nikhil Guliyani, Advocate
For Appellant -(in T.A.No.3 of 2018)	:	Mr. Meet Malhotra, Sr.Advocate Mr. Manjul Bajpai, Advocate Dr. Shashwat Bajpai, Advocate Mr. Jagjeet Singh Sahani, Advocate Ms. Palak Verma, Advocate Mr. Ravi S.S. Chauhan, Advocate Mr. Pallak Singh, Advocate Mr. Manjeet Chawla, Advocate
For Respondent No.1-TRAI	:	Mr. Tushar Mehta, ASG Ms. Maneesha Dhir, Advocate Mr. K.P.S.Kohli, Advocate Mr. Abhishek Kumar, Advocate Mr. Saransh Gupta, Advocate Ms. Sharmistha Ghosh, Advocate
For Respondent No.2- Reliance Jio Infocomm Ltd. (in T.A.No.1 of 2018)	:	Mr. Ramji Srinivasan, Sr.Advocate Mr. K.R.Sasiprabhu, Advocate Mr. Hiten Sampath, Advocate Mr. Tushar Bhardwaj, Advocate Mr. Navin Hegde, Advocate

For Respondent No.2- Reliance Jio Infocomm Ltd. (in T.A.No.2 of 2018)	:	Mr. N. Venkat Raman, Sr.Advocate Mr.Biju P. Raman, Advocate Mr. Abhipsit Mishra, Advocate
For Respondent No.3- Reliance Jio Infocomm Ltd. (in T.A.No.3 of 2018)	:	Mr.Ritin Rai, Advocate Mr.Vishnu Sharma, Advocate Ms.Kritika Bhardwaj, Advocate

ORDER

By S.K. Singh, Chairperson – This judgement shall govern all the three Appeals because they involve same or similar issues of facts and law. These Appeals have been filed against the Telecommunication Tariff (Sixty Third Amendment) Order, 2018 (No.1 of 2018) dated 16.02.2018 (hereinafter referred to as the impugned order), issued by the Telecom Regulatory Authority of India (TRAI)/Respondent No.1. The notification containing the impugned order is on record as Annexure-AI to Telecom Appeal No.1 of 2018. The relevant facts, for the sake of convenience, are from the records of this very Appeal unless expressly stated otherwise.

2. Although on account of convenience of the counsel, Telecom Appeal No.2 of 2018 was argued earlier, it is more convenient to begin and deal with the submissions in Telecom Appeal No.1 of 2018. Thereafter, the submissions in other Appeals shall also be dealt with. At the outset, it is noted that Reliance Jio Infocomm Ltd. has been impleaded as a respondent in Telecom Appeals

Nos.1 and 2 of 2018 in view of its own request made through MAs that were allowed at the initial stage itself, on 19.03.2018.

3. The Telecom Appeal No.3 of 2018 was filed later on 03.07.2018 and Reliance Jio Infocomm Ltd. was allowed to intervene in this case also. By an interim order passed on 24.04.2018 in Telecom Appeals Nos.1 and 2 of 2018, this Tribunal noted that at the interim stage appellants were more concerned with the provisions in the impugned order under which TRAI was seeking informations relating to "discounts" and "segmented tariffs" etc. Interim reliefs were seriously sought against change in the "Reporting Requirement" and the definition of "Significant Market Power (SMP)". The clauses in the impugned order relating to the Reporting Requirement and the definition of SMP were stayed with certain riders that the respondent-TRAI will be entitled to seek details of segmented discounts/concessions for its analysis but no penalty shall be imposed on that basis until further orders. In view of concern of the appellants for confidentiality, it was also observed that it would not be necessary for the appellants to disclose the names of their customers and any other information which they think to be sensitive and if the disclosure may affect their business interests. In such eventuality, they could offer a written explanation for withholding the information. If the respondent/TRAI was aggrieved, it was given liberty to bring such matter to the notice of this Tribunal for appropriate directions. Fortunately, there has been no such occasion and

TRAI has not sought any directions in this regard. The interim order was subsequently adopted in Telecom Appeal No.3 of 2018 also.

4. Learned senior counsel, Mr.Aspi Chenoy appearing for the appellants in Telecom Appeal No.1 of 2018 did not seriously question the jurisdiction and power of TRAI to issue the impugned order in as elaborate a manner as argued in Telecom Appeal No.2 of 2018. He referred to the relevant historical facts in detail starting from the principal Telecommunication Tariff Order (TTO), 1999 dated 09.03.1999. The definition of the term "tariff" in the TTO and in subsequent Regulations, the Telecom Consumer Protection Regulations dated 06.01.2012 were also highlighted. Both the definitions are same and read as follows:

> ""Tariff(s)" mean(s) rates and related conditions at which telecommunication services within India and outside India may be provided, including rates and related conditions at which messages shall be transmitted to any country outside India, deposits, installation fees, rentals, free calls, usage charges and any other related fees or service charge."

5. He also referred to definition of "non-discrimination" and of "Reporting Requirement" in clause 2(k), 2(l) and Clause 7 of the TTO. Before discussing the historical materials referred and relied upon in the context of segmented offers, it may be noted that the point sought to be made out was that segmented offers do not amount to tariff as defined and understood in the TTO or various earlier amendments; but the impugned order has unnecessarily taken a different view, which would unsettle a long standing practice.

6. In order to appreciate the submissions of the parties based upen material changes in the relevant provisions in the TTO made from time to time and finally by the impugned order, it is necessary to take note of such changes in a chronological manner. The TTO, 1999 as well as the Telecom Consumer Protection Regulations, 2012 define tariff in identical terms, already noted. The other relevant definitions are as given below:

> As per Clause 2(k) of TTO 99, "Non-discrimination" – "means that service providers shall not, in the matter of application of tariffs, discriminate between subscribers of the same class and such classification of subscribers shall not be arbitrary."

Clause 2(i) of TTO 99 defined Reporting Requirement as follows:

> "2(i) "Reporting Requirement" means the obligation of a service provider to report to the Authority at least five working days before implementing any new tariff for telecommunication services under this order and changes thereafter."

Clause 7 of TTO 99 provided as follows:

> Reporting Requirement:
>
> "i. All service providers shall comply with the Reporting Requirement in respect of tariffs specified for the first time under this Order and also all subsequent changes.
>
> ii. No service provider shall alter any tariff of any telecommunication service or any part thereof without complying with the Reporting Requirement.
>
> iii. ....."

7. The Telecom Regulatory Authority of India (TRAI) issued the Telecommunication Tariff (Twenty First Amendment) Order 2002 to bring about further changes in the TTO and particularly, in Clause VII containing

"Reporting Requirement", under Section III to provide, *inter alia*, that "at any given point of time not more than 25 plans shall be on offer by a service provider. This includes both pre-paid and post-paid tariff plans. This provision is still operative. The Explanatory Memorandum to this amendment shows that the ceiling of 25 tariff plans was to avoid confusion in the minds of subscribers and undue pressure on the time and resources of the regulator.

8. A new definition of "Reporting Requirement" was introduced through the Telecommunication Tariff (Thirteenth Amendment) Order, 2004, which is as follows:

> "Reporting Requirement" means the obligation of a service provider to report to the Authority at least five working days before implementing any new tariff for telecommunication services under this order and changes therein within SEVEN days from the date of implementation of the said tariff for information and record of the Authority after conducting a self-check to ensure that the tariff plan(s) is/are consistent with the regulatory principles in all respects which inter-alia include IUC Compliance, Non-discrimination & Non-predation."

9. Before taking note of relevant changes in the concept of segmented offers so as to treat them as reportable tariff plans and in respect of concept of Significant Market Power (SMP), the stand of Mr.Chinoy, learned senior counsel needs to be noted, first on the issue of segmented offers and then in respect of SMP. On segmented offers, he has submitted that the impugned amendment order has made unnecessary and illegal departure from the earlier practice by declaring that segmented offers are also tariff plans which need to be

reported. According to learned senior counsel, segmented offers are always in the nature of beneficial schemes and discounts for a well-defined segment and now such discounts or concessions are forced to come within the limit of 25 tariff plans. It will be against the interest of consumers. Reporting requirement of such schemes will only help rival service providers, which is not and should not be the purpose of Regulation under the TRAI Act (the Act). It has further been submitted that a tariff plan, by definition and long usage, means rates as well as conditions on which the supply of services shall be made to the consumers in future over a sufficiently long period of time whereas segmented offers and discounts have a different purpose and limited duration. These can be in the nature of one time offer for a particular segment or a discount of similar duration and hence, by very definition and concept these were rightly not included in the past as tariff plans; were kept out of limit of 25 tariff plans at any given time and were not required to be reported.

10. The other reason for amending the old concept of segmented offers is said to be the requirement of non-discrimination amongst same class of consumers/subscribers. Learned senior counsel has submitted that a segment is always equivalent to a class and it is selected on account of various distinguishing features such as pattern of use, volume of consumption and peculiar needs. Classifications for treating a particular segment or class differently are guided by market conditions and are by very nature non-

discriminatory. Consumers falling in the same segment are not treated differently. According to him an apprehension of discrimination has been raised by a particular service provider who is the latest entrant and is in need of knowing the business practices and trade secrets of his rivals. There is no subscriber or class of subscribers who have come forward to allege discrimination and hence such a bogey should not have been accepted and there is no genuine reason for holding that segmented offers are discriminatory. Such presumption is baseless and unwarranted.

11. To support the submission that segmented offers have been in existence in the past as normal business practice even in telecom sector and it has received pointed attention of the Regulator without requiring any interference in the past, Mr.Chenoy has extracted in details in his written submission the contents of Consultation Paper issued by TRAI on 29.01.2008. In the said Consultation Paper, while dealing with "Issues arising out of plethora of Tariff Offers in Access Service Provision", it was noted that for add-on packs and segmented offers by TSPs, segmentation of customer base was being resorted to based on large number of criteria for the purpose of offering various add-on packs/segmented offers. In the arguments in favour of segmentation of customer base for such scheme it was noted that these were competitive activities and fostered competition in the market. The more number of

plans/packs provided more options to avail a package more suited to the requirement/usage profile of a consumer.

12. It was highlighted by learned Senior Counsel that after considering the pros and cons, TRAI issued the Forty Eighth Amendment to the TTO on 01.09.2008 and chose not to regulate or restrict the segmented offers or add-on packs. Paragraphs 8 and 9 of the Explanatory Memorandum to the Forty Eighth Amendment have been referred to support the submission that while retaining the current cap of tariff plans at 25, the Regulator explained that "for the purpose of monitoring the cap of 25 tariff plans on offer, any package on offer **for enrolment/acquisition of customers** (**emphasis supplied**) into the network and having one or more of the following features shall be counted as a tariff plan". The features held essential for any package on offer being counted as a tariff plan are 9 in number and *inter alia*, include Rental/Fixed Fee, Billing Cycle/Validity, Free Call Allowance/Talk Time, Local Call, STD, ISD, SMS and National Roaming.

13. Paragraph 11 of the Explanatory Memorandum noted above has also been highlighted by learned counsel for the appellant. While dealing with the issue of "Review of number and structure of tariffs offered as add-on packs/value added services/ promotional tariffs", the Authority noted that the packs are optional and generally beneficial to the subscribers and therefore, the Authority decided not to impose any new regulatory restrictions on the number or structure of

tariffs offered as add-on packs etc. Same logic was expressed by the Authority in respect of the segmentation of customer base on a large number of criteria for the purpose of offering beneficial schemes, in the Consultation Paper issued on 13.10.2010. It was noted that such criteria vary from usage profile/loyalty to customery/religious days to non-descript occasions. It was also shown that the TRAI issued the Telecom Consumer Protection Regulations 2012 which introduced the concept of Special Tariff Vouchers or STVs along with its definition. As per the definition, such vouchers, on activation alter one or more items of applicable tariff in the consumer tariff plan for a period not exceeding 90 days in terms of limited or unlimited usage of voice calls, SMS or data without providing any monetary value. It was submitted that though the vouchers admittedly alter items of applicable tariff but they are not treated as a complete tariff plan and do not require reporting and are not limited by the number of 25 which is applicable to tariff plans. It has been pointed out that even in the directions dated 16.01.2012, TRAI chose not to regulate or restrict segmented offers or add-on packs.

14. The impugned tariff order was preceded by a Consultation Paper issued by TRAI on 17.02.2017. This Paper recorded the benefits of policy of 'light touch' Regulation and 'forbearance' and recognised how this policy has made telecom services available at affordable and competitive price to the consumer. The importance of 'reporting requirement' in respect of any new tariff or

amendments therein as well as of transparency in tariff offers were also highlighted after noticing the cap of 25 on tariff offers and the importance of 'non-discrimination'. Questions were formulated for discussions in respect of adequacy of the measures to ensure transparency in the tariff offers as well as non-discrimination. During the pendency of the consultation process, TRAI issued a direction on 25.05.2017, under Section 13 read with some other sections of the TRAI Act. After noticing the requirements of transparency and principles of non-discrimination, it disclosed that some complaints had been received alleging that some service providers are launching tariffs without filing the same with the Authority and were offering discriminatory tariff to individual customers within the same class. Hence, a direction was again issued that tariffs should not be discriminatory between the subscribers of the same class and every tariff offered to a customer must be reported to the Authority unless it was covered by an express exemption provided in the Telecommunication Tariff Order, 1999(as amended from time to time). The petitioner has pointed out that the definition of 'non-discrimination' is very wide and 'exemptions' by Authority are based on practical considerations and not on 'express exemptions' provided in the TTO. For example, concessions or waivers on late fee, bill validity, bill settlement, waiver or call charges are not extended to all the customers but are not considered non-discriminatory and no express exemption is required for such purposes. It was further pointed out that by definition, segmented offer is based on an objective criteria and is also offered to every

subscriber falling under that classification. So far, by practice, the Authority had made an implied exemption. If that position had to change, Authority should have done by giving reasons for giving or not giving an exemption. It would have been appropriate to do so by a consultation for formulating appropriate guidelines/provisions related to exemptions thereby giving opportunity to the petitioners to defend.

15. In the context of aforesaid direction, learned counsel for the petitioner submitted that these directions did not in any manner change the decision recorded in the Explanatory Memorandum to the Forty Eighth Amendment dated 01.09.2008 which stressed that only a "package on offer for enrolment/acquisition of customers into the network and having one or more of the following features shall be counted as a tariff plan". It was also highlighted that the Bharti Airtel pointed out in its representation dated 13.07.2017 that the tariff plans meant for enrolment/acquisition of customers were being reported as per norms but the segmented offers/discounts to particular customers in a segment who were already on board, could not be called as tariff plans so as to be covered by the cap of 25 plans. It was also submitted that the criteria for providing segmented offers is a trade secret of the company and hence confidential information of this nature should not be asked to be disclosed. Segmented offers were sought to be justified by citing accepted practice across various industries for the purpose to retain customers and earn their goodwill

etc. It was also pointed out that the contents and implementation of segmented offers are checked and tested by the Metering and Billing Auditors and that in Open House Sessions it was the general view of almost all TSPs that reporting of segmented offers was impractical. However, the objections were ignored and the impugned tariff amendment was issued on 16.02.2018.

16. Learned senior counsel for the petitioner referred to the clause in the Explanatory Memorandum to the impugned order, containing analysis and decisions and submitted that the decision to treat segmented tariff offers as tariff plans suffers from apparent mistake and illegality in not considering earlier decisions as to what would constitute a tariff plan. According to learned senior counsel the earlier view required no change and therefore, there is no reason for bringing segmented offers within the cap of 25 tariff plans and requiring its reporting for the purpose of scrutiny and Regulation in disregard of existing policy of 'light touch' and 'forbearance'.

17. On this issue, learned counsel for the respondent Authority has submitted that the Authority does not intend to bring segmented offers within the cap of 25 tariff plans. However, the stand of the Authority is that principles of transparency and non-discrimination have held the field for a long time and these principles cannot be compromised, especially, when complaints are being received that in the name of segmented offers, favourable rates are being offered to some of the existing customers when they express their intention to migrate to

another service provider, without extending the same favourable rate to other consumers in the same class. In other words, the Authority wants to have unhindered access to the contents of segmented offers being made by the service providers so that it may examine the details, whenever required to ensure adherence to non-discrimination within the same class of customers. This can be ensured only by issuing directions for reporting of tariff plans unless exempted in the specific terms under the TTO.

18. The aforesaid stand takes care of one of the major concerns of petitioners that segmented offers should not be covered within the cap of 25 tariff plans. However, the submissions noted above fail to meet the case of the petitioners that simple segmented offers or discounts to existing customers do not amount to a tariff plan meant for the general public and intending customers which alone requires reporting. The reply on behalf of the Authority does not meet the genuine concern of the petitioners that segmented offers as existing from before are accepted to be confidentially designed trade practices and therefore, when they do not amount to a tariff plan, they should not be made known to the rival service providers. On a serious consideration of all the contentions in respect of Segmented Offers and Discounts the petitioners' contentions deserve to be accepted. It is accordingly held that segmented offers and discounts offered in ordinary course of business to existing customers without any discrimination within the targeted segment do not amount to a tariff plan and therefore, need no

reporting in the manner prescribed for regular tariff plans. The confidentiality issue also favours this kind of practice. But the issue of non-discrimination between the same "segment" is too important to be ignored and that would require reporting in any particular case when the Authority has reasons to call for reporting any so called segmented offers/discounts during a particular period. Such power is ancillary and essential for effective implementation of the principle of non-discrimination in the matter of all tariff plans. In the factual matrix of this case there is no finding that the Authority was satisfied on complaint or otherwise to exercise such powers.

19. The petitioners have not been able to make out a case that the Authority as a Regulator should not have the required information so that in appropriate cases it may examine a so-called segmented offer with a view to find out whether it actually amounts to a tariff plan and/or violates the principle of non-discrimination. Since this power of the Authority cannot be ignored, hence a way out has to be found. For example, this can be done on case to case basis by the Authority. Instead of insisting on reporting of all segmented offers/discounts not falling within the cap of 25, it may call for details of any segmented offer about which it may receive complaints with a view to find out whether it is only a segmented offer or a tariff plan having all the necessary ingredients and paraphernalia as discussed earlier. It can also examine whether, even as a segmented offer for existing customers, it is non-discriminatory or

otherwise. In order to make this task easier, the TSPs may be called upon, until further policy or decision, continuously on a monthly basis to inform the Authority the number of segmented offers to the existing customers along with a declaration that the benefits of such segmented offer made only have been made available to all the existing customers falling in the particular segment/class and the principle of non-discrimination has been strictly followed. Nothing more need to be said on the issue of segmented offers except that the Authority is required to take a fresh decision on the relevant issues indicated in this respect, and whether the then prevailing facts and health of the sector would require major changes in the meaning of "tariff plans" or in the prevailing policy of 'light touch/forbearance" in respect of Tariffs. Accordingly, issue of 'segmented offer' is remanded back to the Authority. Authority may settle it through open consultation process preferably within six months. However, in the interim, we suggest Authority follows the approach as enunciated in this para as an example.

20. The other issues for consideration can be broadly discussed under the concept of predation. There is no difficulty in appreciating that earlier, the phrase – "Telecommunication Service Providers holding significant market power" – was used and defined under the Telecommunication Interconnection (Reference Interconnect Offer) Regulation 2002. The Regulation 2(i)(b) read with Regulation 3.3 provided that a service provider shall be deemed to have

significant market power if it holds a share of 30% of total activity in a licensed telecommunications service area; and "activity" would mean and include – (a) subscriber base, (b) turnover, (c) switching capacity and (d) volume of traffic. The Regulation referred above required such significant market power to publish a Reference Interconnect Offer (RIO). It may be useful to note and observe that the Regulation of 2002 and the definition of significant market power (SMP) thereunder did not relate to the issue of predation. Requirement to publish a RIO by such market power was only to ensure that smaller service providers are not denied interconnectivity. Hence, although the Regulation of 2002 still retains the above provisions relating to SMP but in an entirely different context, therefore, there cannot be a legal hurdle in the way of a fresh definition of SMP under the impugned tariff order. The fresh definition is in a different context and relevant only for the purpose of preventing predation. Hence, it cannot be held bad in law on the ground urged that it is in violation of the Regulation 2002 which is a subordinate legislation. However, the issue of SMP will be considered further in the light of other criticisms.

21. A tariff should be non-predatory is indeed an old concept recognised since long. The TTO 2003 in the Explanatory Memorandum noted, *inter alia*, that while it is of cardinal importance to ensure compliance of tariffs with IUC Regulation 2003, in addition, the compliance to regulatory principles of non-discrimination and predatory pricing is also of utmost importance. The

Reporting Requirement was only to ensure that the Regulator can examine whether the tariff offered meets with all the necessary requirements including the requirement of non-predatory prices. Through a letter dated 20.05.2003 (**Annexure A5**), TRAI referred to earlier decisions and letters to point out that the tariffs must be non-discriminatory, non-predatory and IUC consistent. However, at that stage it linked the issue of non-predation to "the ability to pay IUC expenses while covering own costs". The service providers, regardless of their market power and whether new or old were required to declare that their tariff plan meets the aforesaid three requirements and for about last 14 years the self-check for tariffs included non-predation and created this obligation on all telecom service providers. The TTO 2004 brought in a new definition of "Reporting Requirement". It created a clear obligation on a service provider to report to the Authority any tariff or any change therein within 7 days after conducting a self-check to ensure that the tariff plan is consistent with regulatory principles which, *inter alia*, include IUC compliance, non-discrimination and non-predation. The Explanatory Memorandum, *inter alia*, explained that the IUC charges will implicitly function as a floor to the retail tariffs and thereby a scope for predatory pricing or cross-subsidisation is limited. No doubt the forbearance regime continued and formally no floor price for retail tariff was announced or fixed by TRAI but non-predation remained a concern for all including every telecom service provider. All tariff plans had to be self-checked to ensure that they were non-predatory. The concept of SMP remained confined

to Interconnection Usage Charges. For those charges only an SMP had to come out with Reference Interconnect Offer.

22. The lack of any definition of non-predation was obvious. The only indirect check was "the ability to pay the IUC expenses while covering own costs". While IUC expenses could be found out, the concept of "own costs" clearly suffered from vagueness. Costs could be for any period and could be comprehensive or variable. In such circumstances, when a new TSP, Reliance JIO Infocomm, launched its Welcome Offer in September 2016, objections were lodged by another service provider but those objections were found unsustainable. TRAI held that the offer could not be considered as IUC non-compliant, predatory and/or discriminatory at that stage of time. Similar objections with regard to another new offer by the same service provider were also rejected in January 2017. This led to filing of Telecom Appeal No.1 of 2016 along with Telecom Appeals Nos.1, 2 and 3 of 2017 against the decisions/letters of TRAI.

23. On 17.02.2017, TRAI issued a Consultation Paper on "Regulatory Principles of Tariff Assessment" (**Annexure A9**). In Chapter 3 of this Consultation Paper, TRAI initiated a discussion on something larger than predation as understood earlier. This Chapter was titled as "Anti-competitive behaviour in tariff offers". In Para 3.1, the Authority mentioned that there is a need to undertake a comprehensive review of the potential anti-competitive

practices that could harm the sector and its consumers and therefore, to set-out clearly defined standards of competitive conduct; and to explore appropriate regulatory tools to address such concerns. The old requirement that all tariff plans of all TSPs be non-predatory was replaced by proposing that "the anti-competitive behaviour in the context of tariff setting can be through predatory pricing by the **dominant market player**" **(emphasis supplied).**

24. The concept of Significant Market Power (SMP) well understood in the context of the Interconnection Usage (IUC) Regulation 2003 was dependent upon any of the four factors, namely; (i) Subscriber Base, (ii) Turnover, (iii) Switching Capacity, and (iv) Traffic Volume. The concept of a dominant market player is well known in Competition laws. How and when dominance is acquired or decided is a complex procedure which is based upon evidence in respect of a large number of relevant factual aspects as well as law. In the Consultation Paper of February 2017, TRAI sought response of TSPs on the questions as to – (i) How to define dominance in the relevant markets and what should be the criteria for its determination; (ii) How to assess SMP in each relevant market and what should be the relevant factors for this purpose and what methods/processes should be applied by the Regulator to assess predatory pricing by a service provider in the relevant market. Petitioner, Bharti Airtel, has highlighted its response. Those responses disclose that it suggested that cardinal principles of tariff should be uniformly applicable to all telecom

operators irrespective of their size; the issues related to relevant products and geographic dominance and significant market power are irrelevant for defining the regulatory principles of tariff assessment; the issues of IUC compliance and predatory tariffs are distinct and moreover there is a Competition Regulator which has the power to look at the issues relating to competition in the telecom sector. It also highlighted that India is predominantly a pre-paid market which has no scope of charging rentals and therefore, non-IUC compliant and predatory tariffs have more significant impact on the entire industry, it can lead to complete market failure, affect investments and also future broadband roll out.

25. On 01.02.2018, this Tribunal passed the final judgment and order in Telecom Appeal No.1 of 2016 and other connected appeals involving a challenge to decisions of TRAI in respect of two offers of Reliance Jio Infocomm. The Tribunal did not interfere with the decisions of TRAI but it found certain crucial gaps or lacunae and hence, directed TRAI to issue clear guidelines/benchmarks/methodology for performing self-check for consistency with the principles of IUC compliance. In respect of Non-predation, TRAI took the stand that without a dominant position, temporary pricing below cost by a TSP which is not a significant market power cannot be *per se* anti-competitive. In this context, TRAI relied upon the definition of SMP in the IUC Regulations 2003. This apparently did not appeal to the Tribunal and hence while it directed

TRAI to work out quick collection of data related to Subscriber Base, Turnover, Switching Capacity and Volume of Traffic, it also separately observed thus: "It is also presumptive to accept that the concept of SMP evolved in the context of the IUC Regulations 2003 is the prescribed benchmark for self-assessment in respect of a tariff's need to be non-predatory. The requirement of self-assessment binds even a new entrant in the field of telecom services".

26. In that judgment the two relevant directions and observations in respect of Non-predation were: (i) TRAI should issue suitable directions/order/Regulation regarding benchmark/guidelines that can be applied for ascertaining consistency with the principles of Non-predation; (ii) "All Services Free" offer is an extreme form of below cost tariff and therefore, most rigorous test must be applied for regulatory compliance. Till TRAI issues the required benchmark/guideline, as an interim measure no "All Services Free" offer in any manner will be launched by Reliance Jio Infocomm (or any similarly placed TSP) without making written submissions to TRAI related to self-check for consistency with regulatory principles of Non-predation. TRAI would examine these submissions within one week and convey its approval or disapproval in writing with reasons. The judgment and order observed that the directions need to be carried out expeditiously and preferably within four months.

27. On the issues relating to SMP and predation, the appellants have raised several objections. It has been submitted that Non-predation was earlier never linked to Competition Law issues. It has further been submitted that now that it has been linked to variable cost, additionally it has been made dependent upon subjective tests for finding out the intent behind fixing charges below such cost and a new concept of SMP has been evolved which is itself dependent upon an arbitrarily fixed share of 30% of total activity in a licenced telecommunication service area. The percentage has been simply borrowed from the Telecommunications Interconnection (RIO) Regulations of 2002 which is claimed to be irrelevant for the purpose. But "total activity" has now been limited only to two factors, subscriber base and gross revenue. It has also highlighted that the amended TTO excludes IUC compliance from the self-check required to ensure that the tariff is consistent with the regulatory principles.

28. On behalf of appellants attention has been drawn to some of the relevant definitions substituted or inserted through the impugned Tariff Amendment Order, into the TTO of 1999. The "Reporting Requirement" still mandates for a self-check to ensure that the tariff which shall include promotional tariff, is consistent with the regulatory principles, including transparency, non-discrimination and Non-predation. The concept of "Average Variable Cost" has been made relevant for Non-predation and has been defined as – Total Variable

Cost ÷ Total Output during the relevant period. Some of the newly inserted relevant definitions are as follows:

> (i) "Non-predation" means not indulging in predatory pricing by a service provider having **Significant Market Power; (emphasis added)**
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> (ii) "Predatory Pricing" means the provision of a Distinct Telecommunication Service in the relevant market at a price which is below the Average Variable Cost with a view to reduce competition or eliminate the competitors in the relevant market, as determined by the Authority;
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> (iii) "Relevant Market" means the market which may be determined by the Authority with reference to the relevant produce market for Distinct Telecommunication Service and the relevant geographical market;
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> (iv) "Relevant Produce Market" means the market in respect of a Distinct Telecommunication Service for which the licensor grants licence to the Telecommunication Service Providers;
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> (v) "Relevant Geographical Market" means a market comprising the respective licenced service area for which the licensor grants licence to the Telecommunication Service Providers to provide Distinct Telecommunication Service;
>
> (vi) "Significant Market Power" means "a service provider holding a share of at least 30% of Total Activity in a relevant market." The Explanation to this definition discloses that Total Activity shall be determined on the basis of either subscriber base or gross revenue.

29. A significant amendment through substitution has been effected in sub-clause (iii) of Clause 7 of the principal Tariff Order and it reads as follows:

> "(iii) If a service provider fails to comply with the Reporting Requirement, it shall, without prejudice to the terms and conditions of its licence, or the provisions of the Act or rules or regulations or orders made, or directions issued, thereunder, be liable to pay five thousand rupees, by way of financial disincentive for every day of delay subject to a maximum of two lakh rupees as the Authority may by order direct;
>
> The Authority may, on reference from any person or *suo motu*, examine the tariffs of a SMP to determine the existence of predatory pricing. The

Authority may, after providing detailed reasons, disallow the relevant tariffs if they are found to be predatory.

In case of tariff being found predatory, the service provider shall, without prejudice to the terms and conditions of its licence, or the provisions of the Act or rules or regulations or orders made, or directions issued, thereunder, be liable to pay by way of financial disincentive an amount not exceeding fifty lakh rupees per tariff plan for each service area as the Authority may by order direct.

Provided that no order for payment of any amount by way of financial disincentive shall be made by the Authority unless the service provider has been given a reasonable opportunity of representing against the contravention of the tariff order observed by the Authority."

30. In paragraph 13.2 and paragraph 14 of the EM, the Authority has pointed out some of the reasons along with the decisions under the heading "Analysis and Decisions". For SMP it has explained that the concept will be based on two factors – (i) price is below the cost; (ii) intent to reduce competition or eliminate the competitors in the relevant market. After explaining the final factors in deciding whether the price is below the cost, which would mean Average Variable Cost, the necessity or intent has been justified by referring to the definition of "predatory price" in the Competition Act 2002. That definition defines predatory price as 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 goods or provision of services, with a view to reduce competition or eliminate the competitors. Further relevant discussion on "Intent" in paragraph 13.2.2 is as follows:-

"……Accordingly a crucial point in analysis of predatory pricing is the value of evidence showing that the SMP has predatory

intent, i.e., intent to reduce competition or eliminate the competitors in the relevant market. Some jurisdictions, such as the European Union, expressly incorporate intent in their predation analysis along with price-cost tests. Others, such as the United States, are more skeptical towards intent as an indicator of predatory conduct and consequential harm to competition. Proponents of using intent evidence in predation cases tend to support their position by pointing out that business managers, not government agencies or judges, are in the best position to determine whether a predatory pricing scheme is likely to eliminate competition and ultimately be profitable. Since these managers are knowledgeable and rational economic agents, any evidence showing that they intended to carry out a predatory plan or harm a competitor is more reliable than guesswork by outsiders about whether recoupment of losses suffered due to sale below AVC, is likely in future. **The Authority is of the view that intent is a vital factor in determining whether the SMP is indulging in the predatory pricing and will examine whether there is evidence of a specific intent to engage in predatory pricing. However, the onus of providing the business rationale of pricing below its AVC and proving that the tariff below AVC is not predatory would lie with the TSP whose tariffs is under examination for predation."(emphasis supplied)**

31. In Para 14 of the Explanatory Memorandum, the Authority has noted the judgment of this Tribunal dated 01.02.2018 in Telecom Appeal No.2 of 2017 and other connected matters. It has felt satisfied that due to amendments it had undertaken, it was on the right path of meeting the directions of this Tribunal to issue suitable direction etc. that can be applied for ascertaining consistency with the principles of Non-predation and for performing self-checks for consistency with the principles of IUC compliance. The Authority has recorded that by the changes made through the present amendments, it has laid down the parameters for self-check relating to Non-predation. In respect of IUC compliance it has been clarified that its scope and meaning is limited to the inter-operator settlement and will not be construed as a floor for retail tariff. It has been noted

that Authority would separately issue self-check guidelines for the TSPs on the basis of parameters set-out through the present amendments.

32. The specific grounds of challenge raised on behalf of the appellants to the new concept of Non-predation and SMP are as follows:

(I) The Reporting Requirement in respect of new tariffs, in practice since quite some time, requires self-check for Non-predation by all the TSPs. Even the amended definition in the impugned order does not exempt a non-SMP from a self-check to ensure that the tariff is consistent with, *inter alia*, principles of Non-predation. However, by inserting a definition of Non-predation a new concept has been introduced – (i) More through the EM than through the actual amendment that the test of Non-predation is to be applied only to a service provider having significant market power. (ii) The definition of predatory pricing based on service below practical costs could have been an objective parameter for self-check but instead it has been made wholly unworkable by introducing a grossly subjective test of intent. It is neither possible for a TSP nor it is desirable to leave self-check in the hands of TSPs when it is based on a subjective analysis as to whether below variable cost services are with a view to reduce competition etc. or not. Further, it has been left to be determined by the Authority and

hence, no self-check is possible with such complex definition or concept;

(II) The concept that only an SMP i.e. Service Provider who has reached the threshold of 30% of Total Activity alone is capable of predation and therefore, fit to be subjected to scrutiny for the purposes of Clause 7 and penalty is over-theoretical and divorced from all practical considerations well-known to the Competition Laws.

(III) The definition of Significant Market Power has been totally borrowed from the concept of SMP in the Telecommunications Interconnection (RIO) Regulations of 2002 when it has been held that the above Regulations had a different purpose and was not at all related to or relevant for Non-predation. The "Total Activity" test existing in the aforesaid Regulation has been given a go-bye by excluding the criteria of (i) "Switching Capacity" and (ii) "Volume of Traffic". Even if the explanation on the basis of change in technology for dropping the criterion of "Switching Capacity" is accepted as correct, there is no reasonable and acceptable criteria for similar treatment to the test of volume of traffic, moreso when JIO Telecom had become an SMP on this criteria as indicated in the judgment of this Tribunal dated 01.02.2018.

(IV) View of stakeholders on the concept of "Total Activity" as noted in the impugned order shows that no stakeholders had asked for dropping of any criterion from the four criteria accepted in the Regulations of 2002.

(V) The Consultation Paper as well as relevant discussion in the EM to the impugned amendment order would show a degree of pre-determination to dilute the entire concept of SMP from an objectively determined or determinable condition of tariff to a subjective concept requiring evidence and adjudication by TRAI. The definition of SMP is itself arbitrary without any deliberation and effective consultation. By this definition TRAI has encouraged and permitted Non-SMPs to indulge in predation by creating a presumption that only SMPs can be capable of predation. This is too simple a view, belied by the reality of the telecom sector and is also contrary to permitted contours and tests for predation under the Competition Laws.

(VI) There was no justification for changing the level playing field existing from before which required all TSPs to ensure through self-check that its tariff was, *inter alia*, non-predatory.

(VII) TRAI has exceeded its role and powers which it enjoys under the TRAI Act, by developing a complex concept of SMP and

Non-predation which would require evidence of intent etc. and adjudication as per procedure required to be established on the lines provided under the Competition Laws for the Competition Commission of India but not at all for TRAI under the Act. This amounts to usurping of a jurisdiction of adjudication and determination of complex issues requiring evidence which is way beyond the powers of TRAI under the Act under which only clear and fair rules of Tariff formulation can be prescribed whose violation can be easily seen and found out by the regulator on complaint or even otherwise.

(VIII) If TRAI passes an order or a direction treating a TSP to be in violation of any conditions in a Tariff Order including non-predation, such allegation or accusation can be subject matter of an appeal before this Tribunal under Section 14(b) of the Act. But in case the Authority chooses not to pass any direction, decision or order relating to issue of SMP and predation, the rival service providers are prohibited by proviso to Section 14(a) from getting such a dispute adjudicated by this Tribunal because such matters would be within the jurisdiction of Competition Commission of India, the successor of Monopolies and Restrictive Trade Practices

Commission. In such a situation, the aggrieved service provider would have to approach the Competition Commission.

(IX) The Act does not empower TRAI to levy any penalty or compensation under Section 11(2) of the Act whereunder the impugned order has been issued. According to petitioner even the Regulations cannot provide for imposition of penalty as provided in clause 4 of the impugned Tariff Amendment Order and therefore, clause 4 is bad for want of power to levy such penalty/financial disincentive. The penalty provision was not even made a subject matter of consultation hence it is bad in law.

(X) There was no effective consultation on definition of SMP, relevant product market, Predation and/or dropping of two parameters for the purpose of SMP. Only a clear proposition on the new concepts along with tentatively indicated reasons could have offered opportunity of effective consultation.

33. The financial disincentive of an amount upto Rs.50,00,000/- (Rupees Fifty Lakhs only) as introduced in the sub-clause (iii) of clause 7 is clearly in violation of Section 29 of the Act and to the extent of such violation it is bad. Moreover penalty provision through an executive order is beyond the powers of TRAI.

34. Regarding the charge of TRAI attempting to lay down a comprehensive competition regime to be adjudicated and determined by it without any sanction of law through the Act or Rules and Regulations thereunder, learned Senior Advocate, Mr. Tushar Mehta has placed reliance on the wide powers of the Competition Commission under The Competition Act 2002 and Section 62 which permits other laws in force to operate by stating that the provisions of this Act shall be in addition to, and not in derogation of any law in force. But it is not disputed that as per Section 60, this Act shall have effect notwithstanding anything inconsistent therewith in any law for the time being in force. In view of elaborate procedure, wider reach and overriding effect apparent from Section 60, the Competition Act cannot be ignored by TRAI in exercise of its executive/administrative powers of determining tariffs. It cannot assume or create for itself a quasi-judicial role in a competition regime of its own creation by the impugned Tariff Amendment Order in so far as it seeks to define SMP and Non-predation.

35. We take note of a recent judgment of Hon'ble Supreme Court dated 05.12.2018 passed in Civil Appeal No.11843 of 2018 **[Competition Commission of India(CCI) Vs. Bharti Airtel Ltd. & Ors.]**. The Apex Court affirmed the judgment of Bombay High Court against order of the Competition Commission passed on 21.04.2017 on the information filed by Reliance Jio Infocomm Limited. Paragraphs 84 to 92 of that judgment highlight that both the

authorities have the power and duty to operate in their respective special jurisdictions. The CCI has only to step in after TRAI has, in the first instance dealt with and decided the jurisdictional aspects which it is more competent to handle as an expert body required to regulate relevant aspects in the telecom sector as per the TRAI Act and the Rules and Regulations framed thereunder. But at the appropriate stage, once TRAI has expressed itself on an issue within its jurisdiction, "the CCI is competent to exercise its jurisdiction from the stand point of the Competition Act." The powers special to CCI as a quasi-judicial authority has been highlighted by extracting Section 27 of the Competition Act and also by referring to the purpose/scope of this Act covering three kinds of practices which are treated as anti-competitive and therefore prohibited. In paragraph 90 of the judgment, role and significance of CCI finds a clear mention with the conclusion that "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."

36. We hasten to add that straightforward and simple objective yardsticks so as to enable the TSPs as well as TRAI to do self-check/check and enforce the requirements relating to Non-predation can be laid down as a condition of Tariffs formulation by TRAI but the latter can not assume the role of an adjudicator of contested issues in a lis like situation. The distinction between an

administrative/executive decision and a quasi-judicial judgment/order is subtle but clear. The latter role requires to decide disputes to pronounce rights and obligations on the basis of rival contentions and evidence and in the light of relevant laws and rules operating in the field. The former, i.e., an administrative/executive decision merely spells out its views on the basis of available materials and may even issue orders or directions on the basis of such views. If the affected party accepts the views and consequent action, it is taken as a normal instance of proper exercise of administrative power but if the view is subjected to protest and challenge, a lis would arise requiring adjudication in an objective manner by a judicial or quasi-judicial authority. Originally, TRAI had quasi-judicial powers but later such powers were given to this Tribunal. Since then, TRAI has no quasi-judicial powers.

37. In view of above discussion, it has to be held that the complex concept of Predation dependent upon determination of **intent** with the requirement of evidence by TRAI is neither desirable nor objective. TRAI's required role is without the backing of adequate provisions for such a role in the Act. The procedural safeguards for such a role also do not exist under the Act or the Rules or Regulations framed thereunder.

38. The purpose of TRAI in fixing 30% of total activity for a SMP is not backed by any intelligible and objective criterion nor any convincing reason is discernible from the Explanatory Memorandum or submissions. As a regulator,

TRAI is expected to be aware of the ground realities, the ups and downs faced by the TSPs, reduction in their numbers in recent times and its various reasons. The impugned order does not show application of mind to the relevant objective datas, facts and figures to support the significant changes under challenge. Only good intentions can not be of much help because law making, even indirectly, is a demanding exercise which would be very difficult to be carried out if there are no practical aims and objectives, like any given goal or mischief to be tackled. Had there been some facts and figures available and discussed to support the impugned changes, the matter could have been examined from a different perspective. But that is not the situation here. There are no good factual reasons to support the impugned significant changes.

39. If a new entrant needs to be protected from the rigors of Non-predation, it can be done through provisions like 'Welcome Offer" and Promotional Scheme as availed recently by Reliance Jio. These can be formalized as just exceptions but to allow freedom from requirements of Non-predation till acquisition of 30% of total activity in a given market prima-facie appears to be an extreme step and unnecessary abdication of its regulatory powers by TRAI in the context of Tariff conditions and their enforcement. With just exceptions, Tariff conditions should generally be applicable to all TSPs uniformly.

40. In reply to the various grounds of attack on the concept of SMP, in the context of Non-predation and on the penalty provisions, on behalf of TRAI

learned Senior Advocate, Mr.Tushar Mehta as well as Ms.Maneesha Dhir have argued at length. According to them, the consultation process was quite lengthy as well as effective. The conclusions of TRAI emerged after the consultation and therefore, it was not practical to restart the consultation process after arriving at the conclusions. According to the stand of TRAI, any further consultation on the basis of conclusions leading to the impugned Tariff Amendment Order was not required by law and would have been a waste of time because the materials upon which the conclusions are based were made available in the Consultation Paper.

41. We are unable to accept this stand of TRAI. The responsibility cast upon TRAI under Section 11(4) is clear and unambiguous. It requires that the Authority shall ensure transparency while exercising its powers and discharging its functions. The issue is already settled by judgment of the Hon'ble Supreme Court in **Cellular Operators' Association of India & Ors. Vs. Telecom Regulatory Authority of India & Ors. – (2016) 7 SCC 703** that the degree of transparency must meet the requirement set out for the Airports Economic Regulatory Authority under the Airports Economic Regulatory Authority Act. In our view, at the minimum it requires effective consultation on the specific proposals which the Regulator should moot after consulting all the stakeholders. The process of consultation, therefore, has to be in more than one phase. At the initial phase the consultation will be on the basis of all the relevant materials

which should also include complaints and grievances from the stakeholders, if any. In the light of such preliminary consultation, the Regulator would have to give tentative proposals or decisions which should be circulated along with the tentative reasonings or views of the Regulator. This alone will lead to effective consultation which will ensure the required measure of transparency. The other requirement for transparency would be to record at least in brief the reasons as to why the suggestions to the contrary were not accepted and what reasons led to the final views/decisions incorporated in the Tariff Order.

42. The above requirements become more strong and compelling when the exercise is to develop an entirely new concept of SMP as well as Non-predation. On going through the contents of the Consultation Paper and the ultimate decision on this important issue, we find that the consultation process was not effective as it stopped with the first round of consultation which could have been only of preliminary nature because the tentative decisions along with the materials or reasons mooted by the Authority also required to be circulated for seeking comments and reasons from the stakeholders. Since, this part of the exercise was not done, the impugned decisions on the issue of SMP and predation cannot be sustained for the reasons of lacking the required transparency. Had the Authority retained the original concepts and provisions by simply reiterating as to what was coming from before, the requirement could have been milder but when the new concepts have been incorporated into the

tariff structure, there can be no scope to dilute the requirement of adequate transparency as well as supply of good reasons. We find even good reasons lacking for vital changes relating to SMP and Non-predation including "Variable Cost" concept.

43. Since we have found that there was lack of required transparency in arriving at the concept of SMP, Non-predation and Average Variable Cost it is not necessary to discuss other issues raised by the appellants and noted earlier. But we would be failing in our duty if we do not communicate our concern in respect of definition of SMP in so far as it introduces subjective yardsticks. The yardsticks must be objective and known to all the TSPs or else the task must be left to be dealt with by a complete code such as under the Competition Laws so that the competent authority can decide a complaint alleging predation. Since the concept of predation under the Competition Laws requires consideration of many issues based upon Enquiry report/evidence, it would not be proper to adopt a definition which provides artificial protection to a TSP who may have the capability and intent to destabilise the sector through predatory pricing before it attains the defined status of SMP. Such stand of the Authority would undermine the power of the Authority and run against the scheme of the Act under which Authority must have powers to regulate any TSP at any time if it finds the actions or the tariff schemes of such TSP to be unacceptable on objective criteria. Instead of indulging in the task of law making through tariff,

it may be in the interest of the sector that the Regulator retains all its regulatory powers against all the TSPs so that it can interfere and disallow a tariff whenever the need arises. Powers and jurisdiction of a statutory authority like the Competition Commission should not be blocked or abridged by issuing orders or directions like those impugned which do not have the flavour of a subordinate legislation such as Regulations. To vest the adjudicating powers of Competition Commission in the Authority, in our considered view, only the Parliament will have the necessary powers. This is clear on going through the relevant provision of the Competition Act 2002 including Section 60. Under the TRAI Act, the adjudicatory powers of the Authority were separated and vested in this Tribunal. Clearly, the provisions in the Act, after creating this Tribunal for purposes of adjudication of disputes and hearing of appeals, do not envisage or provide any scope to the Authority to adjudicate a dispute/lis like the Competition Commission. Any such adjudicatory process must have elaborate rules to safeguard procedural fairness along with the right to take evidence etc.wherever required. No such provision vesting such power in the Authority has been brought to our notice.

44. In the light of discussions made earlier, the impugned Tariff Amendment Order is set aside in so far as it changes the concept of SMP, Non-predation and the related provisions. These provisions shall be reconsidered by the Authority at the earliest, preferably within six months. TRAI shall keep all the relevant

facts in mind while dealing with the matter in the light of this order of remand of the issues relating to Non-predation and SMP. The interim order is made absolute.

45. The appeals are thus partly allowed to the extent indicated above. However, there shall be no order as to costs.

(S. K. Singh, J)
Chairperson

(A.K. Bhargava)
Member

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