

# **Interaction and Inter-Dependence of CCI & TRAI**

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“If, however, a government refrains from regulations and allows matters to take their course, essential commodities soon attain a level of price out of the reach of all but the rich, the worthlessness of the money becomes apparent, and the fraud upon the public can be concealed no longer.”  
**John Maynard Keynes**

## **Abstract**

*Telecom sector in India has witness several up and downs starting from a British controlled line to state run monopoly to a privatisation of the sector. The sustainable and regulated growth of the sector by Telecom Regulatory Authority of India has made India a second largest market of Telecommunication services. TRAI has been vested with quasi-judicial power to regulate the service provider to ensure quality services and sustain the competition in the sector. The rapid privatisation of the sector and cut throat competition to acquire more market share has raised several issues of competition violation which are detrimental to the consumer. Though the TRAI has been vested to regulate and monitor the Telecom sector but Competition Commission of India, an agency to foster the competition collide with the sector regulator. There has been a grey area as to solution of a problem of overlapping of jurisdiction on issue of competition between TRAI and CCI. The author in the present case has analysed the power and functions of TRAI and CCI and overlapping of jurisdiction. Author has assess the need of effective communication between two agencies to nurture more competition in telecom sector. Author has examined international practices followed in cases of collusion between sector regulator and competition authority.*

1. **Introduction:** Tele-communication sector is the key area to keep the bright and burning bulb of digital India in real means.<sup>2</sup> Post liberalisation this sector has witnessed the drastic change from a government monitored control regime to a multiplayer competitive sector. Undoubtedly robust growth of the telecommunication companies is the key to achieve the figure of \$5tn GDP by 2024. India is the second largest market of with consumer base of 1,183.51 million by March 2019.<sup>3</sup> The reformist liberal policy emphasising on ease of doing business, market access and strong regulatory framework has been the key factor of growth of the telecommunication in India. In addition thereto liberalised foreign investment in the sector has also enhanced the pace of growth of the sector. The sector

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<sup>2</sup>Navadha Pandey, Why competition in telecom is key to the digital India dream, available at <https://www.livemint.com/industry/telecom/why-competition-in-telecom-is-key-to-the-digital-india-dream-11573752349022.html>. (Last visited on 21/11/19)

<sup>3</sup>Indian Telecommunications Industry Report, available at <https://www.ibef.org/industry/telecommunications.aspx> (Last visited on 21/11/19)

has witnessed the paradigm shifting from its natural monopoly to a competitive multiplayer sector. It is noteworthy that in 2012 there used to be fifteen telcos which has reduced to four in 2019. In last three years the sector has witnessed a lot of aggressive pricing strategies from the biggest players in the segment such as Airtel, BSNL and Vodafone.<sup>4</sup> In 2019 post Supreme Court judgement on AGR issue and bruising price war by Reliance Jio has shaken up the financial position rival companies in the sector.<sup>5</sup> Therefore, sustainable growth of this sector with efficient regulation is pre-requisite for enhancement of the GDP of the country. The current position of the sector has also attracted issues pertaining to competition law either in the form of tariff war (alleged predatory pricing case against Reliance Jio), interconnection terms and recent merger of the Idea with the Vodafone. The imposition of the IUC charges by the Reliance Jio to the Non-Jio number has also attracted the provisions of the Competition and Consumer Law in India. The sector is going through with a difficult phase where they have to manage between their profit vis-à-vis consumer retention. Therefore, there is a requirement of interaction and interface between the working of regulatory and competition body to protect the interest of all. Though the power of the Telecom Regulatory Authority of India is confined solely to the cases of Telecom Act whereas the Competition Commission of India has a power to check anti-competitive practices. Though Competition Act, 2002 advocates for a non-binding consultation process between sector regulator and competition authority for solution of dispute.<sup>6</sup>

- 2. Overview of the Telecomm Sector of India:** Initially it was the belief of the various policy analysts that the high cost involved in the installation of the fixed assets and infrastructure to provide telecommunication service under this sector was expected to serve best by having one service provider. But post liberalisation with the entry of more private player the growth of the sector have been phenomenal. It was in 1851 during the British regime in Calcutta first operational landline were laid. The freedom of India resulted into the nationalisation of British owned firm and vested under the monopoly of the government. Prior to the enactment of the TRAI it was the Communication Ministry to regulate the telecommunication services pan India. In April 2012 there were total 15 market player. Post 2G spectrum 8 companies out of 15 have lost their license which resulted in reducing of the rivals in the sector. Free data and free calling plan namely 'JioWelcomeOffer' has also disturbed the economics of the small telecommunication companies. The tariff war among the rival companies post entry of Jio in September, 2016 has forced small telecommunication companies like Videocon and Systema sold their spectrum to other companies. India is turned to the second highest telecommunication market. It has 1.20 billion subscriber.<sup>7</sup> To cater the need of increasing subscriber base, sector has witness huge investment both in assets and technology.<sup>8</sup> At

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<sup>4</sup> Mukherjee, Amritanshu; "Jio is now second-largest telecom operator in India, leads overall broadband sector by 55 per cent market share", available at <https://www.indiatoday.in/technology/news/story/jio-second-largest-telecom-operator-in-india-leads-overall-broadband-sector-by-55-percent-market-share-1571504-2019-07-20>(last visited on 22/11/19).

<sup>5</sup> Sharma,S Mihir; "India's telecom sector is staring at decimation, thanks to state action" available at [https://www.business-standard.com/article/companies/india-s-telecom-sector-is-staring-at-decimation-thanks-to-state-action-119103000185\\_1.html](https://www.business-standard.com/article/companies/india-s-telecom-sector-is-staring-at-decimation-thanks-to-state-action-119103000185_1.html) (last visited on 19/11/19)

<sup>6</sup>Competition Act 2002, (Act 12 of 2003) Section 21 and 21A.

<sup>7</sup>Telecom Industry in India, available at <https://www.ibef.org/industry/telecommunications.aspx>. (last visited on 11/11/19)

<sup>8</sup>Ibid

this moment there are four major companies in the telecommunication sector providing voice services. The Reliance Industries Ltd subsidiary has forced the Idea Cellular to get merged with the Vodafone. It is noteworthy that the price war from September 2016-2018 though ensured the benefit to the consumer but it has turned the telecommunication market into an oligopoly. This oligopoly has started affecting the consumer in the December 2019 where all the service providers have increased their tariff to an extent of 42%. There has been policy paralysis and lack of interaction between Telecommunication Authority of India and CCI. The CCI was not effectively able to detect the predatory pricing situation craft by the Reliance Jio. In the present paper the author will discuss the interdependence of TRAI and CCI to ensure efficiency in the sector. Author will delve upon the power and function of the CCI and TRAI pertaining to the protection of the sector as well as the end consumer in the market. Author will analyse judicial pronouncements and the international practices followed to overcome the problem of jurisdictional overlapping.

- 3. Role and Responsibilities of Telecom Regulatory Authority of India:** TRAI has been established to regulate and to watch the healthy growth of the telecommunication companies in India. Being a sector regulator TRAI owes a duty to provide world class telecommunication infrastructure to consumer at the most competitive prices. TRAI a quasi-judicial body established under the Telecom Regulation Authority Act, 1997. The objective of the TRAI Act itself mandate “to make arrangements for protection and promotion of consumer interest and ensuring fair competition and to ensure orderly and healthy growth of telecommunication infrastructure.” The TRAI has been also duty bound to lay the measures pro to competition through enhancing efficiency in the sector and by regulating the telecommunication companies.<sup>9</sup> TRAI necessitates to exercise “powers to discharge its functions, including to call for information, conduct investigations and issue such necessary directions as it may deem necessary for the discharge of its functions.”<sup>10</sup> Apex Court of India in the case of “*Competition Commission of India v. Bharti Airtel Limited and Others*”<sup>11</sup> has discussed the power and functions of TRAI in the following words: “TRAI is, thus, constituted for orderly and healthy growth of telecommunication infrastructure apart from protection of consumer interest. It is assigned the duty to achieve the universal service which should be of world standard quality on the one hand and also to ensure that it is provided to the customers at a reasonable price, on the other hand. In the process, purpose is to make arrangements for protection and promotion of consumer interest and ensure fair competition. Specific functions which are assigned to TRAI, amongst other, including ensuring technical compatibility and effective inter-relationship between different service providers; ensuring compliance of licence conditions by all service providers; and settlement of disputes between service providers.” TRAI has been vested with power to summon information,<sup>12</sup> probe into complaint,<sup>13</sup> pass necessary order to fulfil the mandate given under the Act<sup>14</sup> and power to impose penalty.<sup>15</sup> Exclusivity of jurisdiction of TRAI and TDSAT is ensured by Section 15 and 27 of the TRAI Act. Therefore, the TRAI is an expert regulatory body vested with the quasi-judicial powers to

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<sup>9</sup> Telecom Regulatory Act, 1997 (Act 24 of 1997) ss. 11(1)(a)(iv), 11(1)(b)(ii), (iii), (iv)

<sup>10</sup> Telecom Regulatory Act, 1997 (Act 24 of 1997) s. 12

<sup>11</sup> Civil Appeal No(S). 11843 of 2018 (Arising Out of SLP (C) No. 35574 of 2017)

<sup>12</sup> Section 11(d), Telecom Regulatory Act, 1997

<sup>13</sup> Supra note 9

<sup>14</sup> Ibid

<sup>15</sup> Telecom Regulatory Act, 1997 (Act 24 of 1997) s. 29

ensure the transparency, predictability, certainty and efficiency in the telecom sector with prime focus on holistic development of sector catering the needs of all the sector player.

4. **Role and responsibilities of Competition Commission of India:** CCI is an artificial personality having common seal and perpetuity. It can hold and dispose both fixed and floating assets.<sup>16</sup> Like TRAI, CCI is a regulatory expert body with the semi-judicial power. Competition Act, 2002 is an omnibus code. Commission has advisory, advocacy, investigative and adjudicatory function to discharge.<sup>17</sup> The Commission received grants from the central government for its expenses.<sup>18</sup> Hon'ble Supreme Court of India while outlines the features of the CCI has observed that "Objects of CCI are high, and include the promotion and sustenance of competition in markets, protection of consumer interests and ensuring freedom of trade for all participants in the market, all against the backdrop of the economic development of the country."<sup>19</sup>The legislation is substantive & procedural equipped with necessary explanations. Section 18 of the Competition Act, 2002 mandate to "eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade in markets in India." This over expanding jurisdiction of the CCI collude with the jurisdiction of other sector regulator.<sup>20</sup>For instance, recently we have seen the turf between TRAI and CCI in the case pertaining to the Reliance Jio.<sup>21</sup>
5. **Interaction and Inter-dependence between CCI and TRAI:** India has opted for independent economic regulatory and competition authority with a procedure of formal consultation in case of need. TRAI (regulatory body)and CCI (competition authority) owes a duty to safeguard welfare of consumer.But their approach are distinct owing to their origin under separate enactments passed at different time. Ex Ante regulation is approached by the sector regulator where ex-post assessment approach is used by the CCI. Competition authority checks the position and practices which allows an enterprises to act beyond the competitive forces prejudicing the competition in the market whereas the sector regulator suggest structural change to ensure this competition.<sup>22</sup> Due to common end goal of achieving consumer welfare and to ensure effective competition in the market there is no clear diving lines between the power and function of TRAI and CCI on issue of competition in the telecom sector. Tariff war and Points of Interconnection are recent example of face of between the CCI and TRAI. Face of pertaining to competition between two agencies namely CCI and TRAI is not a good

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<sup>16</sup>Competition Act 2002, (Act 12 of 2003) s. 7 (2).

<sup>17</sup> Hon'ble Justice Jagdish Singh Khehar, Chief Justice of India, delivered the Annual Day Lecture on "Emerging Jurisdiction of Competition Law: How will it serve the business community in India, and India's Trade Policy." Available at [https://www.cci.gov.in/sites/default/files/press\\_release/Press%20release%20annual%20day%2020.05.2017.pdf](https://www.cci.gov.in/sites/default/files/press_release/Press%20release%20annual%20day%2020.05.2017.pdf)

<sup>18</sup>Competition Act 2002, (Act 12 of 2003) s.55

<sup>19</sup>*Competition Commission of India v Steel Authority of India*, (2010)4 CompLJ1(SC) (India).

<sup>20</sup>Banking Regulation Act,1949 (Act 10 of 1949) ss.44A; Telecom Regulatory Act, 1997 (Act 24 of 1997) s. 11(1)(a)(iv)

<sup>21</sup>Telecom Regulatory Act, 1997 (Act 24 of 1997) s. 11(1)(a)(iv).

<sup>22</sup>Paridhi Poddar; "Sectoral Regulation, Competition Law, and Jurisdictional Overlaps: Tracing the Most Viable Solution in the Indian Context", Kluwer Competition Law Blog, available at <http://competitionlawblog.kluwercompetitionlaw.com/2018/05/24/sectoral-regulation-competition-law-jurisdictional-overlaps-tracing-viable-solution-indian-context/> (last visited on 30/11/19)

sign of governance.<sup>23</sup> This issue has been attempted to be address by Section 21 and 21A of the Competition Act, 2002 where former provides process of reference by the statutory authority in cases where element of competition law is involved and later provide reference to the sector regulator in case CCI finds suitable, reference so made need to be disposed of with 60 days.<sup>24</sup> It is noteworthy reference is not mandatory under section 60 of the Competition Act, 2002. Ministry of Corporate Affairs has also recommended to amend the Competition Act to an extent to mandate the consultation in the cases of overlapping of sector regulator and competition authority.<sup>25</sup>

In this regard, the Madras High Court in the “*Vikash Trading Company v. Designated Authority, Directorate General of Anti-Dumping and allied duties, Ministry of Commerce and Industry*”<sup>26</sup> laid down that “making a reference under Section 21 is qualified by use of the word ‘may’ and therefore is not mandatory. Further, Section 62 of the Act provides that provisions of the Act shall only be in addition to and not in derogation of any law in force.”

Hon’ble Supreme Court of India has settled the above issue pertaining to interface of CCI and TRAI recently in a case filed by the Reliance Jio against Airtel, Idea and Vodafone of alleged cartelisation.<sup>27</sup> Jio has initially filed a complaint before the TRAI where TRAI recommended to the Department of Telecommunications (DoT) to impose a penalty of Rs. 50 Crore each on the IDOs. In the meanwhile the Jio has also filed a case of alleged cartelisation among the telecommunication service provider. CCI found the prima facie case and ordered an investigation. This order was challenged by the aggrieved parties and Bombay High Court has set aside the Set aside CCI's order for lack of jurisdiction considering TRAI was already seized of the matter.<sup>28</sup> Apex Court of India through its judgement dated 05.12.2018 has settled this controversy stating that "TRAI being a specialised sector 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." Apex was cautious and have not totally oust the jurisdiction of the CCI and investigation subject to the findings of TRAI by stating as follows: “Once that exercise is done and there are findings returned by the TRAI which lead to the prima facie conclusion that 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”<sup>29</sup>

**6. Conclusion and Suggestion:** This problem of anomaly of jurisdiction is common in almost in all jurisdiction. There may be three solution of this issue of jurisdictional

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<sup>23</sup>Pradeep S. Mehta, Uday S. Mehta; “CCI vs TRAI: The Difference Between Promoting Competition and Curbing Anti-Competitive Practices”, available at <https://thewire.in/business/cci-trai-promoting-competition-anti-competitive-practices> (last visited on 21/11/19)

<sup>24</sup>Competition Act 2002, (Act 12 of 2003) ss. 21(2)-22(2)

<sup>25</sup> National Competition Policy 2011, Government of India Ministry of Corporate Affairs, available at [http://www.mca.gov.in/Ministry/pdf/Revised\\_Draft\\_National\\_Competition\\_Policy\\_2011\\_17nov2011.pdf](http://www.mca.gov.in/Ministry/pdf/Revised_Draft_National_Competition_Policy_2011_17nov2011.pdf) (last visited on 25/11/19)

<sup>26</sup> (2013) 1 MLJ (Mad.) 907

<sup>27</sup>Competition Commission of India v. Bharti Airtel Limited and Others

<sup>28</sup> Vodafone India Limited and Ors. vs. The Competition Commission of India and Ors. (21.09.2017 - BOMHC) : Writ Petition Nos. 8594, 8596 of 2017, Writ Petition No. 7164 of 2017, Civil Application (Stamp) No. 17736 of 2017 in Writ Petition No. 7164 of 2017 and Writ Petition Nos. 7172, 7173 of 2017

<sup>29</sup> Supra Note 25

overlapping. Firstly, Exclusivity Model: Amend the law in such a way to provide exclusive power to one body to deal with the cases. Secondly, Concurrency Model which mandates a consultative approach between the different regulator. Consultation Model: Authorities vested with power of dealing with competition issue will discuss and resolve the dispute together. Depending upon the legal system, political system, and institutional frame work and competition policy countries has devised its model of responding to this controversy of Interplay. United Kingdom has employed concurrent model where sector regulators have the concurrent power to apply EU and Competition law along with Competition Market Authority a national competition agency. South Africa has also followed the line of United Kingdom and opted for the concurrency model. Australia has given vast power to Australian Competition and Consumer Commission to deal with the competition issues of domain of sector regulator. In the United States judge Campbell observed on issue of jurisdictional overlapping between two federal agencies in the case of Government National Mortgage Association “I did not appreciate seeing two federal agencies expend their time and resources fighting a jurisdictional dispute in court. I believe their efforts would be more wisely spent in utilising their expertise to reach a solution which they would jointly recommend to Congress”. The Law Commission of India in its 126 Report has also supplied emphasis that the public undertaking to resolve their meeting through meetings and deliberation rather coming to court and contesting same at public expenses. Therefore, there is need of super regulator above all regulators with an objective to ascertain the consultation between the different sector regulator. In addition thereto the Competition Act, 2002 to be amended to an extent to make consultation under section 60 mandatory rather discretionary. Therefore, the mandatory interaction in the cases of jurisdictional overlapping can be the best possible solution.