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HORIZONTAL AGREEMENTS AND THREATS TO COMPETITION IN THE TELECOM SECTOR IN INDIA

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I. ABSTRACT

The economic development of India is one of the many things that have depended heavily on the telecom sector, but it is also a fragile area as far as anti-competitive practices are concerned. Horizontal agreements among competitors can be reduced by price-fixing, bid-rigging, and market allocation, resulting in possible output restrictions. This research paper provides an exhaustive evaluation of the effects that these horizontal agreements have on competition within India's telecom industry.

The main purpose is to identify specific instances of anti-competitiveness, assess their impact on consumers and industry, and suggest measures to combat them. According to the core hypothesis of this study, competition in the telecommunications industry gets affected adversely by horizontal agreements such as cartels and price fixing, which ultimately lead to high prices, decreased customer choice, and market distortions.

Doctrinal methodology will be used in this research, which involves looking at various materials, such as statutory laws and existing journals, using secondary sources like commentaries and committee reports, among others.

It involves a detailed review of the Competition Act 2002 and the Telecom Regulatory Authority of India (TRAI) Act 1997, with a focus on different cases, including *United States v. L. Cohen Grocery Co.*, *Builders Association vs. Cement Manufacturer Association*, and *BSNL vs. TRAI*. For instance, in the past they have been declared illegal as a horizontal agreement. The work also identifies notable anticompetitive practices

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common in the telecommunications industry, such as price fixing, bid rigging, market sharing, and output restrictions.

The departure of any one among Jio, Airtel, and Vodafone-Idea, who have 88.4% market share, could result in a duopoly, which would raise serious concerns. The study examines regulatory frameworks applied by the Competition Commission of India (CCI) and TRAI, which acknowledge that there is a need for cooperative frameworks to deal with anticompetitive practices.

It proposes that transparency should be increased; predatory pricing should be made illegal, while regulatory authorities should seek synergy amongst themselves in order to ensure fairness in competition. Joint efforts by CCI as well as TRAI can help create coordinated policies capable of barring anticompetitive threats, leading to an improved business setting within this field too.

II. KEYWORDS

Competition Commission, TRAI, Telecom Sector, Horizontal Agreement, Price Fixing, Adverse Effect, Market

III. INTRODUCTION

Massive growth and transformation in India has been witnessed by the telecom sector, which is a major contributor to the nation's economies. Technological advancements and intense competition define this industry that has also remained susceptible to anti-competition concerns.

One of these worries is about horizontal agreements, which are present in the market. These give rise to a number of forms, such as price fixing, bid rigging, market sharing, and output restriction. When they are intended for choking off competition, they can result in cartelization, where all players behave as collusive oligopolists.

This research paper explores the complicated connection between horizontal agreements and how they have affected India's telecommunications industry. This study seeks to

contribute to an all-rounded understanding of challenges faced by this sector by clearly identifying specific practices and their effects.

IV. RESEARCH OBJECTIVE

The primary objective of this research paper is to analyze the current status of competition in telecom sector in India, implications of horizontal agreements on competition. This includes identification of available legal mechanisms, specific anti-competitive practices, examining their consequences on consumers and industry, and proposing effective solutions to mitigate their ill-effects.

V. RESEARCH QUESTIONS

1. What are horizontal agreements, and how do they impact competition?
2. What is the current state of competition in the telecom sector in India?
3. What are the legal and regulatory mechanisms in place to mitigate threats to competition?
4. What are the specific threats to the competition in the telecom sector in India posed by horizontal agreements?

VI. RESEARCH HYPOTHESIS

Horizontal agreements, particularly the practices involving price fixing and cartelization, have an adverse effect on competition in the telecom sector in India, leading to an increase in price, reduced consumer choice, and market distortion.

VII. RESEARCH METHODOLOGY

The methodology for research adopted in this paper is purely doctrinal in nature. Doctrinal research, also known as library research, is a distinctive method for legal research. As included in doctrinal research, a thorough study of the existing literature was conducted.

Many cases, articles, books, committee reports, and acts spanning the last few years were studied and analyzed to thoroughly study the intricacy of competition in the telecom sector in India. Legal databases such as Indian Kanoon, eCourt, SCC Online, etc have been used. The case laws incorporated in the dissertation are those that intricately deal with the dimension of competition in the telecom sector in India.

This methodology is suited for examining technical and conceptual aspects of law and for providing a systematic arrangement of legal doctrines and established principles. The primary sources for this research paper include statutory materials, judicial precedents, and authoritative texts. On the other hand, secondary sources such as commentaries, committee reports, articles, legal digests, and scholarly work are also consulted.

The process of this research involves the identification, collection, and logical analysis of these sources to make judicious conclusions and suggestions. Though doctrinal research restricts the sources, data and interpretation have been compared to provide a comprehensive and coherent understanding of the legal framework governing the subject matter at hand.

VIII. LITERATURE REVIEW

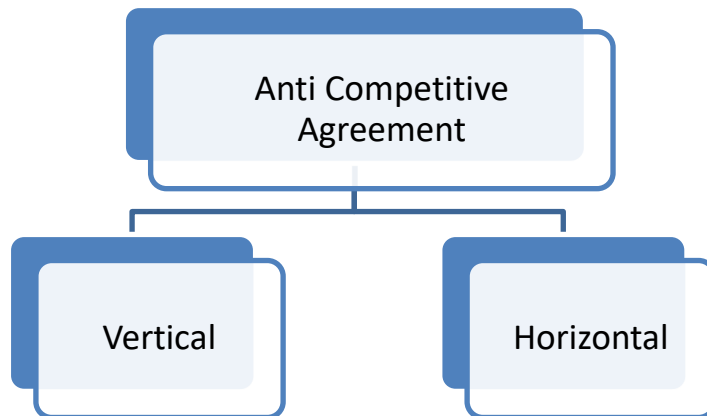
The literature reviewed in the paper provides a comprehensive legal framework governing the competition in the telecom sector in India. The paper draws upon key provisions of the Competition Act 2002 and the Telecom Regulatory Authorities of India Act 1997, more particularly Section 3(3) of the Competition Act. We refer to books that were written by famous writers like Dr. S.C. Tripathi or Dr. H.K. Saharay themselves.

The paper analyzes in depth the report of the Competition Commission of India on the market study of the telecom sector in India. Also, several cases have been referred to make this paper. This includes *United States vs. L. Cohen Grocery Co.*, *M.R. Gupta vs. Union of India & Ors.*, *Builders Association vs. Cement Manufacturer Association*, *BSNL vs. TRAI*, and *Cellular Operator Association vs. TRAI*, amongst others.

The case laws establish the pre-requisites of anti-competitive practices. The paper seeks to analyze the loopholes of law on the subject matter in hand by examining statutory provisions alongside authoritative judicial pronouncements.

A restraint of trade is a kind of agreed provision aimed at restraining another's trade or prohibiting agreements that are counter to public policy unless done with bona fide intention.

It is always possible that the big players can coordinate their actions to achieve a position so that they can control the market, i.e., anti-competitive. Collusion is a situation where firms coordinate with each other to indulge in anti-competitive practices and gain higher profits. Collusion can be explicit or tacit. Under the Competition Act 2002, there are two types of agreements that are considered anti-competitive.



Horizontal agreements³ are agreements between two enterprises who are in the same line of production in which they

- directly or indirectly determine the sale and purchase price,
- limit or control the production, supply, investment, technical development, or provision of services,

³ PSA, "Anti-Competitive Agreements: Tests And Tribulation" PSA (July 11, 2013) <<https://www.mondaq.com/india/trade-regulation--practices/250048/anti-competitive-agreements-tests-and-tribulation>> accessed July 22, 2024

- share the market or source of production or services,
- or the number of customers in the market directly or indirectly results in bid rigging or collusive bidding

Such agreements between enterprises are considered to have an agreement that have appreciable adverse effect (AAEC).

Section 3(3) describes that when two enterprises that are in the same line of production come into an agreement, it is *per se* presumed to be anti-competitive, and the burden of proof is on the company forming the agreement.⁴

There can be a number of ways in which market players interact with each other and conduct their business. Collusion in the form of horizontal agreement can take various forms. One of those forms is price fixing.

Following are the common types of horizontal agreements:

1. Fixing of Price
2. Bid Rigging
3. Market Sharing
4. Output Restriction

A. Fixing of Price

It is a bad practice when the competitors to each other, form an agreement that has the purpose of fixing or controlling the price of the goods and services in the market. The companies mutually set the prices that they want to charge for the market by price fixation. Sometimes a slight increase in the price of each product hardly matters to a consumer, thus it ultimately generates huge profit for the enterprises. Price fixing agreements can be of different types as described below

- Agreement on price increase

⁴ *Competition Act 2002, s 3(3)*

- Agreement to adhere to published prices
- Agreement not to sell unless it is on the agreed price terms
- Agreement on a standard pricing formula
- Agreement regarding providing, eliminating, or establishing methods of providing discounts
- Agreement on credit terms that will be offered to customers
- Agreement to eliminate goods and services offered at low prices from the market, thereby limiting supply and raising the prices
- Agreement between cartel members not to change or reduce prices without notifying each other⁵

Price fixing agreements between the competitors may lead to the destitution of competition. Such an agreement is illegal and hence destroys the nature of the market. As in the matter of *United States vs. Cohen Grocery Co.*⁶ the court held that an agreement that creates the potential power will be held unlawful without the necessity of a minute inquiry to a particular price is reasonable and unreasonable as fixed.

In the US, agreements that are anticompetitive violate Section 1 of the Sherman Act, which prohibits restraints of trade. In a landmark case of *Standard Oil Co.* the US Court established the *per se* rule. As per these rules, it is possible to classify some practices that are intrinsically anticompetitive. “*In a later decision in the US vs. Socony, price fixing was classified as a per se agreement*”.⁷

Similarly, EU courts have classified price fixing agreements as deemed to be anticompetitive.

B. Bid Rigging

⁵ “*Horizontal Agreements and Their Types*,” Module ID: 10 *Horizontal Agreements and their types*

⁶ *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921)

⁷ <https://www.concurrences.com/en/dictionary/price-fixing-agreement>

Bid rigging is a form of collusion that takes place when competitors conspire to manipulate the bidding process by controlling the publication of a competitive tender. It can be described as a practice that limits production, supply, market, technical development and investment, or provision of services directly or indirectly⁸. It has an appreciable adverse effect on competition.

This practice can badly limit the control of production, supply, market dynamics, technical development, investment directly or indirectly. In *Excel Crop Care Ltd. vs CCI*, the court provided a detailed examination of collusive tendering and held collusive tendering as a practice in which firms agree amongst themselves to collaborate over their response to an invitation to tender. This agreement kills the essence of competition.

C. Market Sharing

As the term describes it, it is an agreement of sharing of market. This division can be based on various criteria, such as geographical territories, customer segments, or specific lines of product. The rationale behind such practice is to eliminate competition within agreed segments, ensuring that each participant enjoys dominance over their respective markets.

The players decide to divide each other between territories and decide not to intervene in each other's market. In case of the *Goods Truck Operators Union*⁹ where freight rate was fixed, and competition was eliminated. By agreeing not to compete, they were able to control the market dynamics, leading to the dominance of existing players. Such practice denied access to new entrants. This practice stifles competition and creates an environment where prices remain artificially high. For the incentive to improve services or reduce costs significantly diminishes.

D. Output Restriction

⁸ *Competition Act 2002, s 3(3)(C)*

⁹ *M.R. Gupta vs Union Of India & Ors, (Supreme Court of India August 21, 1995).*
<https://indiankanoon.org/doc/594185/>

Output restriction is an anti-competitive practice where enterprises agree to control the means of production and supply of goods and services in the market. The primary motive behind such practice is simply to extract profit from the buyers, by creating an artificial scarcity of product. Thereby, it allows the participating firms to manipulate market prices, leading to higher costs for consumers. Such an agreement *per se* is illegal. Because it destroys the natural forces of supply and demand.

As in the notable case of the *Builders Association vs. Cement Manufacturer Association*¹⁰, when the cement manufacturers reduced production and raised price resulting to cartelization. This manipulation not only hampered consumers by increasing construction costs but also it affected other industries dependent on cement. It led to a ripple effect throughout the economy. The adverse effects of such practice are manifold. It erodes the welfare of consumers. Furthermore, it can lead to reduced innovation, and efficiency within the industry. When the business entities are not competing, it results in a decrease in the quality of products or services.

The above-mentioned practices undermine the essential principle of a free market economy. It may take various forms which do not fall within the scope of law and regulatory authorities.

IX. TELECOM SECTOR IN INDIA

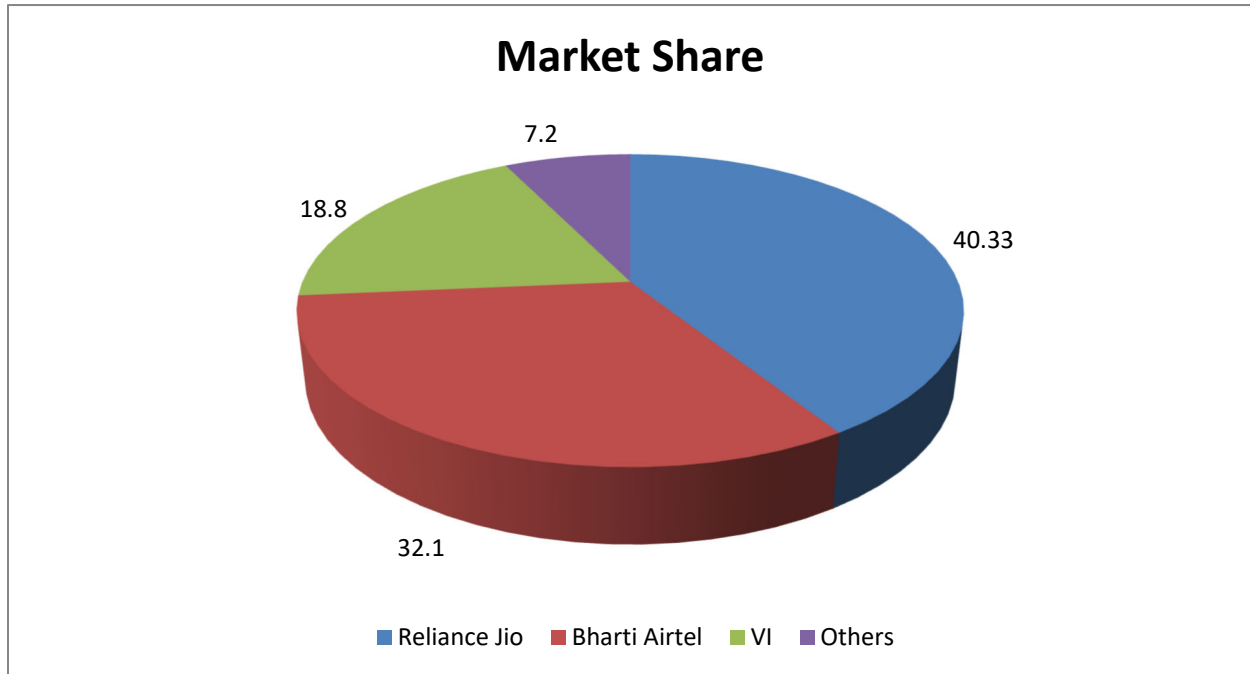
The telecom sector in India is one of the largest and most rapidly growing networks in the world. The sector serves a population of over 1.3 billion people. However, a recent period has emerged, attracting a huge number of subscribers with low pricing by telecom providers.

As per the report of the Competition Commission of India¹¹, the number of operators had reduced to 8, which is due to the aggressive pricing strategy of new entrant Jio in 2016. However, in 2024 the number has been reduced to 6, and the major percentage of market

¹⁰ MCO. (n.d.). Retrieved July 27, 2024, from <https://www.mcolegals.in/kb-details?title=case-study---builders--vs--cement-association---competition-act,-2012&kid=103>

¹¹ (N.d.). <https://www.cci.gov.in/images/whatsnew/en/market-study-on-the-telecom-sector-in-india1652177923.pdf>

share belongs to three operators, Jio, Airtel and Vodafone-Idea, amounting to 88.4% of the market. This raises a concern that the exit of one would result in a duopoly in the market.



[Source: India Today]¹²

X. REGULATION OF COMPETITION

With the enactment of a special framework under “*the Competition Act, 2002*”¹³ the legislature made the CCI (Competition Commission of India) responsible for free competition in the country; the boundaries and potential overlaps between its role and that of sector-specific regulators have not been clarified by law.

As regard the telecom sector, the TRAI Act¹⁴ enables the regulator to recommend on measures facilitating competition and promoting efficiency in the operation of telecommunication services.

¹² Sharma S, “Phone an Old Friend: Tariff Rise by Jio, Airtel, VI May Be a Watershed Moment for BSNL” *India Today* (July 12, 2024) <<https://www.indiatoday.in/diu/story/tariff-rise-jio-airtel-vi-bsnl-mobile-phone-companies-2566010-2024-07-12>> accessed July 25, 2024

¹³ *Competition Act 2002 (Act No. 12 of 2003)*

¹⁴ *Telecom Regulatory Authorities of India Act 1997(Act No. 24 of 1997)*

TRAI makes rules of the game; on the other hand, CCI performs ex post functions. By looking at the market realities reveals multiple points of intersection between authorities. It can be observed by the following cases. The Supreme Court's broader interpretation of TRAI's power in the BSNL case¹⁵ clarified that there is no restriction on the power of authority to make regulation within the scope of the Act and rules made under it.

However, in 2016 when CCI found a prima facie case of cartelization against the incumbents, leading it to initiate a detailed investigation, was failed due to the order of the Bombay High Court stating that CCI lacks jurisdiction on such a matter.¹⁶

XI. REASONABLE THREATS

A horizontal agreement is prone to hamper competition. It is generally presumed that anti competitive horizontal agreements don't serve any just purpose. It has a pernicious effect on competition. 'Cartels have been described as the cancers on the open market economy'¹⁷ and the supreme evil of antitrust.¹⁸

Cartels operating secretly raise price, restrict supply, hamper innovation, and result in an artificially concentrated market. Generally, it has been observed that higher prices of goods and services due to cartelization force some buyers to purchase the goods or service at the cost fixed by the seller. Ill effects of such cartelization can be described below:

- Cartels raise the prices for consumers' goods and services.
- Price increases for commodities and supplies that are used in manufacturing by other entities result in higher capital costs.
- Lowering investment by preventing new players in the market, and raising obstacles to entry, which impacts entrepreneurship growth.

¹⁵ *BSNL vs TRAI (2014), Supreme Court of India, (civil appeal no.5253 of 2010)*

¹⁶ *Cellular Operator Association vs TRAI, 2016, (Supreme Court of India, CA 5018).*

¹⁷ *Monti, M., Former EU Commissioner for Competition. (2010, September 11).*

¹⁸ *Verizon communications, inc. V. Law offices of curtis V. Trinko, LLP, 540 US 398 (2003). (n.d.). Justia Law.*

- Cartels disrupt regular supply, and demand dynamics and can effectively bar other operators from accessing resources, which results in deadweight loss.
- Members of the cartels live a quiet life since they agree not to compete with one another.
- Cartels may cause non-members of the cartels to leave the market.

Even though there is no expressed agreement, circumstantial evidence of parallel prices increasing or decreasing may be present, horizontal agreements may be present, which creates a monopoly of the cartel association. As held in Builders Association of India vs Cement Manufactures Association¹⁹, in which CCI imposed a fine of \$1.13 billion against the 10 largest cement manufacturers using the *per se* rule.

Tracing the recent price hikes in the existing price by the service providers Reliance Jio, Bharti Airtel, and Vodafone-Idea unveils the threat of horizontal agreements by the top players in the telecom sector in India. It is worth noting here that all three enterprises have increased 10 to 27% of tariffs at the same time.²⁰

However, the Telecom Regulatory Authority of India (TRAI) has announced not to intervene in the matter, citing “the price rates are still among the cheapest in the world.”²¹ However, such practice would impact the competition in the telecom sector in India. This sector has been witnessing threats in free competition.

At the moment, TRAI has allowed the sector to set its own prices as per the demand and supply in the market. The reason for such a stand stem from the realization that the

¹⁹ Builders Association of India vs Cement Manufactures Association, (August 31, 2016) Competition Commission of India, case no.29 of 2010

²⁰ Mishra, A. (2024, July 2). Jio, Airtel, Vi tariff hikes: How users can still avoid increased prices. Business Standard. https://www.business-standard.com/finance/personal-finance/jio-airtel-vi-tariff-hikes-how-users-can-still-avoid-increased-prices-124070200652_1.html

²¹ Desk, T. T. (2024, July 4). Why government has no plans to intervene in mobile tariff hike announced by Reliance Jio, Airtel and Vodafone-Idea. Times Of India. <https://timesofindia.indiatimes.com/technology/tech-news/why-government-has-no-plans-to-intervene-in-mobile-tariff-hike-announced-by-reliance-jio-airtel-and-vodafone-idea/articleshow/111480113.cms>

distortionary impact of intervention for price would always exceed perceived benefits in a competitive market.

In the year 2018 in the Telecom Communication Tariffs 63rd Amendment Order, TRAI confirmed its decision to regulate aspects of telecom tariffs. In that order, it has classified all of wireline access services as one market and defined terms such as predatory pricing, significant market power, and relevant market in that segment. These aspects are also covered under the Competition Act of 2002. Thus, it leads to the question of jurisdictional overlap.

CCI's guideline on competition assessment describes a process by suggesting that economic legislation and policies should be subjected to an assessment of their potential impact on competition in the relevant market. It includes free entry and exit, symmetry of information, and the ability and motivation of the participants to compete with each other.

By tracing the incidents that the market has witnessed, such as a decrease in the number of players in the market, the merger of two enterprises, and all party consensuses on the same decision, this raises concern. In such scenario, discussion on the need for regulatory impact assessment with the cooperation between CCI and TRAI is needed.

XII. CONCLUSION AND SUGGESTIONS:

The telecom sector in India is a dynamic canvas and evolving market to meet the demands of the digital age. A remarkable quarterly growth rate of 3.48% in March 2023 depicts the strength of the market. The search for digital adoption is a key factor for the industry as the country progresses in economic internet penetration and technology develops and creates new opportunities.

Further proliferation of Android phones has empowered people to access information and services. Creating services and applications that cater to the increasing demand creates challenges for the players in the market. Regulatory hurdles like changes in policies, licensing issues, and spectrum allocation pose hurdles for the players.

Navigating these hurdles with pressure to gain a significant market share leads to malpractices adopted by the enterprises.

In the recent period, this sector has witnessed many mergers, acquisitions, and even horizontal agreements among the key players. Declining profitability debt and the need to be financially flexible to face competition primarily from Reliance Jio are foreseen telecoms to merge and harness operational and financial synergies.²² Infrastructure sharing prevents unnecessary duplication of infrastructure, so enabling infrastructure is needed in the lead up to new 5G technology in order to lower investment costs.

Since the sector is going through development and growth, the policy and regulatory framework will have to respond accordingly. One of the solutions for these challenges lies in strengthening the transparency mechanism by encouraging best practices of impact assessment in the formation of regulation.

Issues like predatory pricing bundling of services under horizontal agreements should be prohibited and penalized. As it will result into declination of anti-competitive horizontal agreements.

The trap of jurisdictional tussle should be resolved, and focus should be on creating synergy between sector regulators and the competition commission of India by creating effective cooperation mechanisms. There should be inclusion of CCI in TRAI's consultation processes, review of regulatory provisions to assess their impact on competition.

So that it will resolve the jurisdictional tussle. Mechanisms for sharing knowledge and information between authorities such as TRAI and CCI will be greater for a free and fair competition, which will benefit all the stakeholders and contribute to the economy of our country.

²² D'Monte, L. (2017, April 7). *It's the survival of the biggest in India's telecom industry*. Mint. <https://www.livemint.com/Industry/n02lQV04A2ui4x37XKVzmL/Its-the-survival-of-the-biggest-in-Indias-telecom-industry.html>

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