Development of the Indian Telecommunication Sector throughout Last Decade: A Tale about Merits and Demerits of Telecom Law and Competition Law in India

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Abstract

[Purpose] During the post-liberalization era, the Indian legal system introduced multiple laws with the objective of safeguarding the interests of Indian consumers and fostering equitable competition within the telecommunications sector. Notably, the Indian legal system has demonstrated a significant commitment to the resolution of telecommunications-related disputes, exemplified by the enactment of the Telecom Regulatory Authority of India (TRAI) Act in 1997 and the Competition Act in 2002. Both legislative measures were designed to advance the cause of fair competition in the telecommunications industry. The primary purpose of this article is to conduct an examination of whether the objectives set forth by these two Acts have been effectively realized over the past decade (2012-2021). Additionally, this article will undertake a comparative analysis of these Acts in relation to legal frameworks in other countries beyond India.

[**Methodology]** The foundational methodology employed in this research centers on the analysis of cases adjudicated by both the Telecom Regulatory Authority and the Competition Regulatory Authority in India, particularly in instances involving disputes within the telecommunications sector. This article offers a concise data analysis concerning the evolution of the Indian telecommunications market over the past decade (2012-2021).

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The primary aim is to undertake a critical evaluation of the effectiveness of the Acts in place for the preservation of fair competition within this industry.
[**Findings]** Based on the legal analysis, this article argues that there is an unresolved territorial dispute between the Telecom Regulatory Authority of India (TRAI) Under section 3 of the Telecom Regulatory Authority of India Act, 1997, the Indian government established the regulatory agency to oversees the telecommunications industry in India and the Competition Act, 2002 establishes the Competition Commission of India being primary national competition regulator in India. It is an official department of the Ministry of Corporate Affairs tasked with upholding the Competition. The findings also suggest that the Government of India should overhaul its institutional framework in order to insert the "collective dominance" concept in the Competition Act. This concept/amendment was about to be passed in the India Congress by the United Progressive Alliance (UPA) Government in 2014. However, it failed due to dissolution of the Lok Sabha, the lower house of India's bicameral Parliament. Consequently, numerous disputes and concerns remained unresolved. Lastly, Reliance JIO Infocomm Limited is a Public Company that was established on February 15, 2007, is categorized as a Non-Government Company, and is registered with the Registrar of Companies in Mumbai, India. It applied a "zero pricing" strategy which created market distortion which reduced most of the rivals from the telecom market. This kind of strategy was previously ordered void in the NSE[1] case but the same was allowed to the JIO on the premises that it was a new entrant and not dominant. The Competition laws mostly address "predatory pricing", however, in the matter of "penetrative pricing" they have remained silent. The "penetrative pricing" is allowed for the promotion, but the benchmark of promotion has not yet been regulated.

Keywords: Telecom. Regulation. Anti-Competitive Agreement. Competition Law. Competition Act. Collective Dominance.

INTRODUCTION

In the year 1991, the then Finance Minister and Former Prime Minister Dr. Manmohan Singh introduced and successfully passed the liberalization policy towards the economic development of India, and it dissolved several state monopolies, abolished the Licence Raj (investment, industrial, and import licensing), and made it possible for foreign direct investment to be automatically approved in a variety of industries. Since then, the general course of liberalization has not changed, regardless of the in-power party, despite the fact that no party has attempted to take on strongholds like the farmers' and trade unions' lobbies or divisive subjects like changing labor laws and lowering agricultural subsidies.

[1] NSE National Stock Exchange

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Foreign companies were allowed to make direct investments in multiple economic sectors like telecom, real estate, air transport sector, etc. Even in the middle of the twentieth century, the telecommunication system had not been created. The telecommunications market began to flourish during the National Democratic Alliance (NDA) rule (1996-2004).

The Central Government enacted TRAI Act 1997, and established the Telecommunication Dispute Settlement and Appellate Tribunal (TDSAT) to adjudicate disputes and dispose of appeals to protect stakeholders covered in the telecom sector. The preamble of the Act laid down that it would work to protect the interest of service providers and consumers of the telecom sector. It would also work for the growth of the telecom sector. According to section 2(k) of the TRAI Act 1997 "telecommunication service" means any services like electronic mail, voice mail, radio paging, cellular mobile telephone services etc., which can be transmitted through sound, signals, radio, wire or any form of electromagnetic means except broadcasting.[2] Section 14 of the TRAI Act 1997 lays down that the establishment of the TDSAT would work to adjudicate the dispute between licensor and licensee; between two or more service providers and between one service provider and many consumers.[3] The Monopolistic Restrictive Trade Practices Commission cannot intervene into the power of TDSAT. This is provisioned under section 14(*A*) of the Act. Subsequently the MRTP Act was entirely repealed when the adjudication power was fully transferred to the Competition Commission of India (CCI) from Monopolistic Restrictive Trade Practices Commission (MRTPC) after the successful enactment of Competition Amendment Act 2009 (CC Act).

This article investigates how the CCI has been discharging its adjudication related to telecommunication disputes. In this context, the study of *Cellular Operator Association of India v. Competition Commission of India*[4] case, *Shri Sonam Sharma v. Apple, Vodafone, Airtel and Others*[5] case, and *Bharati Airtel v.*

[2] Telecom Regulatory Authority of India Act, 1997 (Act 24 of 1997), S. 2(k).
[3] Telecom Regulatory Authority of India Act, 1997 (Act 24 of 1997), Sec 15.
[4] Cellular Operator Association of India v. Competition Commission of India 2017 SCC OnLine Bom 8524.
[5] Shri Sonam Sharma v. Apple, Vodafone, Airtel and Others 2013 CompLR 0346 (CCI).

Reliance Industries Ltd and others[6] cases are pertinent to understand the concept of collective dominance.

This article emphasizes these cases because of their impacts. In the first case the territorial conflict between the TRAI and the Competition (Commission) was noticed. The second case raised the "collective dominance" concept which Indian legislatures are not allowing till yet. However, the Competition Amendment Bill 2012 came with a view to incorporate this concept understanding the requirement but was lapsed due to the dissolution of the Lok Sabha in the year 2014. In the year 2018, the Government of India, under the Ministry of Corporate Affairs has established a Competition Law Review Committee to study the Competition Act in order to further its goal of ensuring that legislation is in line with the requirements of sound economic principles. The Committee argued the concept of cartel elaborated in the Competition Act, 2002 is sufficient to deal with "collective dominance" issue. Moreover, it said that the concept of "group", which was incorporated through the Competition Amendment Act 2007, could deal with the collective dominance issue. The firm must be dominant unconditionally to abuse dominance, but the firm does not have to be so to form a cartel. Then how this argument is justified is a question of law. Indian legislators were mute on the subject. This article also analyses the data found in TRAI Government Website portal to investigate the growth of telecom enterprises in the last ten years to understand whether fair competition prevailed in the Indian telecom market or not.

RELOOK INTO TELECOM AND COMPETITION LAWS IN INDIA

After its independence, India mostly modelled its economic system following the soviet model, since the Soviet Union was the great example of socialistic state at that point in time. In this regard, the Indian Constitution framed Part IV of the Indian Constitution.[7] According to its Article 39 (c), the Indian economy must be structured in such a way that wealth and means of production do not concentrate to the detriment of the general public.[8] The socialist state's goal

[6] Bharati Airtel v. Reliance Industries Ltd and others, CCI Case No. 03/2017.

[7] The Directive Principles of State Policy (DPSP) are the principles that the state must follow when developing new laws and policies, and they outline all of the goals that the Constitution attempts to achieve. The phrase "justice - social, economic, and political" contained in the preamble is the ultimate goal that must be accomplished through the development of the DPSP. The DPSP is chosen to achieve the ultimate goal stated in the preamble, which is Justice, Liberty, Equality, and Fraternity, commonly known as the four pillars of the Indian Constitution. It also incorporates the concept of the welfare state, which was lacking during colonial administration. Article 36 to 51 of the Indian Constitution are basically concerned with the directive principle of state policy.

[8] The Constitution of India, art. 39(c).

is to redistribute wealth as evenly as possible for common development and to strengthen public corporations. Moving one step ahead, former Prime Minister Indira Gandhi incorporated the "socialist" concept into the preamble of the Indian Constitution through the 42nd Amendment, in 1976.

The Monopolistic Restrictive Trade Practices Act of 1969 (MRTP 1969) became enacted to control the abuse of monopolization. In a monopoly market there is a single seller, which sells a unique product to customers. Customers are therefore completely dependent on that particular company to access the market. Taking advantage of this situation, the monopolistic agent frequently abuses its position by disrupting the supply and manufacturing supply chain in order to artificially concentrate market. This is illegal as well as unethical in a fair competitive market. Hence, to promote fair competition, Indian legislators enacted the MRTP Act 1969, restricting "monopolistic trade practices"[9], "restrictive trade practices"[10] and "unfair trade practices".[11]

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[9] The Monopolies and Restrictive Trade Practices Act, 1969 (Act 54 of 1969), s. 2(i) monopolistic trade practices refers a trade practice which has, or is likely to have, the effect of,—
(i) [maintaining the prices of goods or charges for the services] at an unreasonable level by limiting, reducing or otherwise controlling the production, supply or distribution of goods or the supply of any services or in any other manner;
(ii) unreasonably preventing or lessening competition in the production, supply or distribution of any goods or in the supply of any service;
(iii) limiting technical development or capital investment to the common detriment or allowing the quality of any goods produced, supplied or distributed, or any service rendered, in India to deteriorate; increasing unreasonably,—
(a) the cost of production of any goods; or
(b) charges for the provision, or maintenance, of any services;
(v) increasing unreasonably,—
(a) the prices at which goods are, or may be, sold or re-sold, or the charges at which the services are, or may be, provided; or
(b) the profits which are, or may be, derived by the production, supply or distribution (including the sale or purchase) of any goods or by the provisions of any services;
(vi) preventing or lessening competition in the production, supply or distribution of any goods or in the provision or maintenance of any services by the adoption of unfair methods or unfair or deceptive practices;] "notification" means a notification published in the Official Gazette;

[10]The Monopolies and Restrictive Trade Practices Act, 1969 (Act 54 of 1969), s. 2(o) Restrictive trade practices refer means a trade practice which has, or may have, the effect of preventing, distorting, or restricting competition in any manner and in particular, —
(i) which tends to obstruct the flow of capital or resources into the stream of production, or
(ii) which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified cost or restrictions.

[11]The Monopolies and Restrictive Trade Practices Act, 1969 (Act 54 of 1969), deals with Unfair Trade Practices are acts of false & misleading nature related to goods and services by the firms. Section 36-A of the MRTP Act, 1969 explicitly prohibits firms from indulging

The TRAI Act is five years elder then Competition Act 2002. The ultimate goal of these two is to encourage fair market competition. The Competition Act of 2002 completely repealed the MRTP Act 1969. Following the adoption of the Competition Amendment Act 2009, the power of adjudication was fully moved from the MRTPC to the CCI. However, the section 14(*A*) of the TRAI Act is not changed yet. The Competition Act 2002 basically prevents the "anti-competitive-agreement", "abuse of dominance" and "combination"[12]. "Abuse of dominance" is illegal whereas dominance is not. The Act denotes many factors like market power, market share and etc. to identify a dominant firm. However, when that dominant firm abuses its power by exploitative and exclusionary rule. The Competition Commission can pass "desist and cease" order.[13] Even that firm will be liable to pay not more than 10% turnover of the last three preceding financial years as fine.[14] In this context it is pertinent to mention that Indian competition law basically follows the civil procedure rather than penal laws. The Central Government of India benchmarks a threshold for combination. The combination can be held through acquisition of one or more enterprises by one person or more than one person or merger or amalgamation of enterprises.[15] As a result, it is evident that the terms that are anticompetitive under the Competition Act 2002 are not the same as the illegal acts defined by the MRTP Act 1969. This article has observed the amendments incorporated into TRAI Act and it is found that TRAI Act has been amended for two times since enactment. The first amendment took place in 2000 so the question of changing section 14(*A*) of the TRAI Act did not arise. on the second amendment took place in 2014 but the legislatures might have overlooked the matter. Although the Competition Commission Act 2002 entirely repealed the MRTP Act by taking its adjudicating power as it is replaced by the new act within the competition regime. However, the following incidents over the recent decade have revealed some flaws remaining in both Acts.

CASE STUDY ON "COLLECTIVE DOMINANCE"

The concept of "joint dominance" or "collective dominance" has not been accepted by Indian legislators. The Competition Amendment Bill 2012 was lapsed because of the dissolution of 15th Loksabha led by Indian National Congress. The

in Unfair Trade Practices (UTPs). The provision against Unfair Trade Practices was inserted by the 1984 Amendment to the MRTP Act.

[12] According to Section 5 of the Competition Act, 2002 a combination is an "acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises".

[13] The Competition Act, 2002 (Act 12 of 2003), s. 4(2).

[14] The Competition Act, 2002 (Act 12 of 2003), s. 27(b).

[15] The Competition Act, 2002 (Act 12 of 2003), s. 5.

Bill came to incorporate collective dominance notion into the Competition Act, 2002.[16] Dominant firms can abuse their dominance by exclusionary or exploitative rules. This study wishes to remark on how exploitation leads to exclusion. When the fair competition rights of an enterprise get exploited because of some anti-competitive practices mentioned in the Competition Act of 2002 they themselves wind up their business from the market. This study will depict how our telecom market got affected in last 12 years. Competition law's duty may be protect competitive rights in the market and it does not mean that competitors saving is not the duty of Competition laws. When there is no competitor how competition rights would be prevailed? Section 3 prohibits the anti-competitive-agreement.

Sonam Sharma, one consumer of telecom market, individually filed information against Apple, Apple India, Vodafone and Bharti Airtel before the CCI under section 19(1) of the Act. As per the section 19 any individual, enterprise or government can lodge case before CCI.[17] The CCI as per the section 26(1) directs the Director General (DG) for starting investigation. If the Commission finds any anti-competitive practises that have an adverse effect in the relevant market after reviewing the DG's investigation report and other related evidence submitted by both the informant and the opposition, it can issue a "cease and desist" order or a penalty of not more than 10% of the annual income of the previous three financial years, or both.[18] According to Section 2(r) of the Competition Act 2002 the "relevant market" means both the "relevant geographic market" mentioned in section 2(s) and the "relevant product market" mentioned in section 2(t) of the Competition Act. A "relevant geographic market" is an area where the conditions of product supply and service provision are noticeably homogeneous and distinguishable from those in neighbouring areas. A "relevant product market" is a market that includes all items and services that, according to their qualities, prices, and intended use, can be substituted or interchanged by customers. In the *Sonam Sharma* case[19] the information of the relevant market was "iPhone" because it couldn't be replaced with other phones. However, the DG opined that in the case of technology-driven products it might be unjustifiable to identify a market only by observing as a definite point of time but it should be

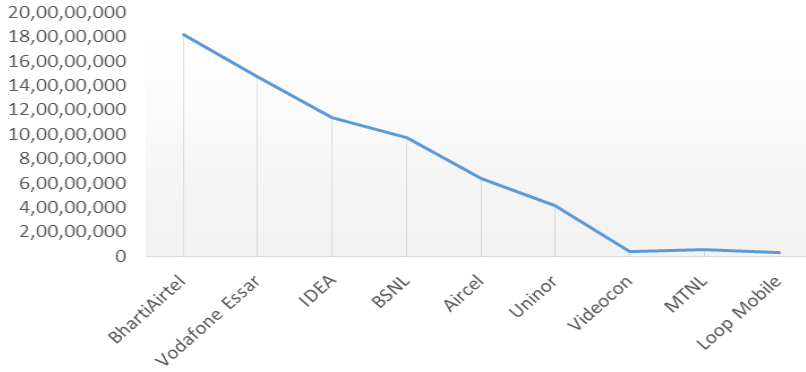
[16] The Competition Act, 2002 (Act 12 of 2003), s. 4.
[17] The Competition Act, 2002 (Act 12 of 2003), s. 19(1) describes The Commission may inquire into any alleged contravention of the provisions contained in sub-section (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—
(a) receipt of a complaint, accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or
(b) a reference made to it by the Central Government or a State Government or a statutory authority.
[18] The Competition Act, 2002 (Act 12 of 2003), s. 27.
[19] Supra no,05.

observed for a certain period of time to check its substitutability or interchangeability. The DG categorized two kinds of telephone market: one was the smartphone market and other was the normal phone market. The smartphones can be distinguished for their characteristics compared to normal phones. The smartphones contained more third-party applications than normal phones. It encouraged users to use high-speed internet (3G), something a regular phone could not provide. Having accepted this, the DG went on to say that while iPhones have certain distinguishing features such as a multi-touch screen, light detecting, and proximity sensors, they may still be classified as smartphones due to their resemblance. It was also noticed at the time of investigation that the cellular market was divided into two kinds. The telecom market was two types. One is CDMA and other is GSM. Many methods used in second- and third-generation (3G and 2G) wireless communication, mainly used for mobile communication, are referred to as Code Division Multiple Access (CDMA). CDMA technology's objective is to transfer digital information in the form of ones and zeros over the air. GSM is a digital cellular technology that allows mobile data and voice services to be delivered across many devices. The Global System for Mobile Communication (GSM) is a second-generation (2G) telecommunications standard. GSM is just a wireless network used to transport data between mobile devices. It was and still is misconstrued as a mobile phone in several areas. GSM, on the other hand, is a method of communication between digital cellular devices rather than a mobile phone.

Both cellular services were not substituted with each other. So both are unique for their own nature. Furthermore, each of these cellular providers' SIM cards are only compatible with devices that use their particular technology. The CCI deduced from the DG's investigation report, the evidence presented, and the opposing parties' objections that the relevant market in this case had two sides: one was the "Market of GSM Cellular Services in India" and the other was the "Market for Smartphones in India." Chart 1Chart 1 isbased on information from the above-mentioned case.[20]

[20] Ibid.

Chart 1 – GSM Subscriber Wise Market Graph

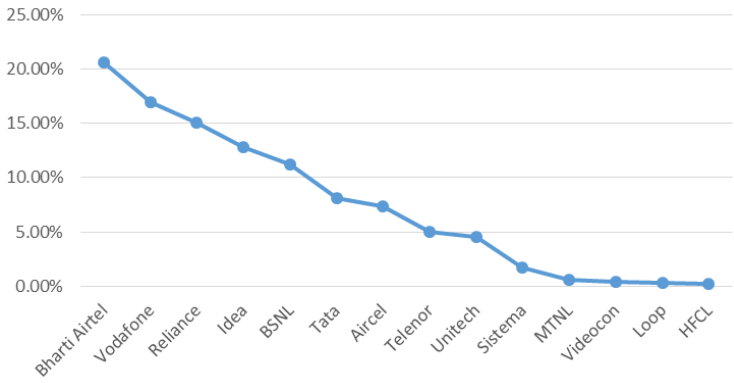


In December 2012, Bharti Airtel, Vodafone Essar, Idea, and BSNL were all in close rivalry, according to Table 1 and Chart 1Chart 1. Furthermore, there were nine companies in the market. Therefore it couldn't be argued that one player dominated the GSM industry. Multiple players are not considered to have abused their dominant under Indian competition law. As a result, the allegation was dismissed by the CCI. The allegation that Bharti Airtel and Vodafone Essar were jointly dominant since they had more than 50% market share in GSM was rejected outright by the CCI. According to the Smartphone Market Proportion for India (2008-2011), Apple India had a share of the smartphone market ranging from 1% to 3%. As a result, neither Bharti Airtel or Vodafone in the GSM cellular service industry, nor Apple India, Apple's Indian subsidiary, were dominant in their respective marketplaces.

According to a press release issued by the TRAI on November 30, 2012, the following Chart 2 elucidate the market share division between telecom enterprises:[21]

[21] Government of India, "Annual Report" (Telecom Regulatory Authority of India, 2012-13).

Chart 2 – Service Provider Wise Market Share



The Competition Amendment Bill 2012 came to include collective dominance concept in order to determine abuse of dominance under section 4(a) of the Competition Act 2002. However, it was partially rejected by the Standing Committee made by the Ministry of Corporate Affairs for reviewing the Bill. The Standing Committee was chaired by the Member of Parliament Shri Yashbant Sinha. The Bill subsequently after passing from upper and lower houses was placed to a Standing Committee comprised with leaded economic advisor firms of India and Vinod Dhall, former Secretary of CCI.[22] Two kind of propositions came out from the observations of them; one is collective dominance is not required to be incorporated because of cartel. Cartel is enough to handle the collective dominance cases and other is collective dominance is required to be addressed. CCI observed by going one step ahead, de jure cartel is possible which effects competitive markets. In this regard, the view of the Ministry of Corporate Affairs is noteworthy. The Ministry observed that anti-competitive agreements (Section 3) and abuse of dominant position (Section 4) of the Competition Act 2002 are not "mutually exclusive".[23] Moreover, Section 19(4)(m) of the

[22]The Bill was proposed before the Loksabha on February 13 13th February, 2014, subsequently, it was placed in the Upper House (Rajyasabha) on 17th February, 2014 and thereafter it was sent to the Standing Committee for reviewing the Bill and for specifying proposal if required. The Committee obtained several written information from the CCI, Luthra & Luthra (Law firm), the Federation of Indian Chambers of Commerce and Industry (FICCI), the Confederation of Indian Industry (CII), the Associated Chambers of Commerce and Industry (ASSOCHAM), the Consumer Unity & Trust Society (CUTS) the International and Shri Vinod Dhall, the Consultant & Former Secretary, and the Ministry of Corporate Affairs.

[23] Government of India, "Report of Competition Law Review Committee" (Ministry of Corporate Affairs, 2019).

Competition Act, 2002 provided discretion to the CCI to assess any relevant factor it deems appropriate to determine the dominance position of an enterprise. Moreover, the Ministry also observed that in the European Union, Canada there was established and well developed law to determine collective dominance. The Ministry also pointed out that this "collective dominance" concept might help the CCI to deal with entities "who are structurally unrelated but are otherwise jointly dominant" in an oligopoly market.

DECISIONS OF THE EUROPEAN COURT OF JUSTICE (ECJ) IN TELECOMMUNICATION CASES

The European Court of Justice (ECJ) held in *Compagnie Maritime Belge Transports SA and Others v. Commission of the European Communities*[24] case that two or more independent economic entities could act together in a particular market as a collective entity. The *Vodafone*[25] case in Europe is particularly noteworthy in this regard. The European Commission received a notification from the Commission for Communications Regulation ('ComReg') on the 10th of December 2004. The market was a wholesale market for public mobile telephone network access and call origination in Ireland. The accusation was that independent service providers were denied access. The ComReg established a two-dimensional focal point: pricing and denial of access to independent service providers. Vodafone and O2 had a similar range of services, according to the ComReg, with complex rates that could be clarified using the Minimum Monthly Bills (MMBs) technique, which operators use to compare tariffs. In the year 2004 the telecom market of European Union was dominated by Vodafone having 54 percent shares and O2 with 40 percent. The other market player Meteor underwent with 6 percent market shares. So, Vodafone and O2 together enjoyed percent market share. Therefore the Commission for Communication Regulation in Europe designated Vodafone and O2 as being jointly dominant on the wholesale market for mobile access and call origination. The European Commission held that Vodafone and O2 both were jointly dominant.

In another case, the European Commission penalised *Deutsche Telekom*[26] for increasing the cost of wholesale access to the local loop for new entrants. It was determined that *Deutsche Telekom* had abused its 95 % market share in retail broadband and narrowband access. This discouraged new companies from

[24] Compagnie Maritime Belge Transports SA and Others v. Commission of the European Communities, ECR I-1365 [35]–[45] [2000].
[25] M Brenncke,(2010,p.no 1793-1814) "Case note on European Court of Justice, C-58/08, Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform" 47(6) Common Market Law Review.
[26] Deutsche Telekom AG v. European Commission , (2010) C-280/08

entering the market, lowering consumer pricing competition and reducing the number of telecommunications service providers. One of the significant issues that needed to be examined in this context was the *Visa Mastercard*[27] case. Visa and Mastercard were both global firms that provided credit and debit cards. Until present, they did business in over 230 countries throughout the world. Visa and Mastercard were held dominant Canadian Department of Justice .Both parties decided to do business together under a bye-law. Visa and Mastercard members in Canada were required to issue both cards at the same time. Furthermore, the bye-law prohibited its member banks from introducing competing cards such as Amex or Discover.

CASE STUDY ON TERRITORIAL CONFLICT

Reliance JIO Infocomm Ltd. previously filed a complaint with the CCI against Bharti Airtel, Vodafone, and Idea for failing to share the "point of interconnection," which was required by the TRAI Act.[28] A "point of interconnectivity" is a network interconnection that allows consumers to communicate with one another. As a result, the trio formed a cartel in the telecom sector, preventing fair competition. The CCI directed the DG, the investigating authority, to begin a probe after *prima facie* in the information. In the Bombay High Court, Bharti Airtel, Vodafone, and Idea (Incumbent Dominant Operators) appealed the order of probe, claiming that the CCI lacked authority to hear this telecommunications case. After hearing the case, the High Court ruled that the CCI's order was invalid due to lack of jurisdiction.[29] The CCI filed a special leave appeal before the Supreme Court of India, citing its dissatisfaction with the High Court's decision. The Supreme Court upheld the Bombay High Court's decision but added that the CCI also had jurisdiction over telecom disputes, but in that particular case the telecom problems would be heard first by the TDSAT and then by the CCI.[30]

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[27] The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated et al. CT-2010-010 (Visa, MasterCard).

[28] CA Ranjan Sardana vs M/s Cellular Operator Association of India, M/s Bharti Airtel Limited. and M/s Idea Cellular Limited CCI Case no 81/2016, Mr. Kantilal Ambala Puj vs Cellular Operation Association of India, Vodafone India Limited, Bharti Airtel Limited, Idea Cellular Limited, Telenor (India) Communication Private Limited, Videocon Telecommunication Limited, Aircel Limited and Reliance Jio Infocomm Limited CCI Case no 83/2016, Reliance Jio Infocomm Ltd. against Cellular Operators Association of India, Vodafone India Limited, Vodafone Mobile Services Limited, Vodafone Group PIC, Bharti Airtel Limited, Bharti Hexacom Limited and Idea Cellular Limited CCI Case no 95/2016.

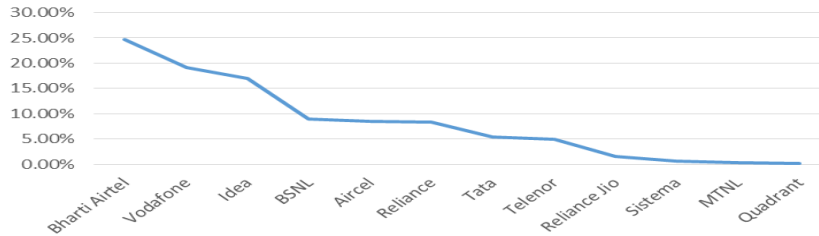
[29] Vodafone India Limited and Ors v. The Competition Commission of India and Ors., MANU/MH/2284/2017.

[30] Competition Commission of India v.Bharti Airtel, (2019) 2 SCC 521.

According to the Indian Constitution, the judiciary does not have power to amend the law. The law-making power is specially given to the legislators of India. It is true that Article 141 of the Indian constitution binds all the courts, even quasi-judicial bodies, to follow the precedent fixed by the Supreme Court.[31] However, a specific amendment is required to clear this ambiguity.

To clarify market position on that particular time when the case was filed by newly entered Reliance JIO, a Chart 3 is drawn by author below to understand the position of telecom market in the year 2016.[32]

Chart 3 – Access Service Provider-Wise Market Share's Graph in term of Wireless Subscriber Base as on 30th September, 2016



It is obvious from this market graph that there were 12 businesses operating at that time. The closest competitors to Bharti Airtel the then were Vodafone and Idea.

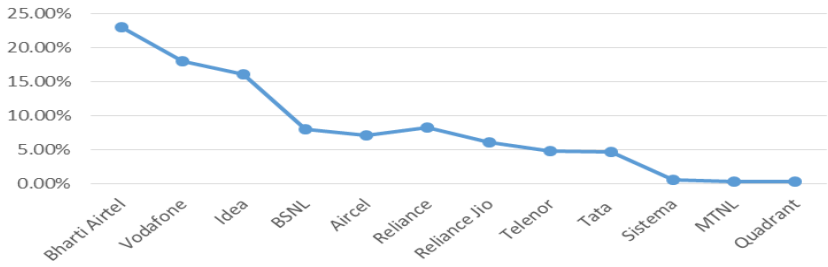
CASE STUDY ON "PREDATORY PRICING"

The Oxford dictionary defines "Predatory Pricing" as pricing of goods and provision of services at such a level that other competitors are unable to perform into the market. According to section 4(b) of the Competition Act 2002, it is defined as "the sale of goods or provision of services at a price below the cost of production of the goods or provision of services, as determined by regulations, with the intention of reducing competition or eliminating competitors." Once Bharti Airtel filed a case against Reliance Industries Ltd and Others which raised the allegation of "Predatory Pricing". However the CCI ordered providing free access is not predatory pricing for the new entrants.[33] JIO, a new entrant in the

[31]The Constitution of India, art. 141.
[32]Government of India, "Annual Report" (Telecom Regulatory Authority of India, 2016-17) available at: https://trai.gov.in/sites/default/files/AnnualReportEng16032018.pdf
[33]Supra note, 06.

mobile telecommunications business, was accused by Airtel of engaging in "predatory pricing" in order to eliminate competition in the relevant telecommunications market. JIO free access by utilizing immense financial strength of Reliance Industries Ltd almost changed the telecom market within a few years. To understand the position of telecom market in the year 2017 just after one year of the JIO entry author articulates Chart 4 as per the press release from the Telecom Regulatory Authority in September 2017.[34]

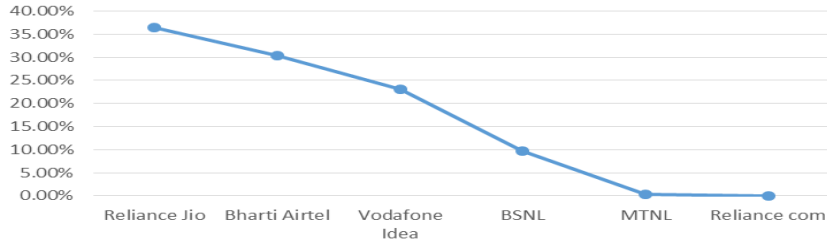
Chart 4 – Access Service Provider-Wise Market Share's Graph in term of Wireless Subscriber Base as on 30th September, 2017



There were twelve businesses in the same market, as seen in this table and graph. However, the threat that Reliance JIO has created to the Indian telecommunications business may have never been seen in the previous decades. The Chart 4 given below are based on the publication Access Service Provider-by-Access Service Provider Market Shares in Terms of Wireless Subscribers as of September 30, 2021.[35]

[34]Supra note 29.
[35]Government of India, "Highlights of Telecom Subscription Data" (Telecom Regulatory Authority of India, 30th Sep, 2021) available at: https://www.trai.gov.in/sites/default/files/PR_No.50of2021_0.pdf (last visited on May 09, 2022).

Chart 5 – Access Service Provider-Wise Market Share's Graph in term of Wireless Subscriber Base as on 30th September, 2021



Having analysed these tables (Table 1, Table 2, Table 3, Table 4 and Table 5) and market graphs (Chart 1, Chart 2, Chart 3, Chart 4 and Chart 5), this article notices a serious decline in the number of participants in the telecommunication market. There were fourteen telecom companies in 2012. Following that, it dropped to twelve in 2016, and then to only six in 2021. Table 5 demonstrates that the majority of the businesses existed prior to 2017. However, in just four years, the market graph has shifted significantly in favor of Reliance JIO. Not only that, but most companies including Aircel, MTNL, Tata, Quadrant, Uninor, Sistema, and Telenor, who had a modest share of the telecom market only four years ago, have shut down. Vodafone, which was the second player on 2017 is combining with Idea, the third player, in an attempt to salvage their business.

Bharti Airtel's allegation of "predatory pricing" was dismissed by the CCI. The CCI did not consider Bharti Airtel's arguments on a TRAI order violation to be credible. Without complying with a TRAI ruling, Reliance JIO prolonged their welcome offer, which was free, and then extended their happy new year offer, which was also free, which could be the cause for this egregious removal. Bharti Airtel further said that Reliance JIO was able to provide free services for such a long time because of their superior firm Reliance Industries Ltd's market power. As a result, both Reliance Industries Ltd and Reliance JIO Infocomm Ltd should be grouped together. But it was also rejected by the CCI saying that the purposes of the two companies are different. The CCI also gave no weight to Bharti Airtel's allegation, despite the fact that one Infotel Broadband Services Private Limited won the 2300 MHz band spectrum auction on a pan-India basis in 2010. Reliance Industries Ltd then bought the company's majority stake (96 %) and renamed it Reliance JIO Infocomm Ltd. Bharti Airtel further claimed that Reliance Industries Ltd invested Rs. 1,60,000 crore to establish Reliance JIO Infocomm Ltd, which the Commission ignored. A group is defined as two or more firms that control management and equity of other enterprises under Section 5(b) of the Competition

Act 2002.[36] Though both the enterprises are controlled by one person Mukash Ambani, the Managing Directory of both entities.

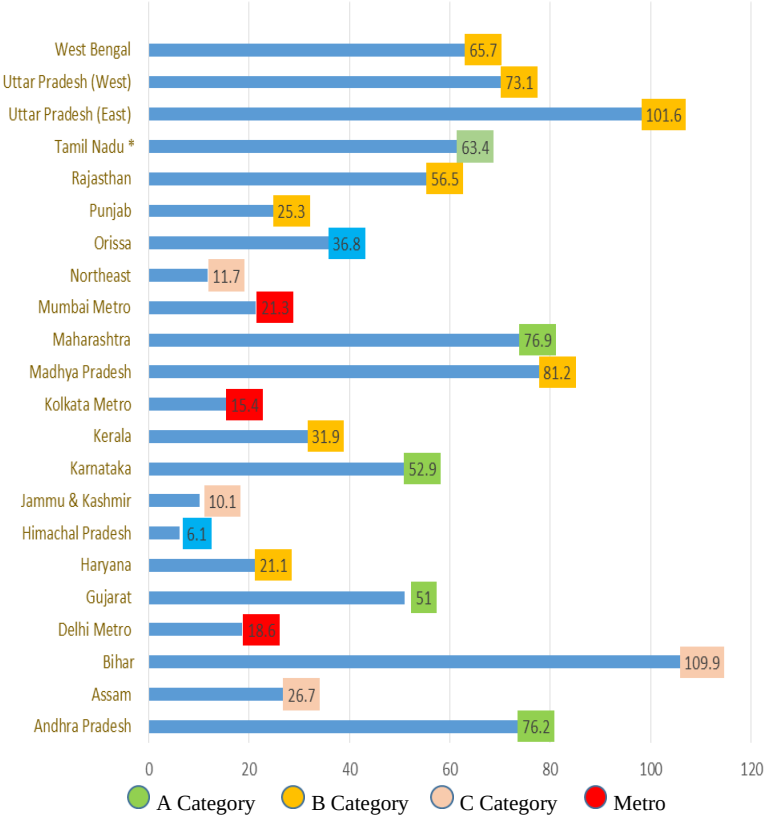
The telecommunication market in India in the year 2021 was concentrated between Reliance JIO Infocomm Ltd and Bharti Airtel. Jointly they grab more than 66%. The transition of telecom subscribers from 3G to 4G is also noteworthy. Most of India's population was only using 3G in the year 2018 but they suddenly shifted from them from 3G to 4G. The enterprises like Aircel, MTNL, Tata, Quadrant, Uninor, Sistema, and Telenor have been thrown off the competitive market track. This shift started after Reliance JIO entered the market with their free offer. Bharat Airtel wanted to depict the relevant market in its information as "providing 4G LTE services of telecommunication in India". However, the CCI observed that Bharti Airtel also had subscribers in the 4G market as well as it had a market in 3G and 2G. So, the CCI determined the relevant market as"provision of wireless telecommunication services to end users in each of the 22 circles in India".[37]

[36] The Competition Act, 2002 (Act 12 of 2003), s. 5(b).
[37] Supra no.06.

INTRODUCTION OF TWENTY TWO

There are twenty two telecom circles in Indian Telecom Market. The circles are categorized as A, B, C and Metro. A population-based graph of the twenty-two telecom circles is articulated below.

Chart 6 – Population Covered



Source: http://www.indiacallinginfo.com/india-telecom-circles.

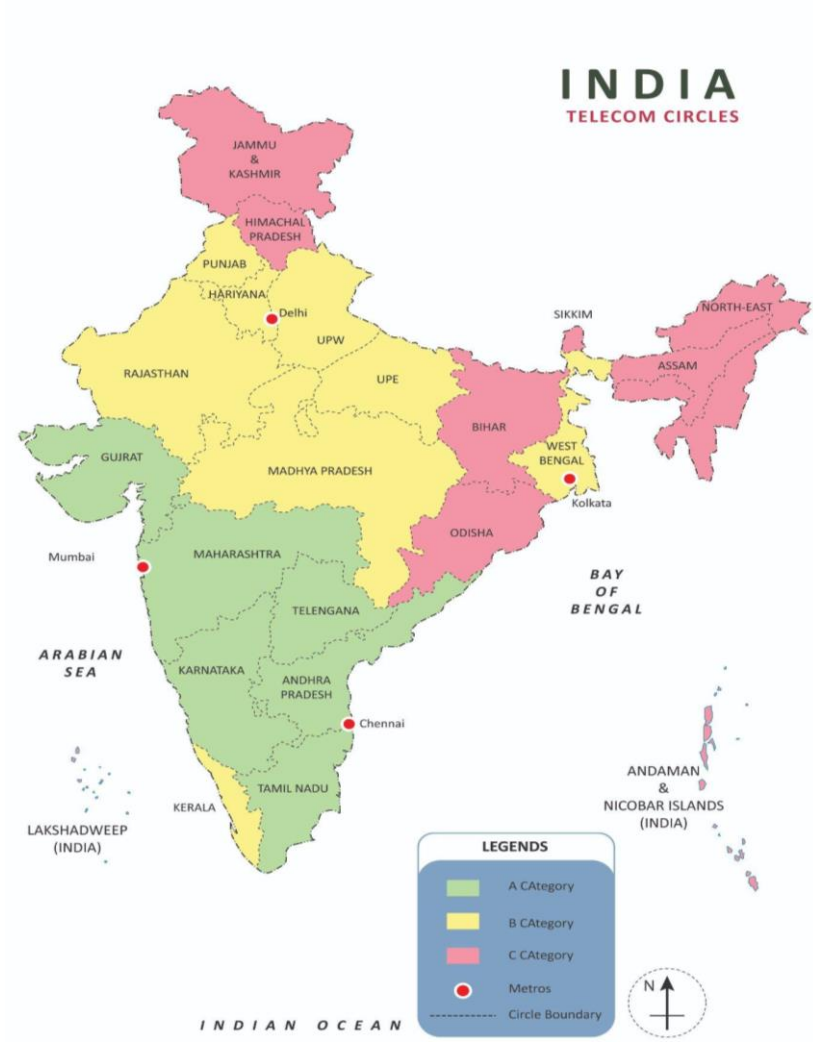


Figure 1 – Areas Covered: Map of Indian Telecom Circles-A

Source: https://www.mapsofindia.com/maps/india/telecomnetwork.html.

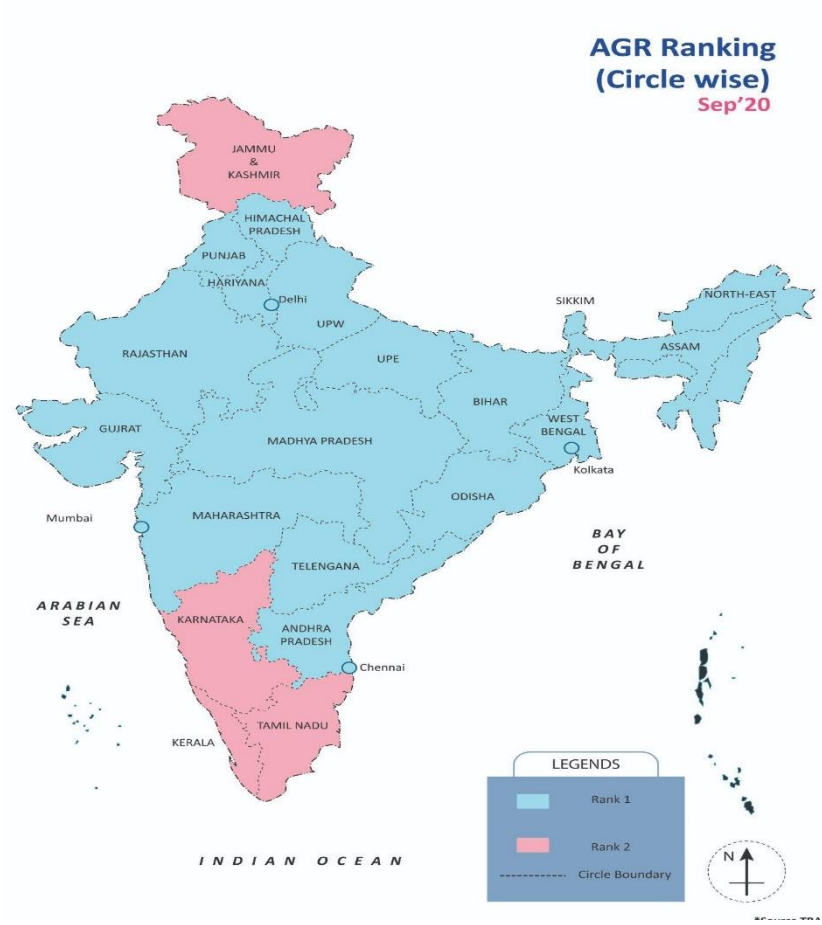


Figure 2 – Map of Territory covered by JIO according to AGR Ranking (Circle Wise) – B
Source: https://onlytech.com/reliance-JIO-leads-in-18-out-of-22-telecom-circles-in-terms-of-agr-ranking/.

As per the Telecom Regulatory Authority Report of September, 2020 this below map is drawn and this map depicts the Reliance JIO Infocomm Ltd stood first in eighteen telecommunication markets out of twenty two and in rest other four telecommunication markets the Reliance JIO stood second in terms of Adjusted Gross Revenue (AGR) market.

The map discloses the impact of Reliance JIO in the telecom market. The explanation for this could be that the accused organisation did not obtain TRAI's consent to extend the 'Welcome offer.' JIO's offer was extended till December 31, 2016, whereas TRAI's regulation said that the 'welcome offer' could be extended until December 3, 2016. It received no probative value from the commission. As a result, it amassed 72 million subscribers in four months, posing a threat to every telecommunications company.[38]

Data Collection and Data Analysis

To better understand the shift towards 4G from 2017 to 2021 this random data collection done. So, author frames some questionnaire and provides those to his students and colleagues spreaded over India, more than 150 responses collected, and based on that following pie charts are created.

Questionnaires are follows:

1) Which sim/sims is/are you using now? (4G/3G/2G/Others)
2) Which sim/sims was/were you using on 2019? (4G/3G/2G/ Others)
3) Which telecom player or players service/services was/were you availing four years back?
4) Which telecom player or players service/services is/are you availing now?

Answer of Question 1:

97.9% of respondents are using 4G telecom services.

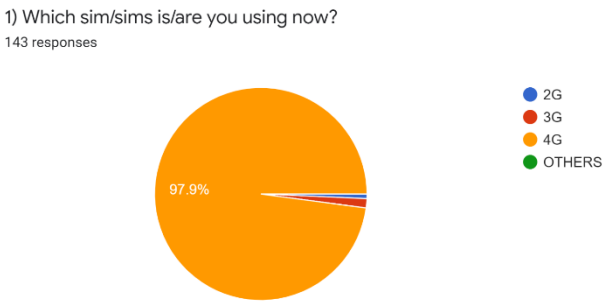


Figure 3 – Answers to Question 1

[38] Supra note 34.

Answer of Question 2:

48.3% of respondents used 3G, 36.4% used 4G and only 14% used 2G enabled sim.

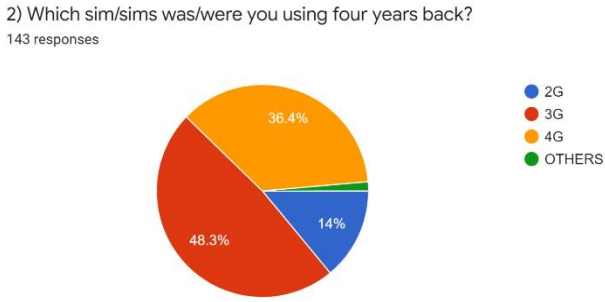


Figure 4 – Answers to Question 2

Answer of Question 3:

32.9% used Bharti Airtel. Same number of users had a subscription to Vodafone, 12.6% of the subscribers had Reliance, 9.8% of users had BSNL subscription and the rest others.

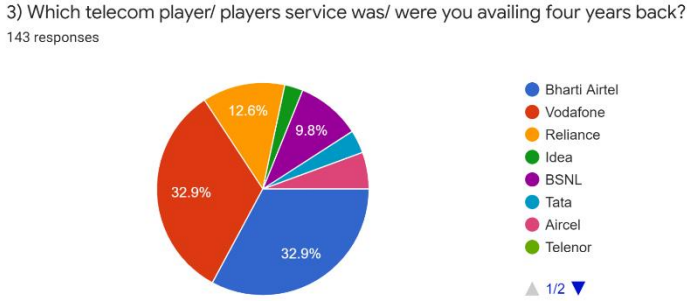


Figure 5 – Answers to Question 3

Answer of Question 4:

As per Figure 4 51.7% responded Reliance JIO, 32.2% Bharti Airtel, 13.3% Vodafone Idea and the rest others.

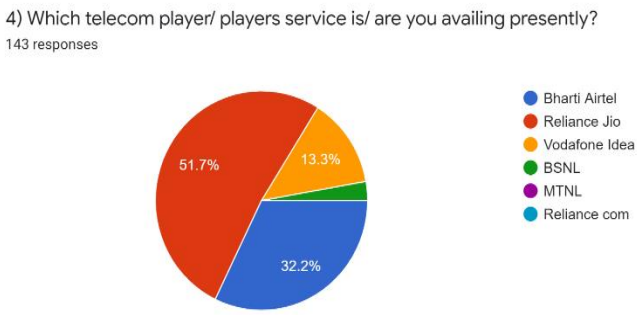


Figure 6 – Answers to Question 4

The data, collected by author reveals that the market that was determined by the CCI in *Bharti Airtel vs Reliance JIO Infocomm Ltd*[39] case as "wireless telecommunication market" may be wrong. Within four years the telecom market has almost shifted. 97.9% of customers are using 4G sim as the data shows. The Director General (D.G) in *Sonam Sharma vs Apple & Others*[40] case opined in its investigation report as "it might be unjustifiable to identify interchangeability or substitutability of a technologically driven product market by observing for a definite period of time, it is needed to be observed for a certain period of time". If CCI waited for a certain period, decision might have been changed. Presently, the mobile customers hardly use 3G or 2G. For the sake of living in the digital world using 4G sim is highly required. However, the judgment passed in *Bharti Airtel vs Reliance Industries Ltd. & Others case*[41] (JIO case) was based on the data published in September, 2017, which was just after one year of JIO entry. This data analysis argues based on the observation of the D.G in *Sonam Sharma*[42] case that the observation for a certain period the penetration capacity of a new entity should be there to save competitors. If there is no competitors alive, how competitive rights gets prevailed. Presently Reliance JIO has grabbed more than 50% market in its favour. Bharti Airtel has lost its first boy cap but the enterprises like Aircel, Tata, Uninor, Quadrant etc. were eliminated from the telecom market even the second boy Vodafone by merging with the third boy namely Idea has been trying to save them in the telecom market.

[39] Supra note. 08.
[40] Supra note. 07.
[41] Ibid no. 41.
[42] Ibid no. 41.

"Penetrative Pricing": A Significant Study related to the JIO Case

The Reliance JIO Infocomm Ltd released its "welcome offer" on 5th September, 2016 and thereafter it was extended till end of the December. Subsequently, it provided a "happy new year" offer till 31st March, 2017. Even it charged very minimum for its every plan till 2019. The Reliance JIO brought a gigantic fund from Reliance Industries Ltd to penetrate the telecom market towards its favor. The "zero pricing" strategy which they adopted might be the reason for the huge change in the telecom market. The Bharti Airtel blame was, "zero pricing is predatory pricing". In *MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd. (2011)*[43], the CCI observed "predatory pricing is the unfair price and in the Act the definition of unfair price is not given". The National Stock Exchange of India (NSE) has no logical rationale for continuing to provide its services for free for such a long time," the CCI stated, "and the practice of zero pricing in this case goes beyond promotional or penetrative pricing. The TRAI permitted JIO to maintain its cheap expenses while prohibiting its competitors from decreasing their prices in order to compete. To the TDSAT, incumbent players challenged TRAI's rule (Telecom Dispute Settlement Appellate Tribunal). According to Airtel and Vodafone-Idea, the legislation granted "artificial protection" to a telecom operator with the "capacity and will" to destabilize the industry by predatory pricing before obtaining "significant market power (SMP)." An SMP is a service provider with a share of at least 30% of overall activity in a relevant market, according to TRAI guidelines. On the 13th of December, 2018, a TDSAT bench led by Justice S.K Singh and member A.K Bhargava stated unequivocally that TRAI could not apply financial disincentives and ordered TRAI to rewrite the predatory pricing laws within six months. As a result of this finding, it may be concluded that the implementation of TRAI allowed Reliance JIO to gain "significant market power" in between four years.

Penetrative pricing is a strategy by which a company artificially minimises the price of a product or service and because of which within a short period the company grabs a large market and once it is achieved the company increases the price. It is also called "incentive based strategy". This "incentive based strategy" is always used for the promotion of goods or services. The TRAI wanted to promote Reliance JIO as it was a new entrant. So that it might forbid other companies to minimize their charge. However, the entire shift noticed in the surveys which this paper has done makes it clear that Reliance JIO has gained the market because of its "zero pricing strategy" or "low pricing strategy". This strategy was observed by the CCI in the National *Stock Exchange*[44] case as

[43] MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd. , CCI Case No. 13/2009.
[44] Ibid.

anticompetitive. However, the CCI had the opposite view in the JIO case. The CCI concluded "Reliance JIO is not a dominant player in the relevant market. Many players already exist there. Out of them the informant Bharti Airtel is one. Even the quality and best technology that the JIO is providing makes a dynamic change in the telecom market. So, JIO cannot be considered dominant. The Competition Act lays down that the dominant player only creates the predatory price and JIO may not be like that". According to Section 4(2)(a)(i) of the Act the "predatory price" means the sale of goods or provision of services at a price, which is below the cost, as may be determined by the regulation or of production of goods or provision of services, with a view to reduce the competition or eliminate the competitors from the market.

The basic difference between "penetrative pricing" and "predatory pricing" is the former is done by an enterprise which is not dominant but the latter is done by a dominant player only. The Competition Act remains silent in "penetrative pricing" matters. The Commission in its obiter dicta in the case of *Bharti Airtel vs Reliance Industries Ltd and Others*[45] mentioned the term "penetrative pricing". However, it is not defined yet. The Commission even in the *Meru Cab*[46] case allowed "penetrative pricing" or low pricing strategy for the purpose of promotion of a new entrant. Likewise in the case of *Reliance JIO* the Commission put its same view. The National Stock Exchange in the *MCX v NSE*[47] case was the dominant player but Reliance JIO was not the dominant according to the view of the Commission. The Commission observed in the Reliance JIO case that the technological revolution took place in the digital market because of JIO. "The fiber optic networks and eco-friendly tower which Reliance JIO used, changed the scenario of the telecom market' the Commission observed.[48]

The preamble of the Competition Act denotes that this Act would work for the consumer interest. The maximum interest of the consumers should be achieved by the Act. "The basic purpose of competition legislation is to promote economic efficiency utilizing competition as one of the strategies of helping the establishment of markets responsive to consumer preferences," the Supreme Court of India stated in the *CCI vs SAIL*[49] case. The European Court of Justice also observed that competition law would work for the maximum benefits of the

[45] Supra note. 08.
[46] Meru Travel Solutions Pvt. Ltd. (Meru Cab) v. Uber India Systems Pvt. Ltd& Others. CCI Case No. 96/2015.
[47] Supra note.45.
[48] Supra note. 08.
[49] Competition Commission of India v. Steel Authority of India Ltd. (2010) 10 SCC 744 SCC 744.

consumers in the cases of *Postsparkasse AG*[50] *and GlaxoSmithKline*[51]. The CCI in the *JIO* case mentioned the term "penetrative pricing" not in its *ratio-decidendi* but in its *Obiter Dicta.* Although the regulating body (CCI) promoted this concept. It viewed that "zero pricing strategy" could be used for the promotion of a new enterprise so that it could compete in a better way with the existing rivals in the same market. "A new entrant with a fresh idea, superior technology, or a superior product or technological solution that challenges the existing status quo in a market and swings a significant consumer base in its favour cannot always be seen as dominating" the CCI observed in the *Meru Cab* case.

The question now arises does "penetrative pricing" have any appreciable adverse effect in a competitive market? The next pertinent question which also arises was not JIO empowered by the market power of its brother concern Reliance Industries Ltd? Facts and laws show Mukesh Ambani is the managing director of both companies. The argument of Bharti Airtel relating to the market power of the JIO was not considered by the CCI. The argument was that with the market power of Reliance Industry, JIO continued its "zero pricing offer". The TRAI regulation allowed Reliance JIO to continue their 'welcome offer' and 'happy new year' back to back that helped Reliance JIO to grab significant market power (SMP) in the telecom market. However, the Appellate body of TRAI (TDSAT) did not consider the penetration price theory. Predatory pricing is not allowed by most of the antitrust laws all over the world. The Court of European Justice observed in the *Akzo*[52] case that without any rational reason if one undertaking charged "below-average" cost, that practice had to be considered predatory. The same type of observation the European Court of Justice held in *Tetra Pak II*[53] case. However, in the *Compagnie Maritime Belge*[54] the Attorney General argued that to identify predatory price the intent and recoupment test is required. The Court in the case of *AKZO*[55]observed the same view which the Attorney General raised in the *Compagnie Maritime Belge* case. From this discussion, it is obvious that predatory pricing jurisprudence is established primarily in India and Europe since the Acts provide for it, but the Acts are silent in the context of "penetrative pricing," preventing the development of jurisprudence on the subject. The TDSAT ruling on TRAI's predatory regulations,

[50] Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG v. Commission of the European Communities, Joined cases T-231/01 and T-214/01 [2006].
[51] GlaxoSmithKline Services Unlimited v. Commission of the European Communities, Case T-168/01 [2006].
[52] Akzo Nobel NV Akzo Nobel Chemicals GmbH Akzo Nobel Chemicals BV v European Commission, Case C-516/15 P [2016].
[53] Tetra Pak v Commission, Case C-333/94 P [1996].
[54] Supra note.26.
[55] Supra note 54.

combined with the COMPAT (Competition Appellate Tribunal) verdict in the Meru Cab case, cast doubt on CCI's position in the Reliance JIO case. The Director General (Investigating Authority) was directed by the COMPAT in Meru Cab to begin a probe into Uber's market power. Whether Uber India, the subsidiaries of the American Company Uber, imposed predatory pricing as they were empowered by the market power of Uber group? This point was raised by the Meru Cab, the informant enterprise and this point was given importance by the COMPAT whereas the CCI ignored it. The CCI also ignored the same type of point that was raised by Bharti Airtel, the informant enterprise in the JIO case. The quasi-judicial body (CCI) of the competition law rejected the argument related to market power of Reliance Industry. This market power empowered JIO to continue "zero pricing" or "low pricing" or "penetrative pricing" and helped JIO to grab a big market share only in four years which is being noticed in tables, graphs, maps and charts articulated by this paper from the relevant sources.

CONCLUSIONS & SUGGESTIONS

Competition law and telecom law in India have been thoroughly examined in this study. It also looked at case laws from both inside and beyond India. After reviewing the relevant literature, this study concludes that both laws are working toward the same goal and that is promotion of fair competition and, ultimately, the benefit of the customer. Both Competition Act, 2002 and Telecom Regulatory Authority Act, make any sort of abuse enforceable and penalized. There is no standard for determining dominance in the Competition Act of 2002, although the TRAI Act 1997 fixes 30% market share for determining significant market power (SMP) of an enterprise. The Significant Market Power (SMP) is equivalent to the concept of dominance as per the ECJ.[56] India, on the other hand, does not follow the same rules. One Bill tabled before in the parliament on 2012 with a view to inclusion of the "collective dominance" concept in the Competition Act 2002 but it was lapsed due to dissolution of the Loksabha. The Standing Committee Report 2014 chaired by the then Member of Parliament Yashbant Sinha advised the Ministry for finding out other proper legislation connected with the collective dominance concept although the Ministry was direly wanting to incorporate collective dominance to the Competition Act 2002. In 2014, the UPA lost an election, and the NDA won a majority in the Indian parliament. The NDA has had an absolute majority since 2014, however the Bill of 2012 has yet to be reintroduced. Collective dominance is not determined by either of the current Acts

[56] BERNAERTS Inge & KRAMER Stephen (2005) Director-General Competition, unit C-1, "First collective dominance cases under the European consultation mechanism", Competition Policy Newsletter, Antitrust, Number 2-Summer 2005, p.no. 47-52

governing telecom disputes. Between both the Acts the territorial dispute still exists. Though the Supreme Court observed in the *Incumbent Cellular Operators Association* case that any telecom matter should be decided by the Appellate Body of TRAI (TDSAT) first and then the CCI would decide. As per the Article 141 of the Indian Constitution the Supreme Court judgment would be binding in nature upon all intermediate courts including quasi-judicial bodies existing in India.[57] However, the provision is required into both Acts which is not yet specified. Lastly, the emerging concept namely "penetrative pricing" is allowed in India for promotion of a new product or provision of services. Using this strategy Reliance JIO Infocomm Ltd has grabbed Significant Market Power (SMP) within four year. Bharti Airtel, the next rival also has the SMP as the TRAI Report depicts. Vodafone and Idea being merged are struggling in the telecom market for their existence, rather the BSNL has held almost the same share which it had one decade ago. The other rivals MTNL and Reliance Com had minimum market share according to TRAI Report, September, 2021. According to TRAI records, the competitors, such as Aircel, Tata, Quadrant, Uninor, etc., existed from 2012 to 2018 but just recently exited the market. The TRAI gave an opportunity to the Reliance JIO because it was a new entrant also the Competition Act considered the JIO to be not dominant. The TRAI and the CCI did not assess the market power of the Reliance Industry Ltd from which this JIO took birth and the four years old kid achieved the first position because of its pricing strategy and promotion of a new technology (4G) first. The DG in the *Sonam Sharma* case reported that a technology market should be observed for a certain period of time in order to understand the "appreciable adverse effect in the competitive market" but the famous *JIO* case was decided seeing only the report of 2017. Most telecom businesses have been destroyed in the last four years, but JIO has revolutionised the Indian telecom market. Now, this study finishes by stating that new entrants must be promoted, but that a baseline should be established. What should the pricing be set at? or How much time should be allocated to the promotion? The market cannot be dominated by a single party. There is a high chance of victimization of the total Indian populace if predatory monopolistic practices become the norm. The Government in such a case should promote public telecom companies in absence of other players. It should be done whenever a new generation of technology is adopted to keep the market viable, competitive and fair. These are the challenges that both Acts should address initially, and the legislatures in India have yet to establish any norms in this regard. As a result, the following probable solutions are provided in this paper:

[57] The Constitution of India, art. 141.

a) Reintroduction of the collective dominance concept is required. *Sonam Sharma* was not the only case where the collective dominance allegation was straightly rejected but also many more cases took place between the last ten years but it was straightly rejected due to its inexistence.

b) The jurisdiction issue that exists between two pertinent Acts could be resolved through the legislative process in the near future.

c) The promotion strategy like "zero pricing" or "low pricing" may be tackled by benchmark otherwise the market would be getting concentrated which is anti-constitution but telecom market in last four year gets concentrated between Reliance JIO and Bharti Airtel like the radio taxi market. The radio taxi market is also a technology driven market. The COMPAT in the *Meru Cab* case ordered DG to reinvestigate the market power of Uber because the Uber was providing incentives to the drivers and customers because of its world base market power whereas in the *JIO* case the same issue was not taken care of by the CCI. Extensive discretion may bring different opinions to the same issue which creates problems. This paper requests the legislatures of India for framing out the guidelines on how much "penetrative pricing" would be allowed in the name of promotion and what would be the time period of promotion for a new entity.

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