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Inter alia... is a legal newsletter published each quarter by AZB & Partners for a select list of clients and colleagues. Each issue aims to provide a snapshot of the recent legal developments in certain critical areas: infrastructure, foreign direct investment, securities law, exchange control regulations, corporate law, media and entertainment, intellectual property and banking. We hope you will find the content informative and useful. If you have any questions or comments, please email us at: editor.interalia@azbpartners.com or call AZB & Partners.



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MUMBAI: AZB House | Peninsula Corporate Park | Ganpatrao Kadam Marg | Lower Parel | Mumbai 400013 | India | TEL +91 22 66396880 | FAX +91 22 66396888 | E-MAIL mumbai@azbpartners.com

MUMBAI: Sakhar Bhavan | 4th Floor | Nariman Point | Mumbai 400021 | India | TEL +91 22 66396880 | FAX +91 22 49100699 | E-MAIL disputeresolution.mumbai@azbpartners.com

DELHI: AZB House | Plot No. A8 | Sector 4 | Noida 201301 | National Capital Region Delhi | India | TEL +91 120 4179999 | FAX +91 120 4179900 | E-MAIL delhi@azbpartners.com

GURGAON: Unitech Cyber Park | 602 Tower-B | 6th floor | Sector 39 | Gurgaon 122001 | National Capital Region Delhi | India | TEL +91 124 4200296 | FAX +91 124 4038310 | E-MAIL gurgaon@azbpartners.com

BANGALORE: Embassy Icon | 7th Floor | Infantry Road | Bangalore 560 001 | India | TEL +91 80 42400500 | FAX +91 80 22213947 | E-MAIL bangalore@azbpartners.com

PUNE: Onyx Towers | 1101-B | 11th floor | North Main Road | Koregaon Park | Pune 411001 | India | TEL +91 20 67256666 | FAX +91 20 67256600 | E-MAIL pune@azbpartners.com



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Role of CCI in Regulated Sectors: Overlapping Jurisdictions

Background

The Supreme Court of India ('SC'), on December 5, 2018, ruled on the roles of the Telecom Regulatory Authority of India ('TRAI') and the Competition Commission of India ('CCI') and the interplay between the responsibilities of the two regulators¹. CCI is a sector-agnostic regulator tasked with preserving and promoting competition in India. In carrying out its mandate, CCI regulates conduct in sectors that are characterized by specialized sector-specific regulators, such as the telecom sector. TRAI is the sectoral regulator tasked with regulating telecom services, and promoting and ensuring orderly growth of the telecom sector in India.

In 2017, the CCI, acting on information filed by Reliance Jio Infocomm Limited ('Jio') under Section 19(1) of the Competition Act, 2002 ('Act'), ordered the Director General, CCI ('DG') to investigate ('CCI Order') against the alleged cartelization by Bharti Airtel Limited, Vodafone India Limited, Idea Cellular Limited and the Cellular Operators Association of India ('OPS'). It was alleged that OPS had cartelized to deny Jio entry into the telecom sector by not providing it adequate Points of Interconnection ('POIs')², resulting in call failures between Jio and other networks. Jio had also filed letters with the TRAI complaining against the conduct of the OPS.

The Bombay High Court ('BHC') by way of an order dated September 21, 2017 ('BHC Order') set aside the CCI Order and held that the telecom sector is governed, regulated and controlled by certain special authorities, and the CCI does not have the jurisdiction to deal with interpretation or clarification of any "contract clauses", "unified license", "interconnection agreements", "quality of services regulations", etc., which are to be settled by the TRAI/ Telecom Disputes Settlement and Appellate Tribunal ('TDSAT'). BHC further held that the powers of CCI are not sufficient to deal with the technical aspects associated with the telecom sector, which solely arise out of the Telecom Regulatory Authority of India Act, 1997 ('TRAI Act') and related regulations. CCI and Jio, aggrieved by the BHC Order, approached the SC.

Supreme Court's Verdict

The SC, in its judgment, recognized the specialized nature of TRAI as a regulator and held that TRAI is better suited to decide such cases. It held that TRAI's functions include: (i) ensuring technical compatibility and effective inter-relationship between different service providers; (ii) ensuring compliance of license conditions by all service providers; and (iii) settlement of disputes between service providers. The SC noted that "[Jio's] disputes in this case touches upon these aspects". Moreover, it was noted that Jio itself had also specifically approached the TRAI for settlement of these disputes.

The SC also recognized that the CCI is the experienced body in conducting competition analysis. Further, this specific and important role assigned to the CCI cannot be completely wished away and the 'comity' between the TRAI and the CCI is to be maintained. Therefore, the CCI's jurisdiction is not totally ousted insofar as the telecom sector is concerned but only pushed to a later stage, once TRAI has come to a conclusion.

Blurred Lines

Some sectoral laws do make a broad declaration of competition goals, absent any specification. For instance, the TRAI Act mandates TRAI to take measures to 'facilitate competition' and 'promote efficiency in the operation of telecommunications services'³. The Petroleum and Natural Gas Regulatory Board Act, 2006 requires the Petroleum and Natural Gas Regulatory Board to 'foster fair trade and competition'⁴. The Electricity Act, 2003 ('EC Act') empowers the Central Electricity Regulatory Commission to 'issue directions' to a licensee if it 'enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition'⁵. Such legislations have blurred the distinction between ex-ante regulation and ex-post competition assessment, allowing for potential conflicts between these regulators and the CCI.

Approach in Other Jurisdictions

Anti-trust regulators in other jurisdictions have been able to resolve similar conflicts between

1 *Competition Commission of India vs. Bharti Airtel Limited and Others*, available at:

https://www.sci.gov.in/supremecourt/2017/40072/40072_2017_Judgement_05-Dec-2018.pdf

2 Points between two network operators which allot voice calls originating from the work of one operator to terminate on the network of the other operator. Smooth connectivity amongst different telecom service providers is ensured by unified licenses, which put an obligation over the telecom service providers to interconnect with each other on POIs.

3 Section 11 (1) (a) (iv) of TRAI Act.

4 Regulation 7 of the Petroleum and Natural Gas Regulatory Board (Guiding Principles for Declaring or Authorizing Natural Gas Pipeline as Common Carrier or Contract Carrier) Regulations, 2009.

5 Section 60 of the Electricity Act, 2003.

sectoral regulators and competition authorities by crafting specific exemptions in areas of conflict or concurrent jurisdiction between sectoral regulators and competition authorities.

In the United Kingdom, various sectoral regulators have concurrent power to apply EU and UK competition law alongside the national competition agency, the Competition and Markets Authority ('CMA'). For this purpose, the CMA publishes Concurrency Guidance which gives a basic outline of the concurrency regime. Issues not covered are to be outlined in detail in a Memoranda of Understanding between the CMA and regulators.

South Africa follows a similar concurrent model as the UK. The perceived benefits of a concurrency system are that it: (a) leverages the regulators' industry expertise, enabling them to use their sector-specific knowledge when bringing cases in their sectors; and (b) maximizes the enforcement of competition law through working in partnership.

Australia adopted the position that specific rules were preferable to reliance on general competition rules. Administration of industry-specific rules has been entrusted to the Australian Competition and Consumer Commission ('ACCC'). This was to avoid proliferation of regulatory bodies and to facilitate the transition to more competitive markets. Issues related to telecommunication, gas and electricity, airport postal services, as well as the administration of price control oversight over federally operated utilities, was brought within the purview of ACCC.

Proposed Interaction between the Sectoral Regulators and the CCI

India can benefit from the experience of other regimes by conducting a comprehensive review of the mandate of sectoral regulators and CCI, and identify potential areas of conflict in the legislations.

A system of consultation between the CCI and the sectoral regulator(s) appears to be the best option. It is worth considering that maybe such consultation mechanism should be mandatory and not just discretionary. This would ensure minimum friction between the sectoral regulators and CCI, and the reconciliation of their respective mandates. This will also be in line with the approach of the SC to follow a harmonious approach to resolve conflicts between regulators.

CCI Orders

CCI Dismisses Allegations against Chemists on the Collection of PIS Charges from Pharmaceutical Manufacturers

On November 8, 2018, the CCI dismissed allegations of contravention of Section 3 of the Act filed by Shri Nadie Jauhari ('Informant') against Retail & Dispensing Chemists Association ('RDCA').⁶ The allegations were with respect to the collection of Product Information Service ('PIS') charges by the RDCA from the manufacturers of pharmaceutical products. PIS is a fee charged by chemists and druggists associations for advertising a new product/drug of a pharmaceutical company in the publications of such associations. In this regard, CCI had issued a public notice in 2014, calling trade associations to cease and desist from *inter alia* compulsory payment of PIS charges by pharmaceutical firms.

In assessing the allegation of the Informant, CCI was of the view that the decisive factor for holding a PIS charge as anti-competitive is the nature of such a charge, that is, if the PIS charge is mandatory (in the sense that absence of payment will lead to the new drugs not being introduced in the market), the practice will be found to be anti-competitive. However, an independent decision of manufacturers/ pharmaceutical companies to avail the PIS charge on a voluntary basis makes it fall outside the purview of the Act.

CCI examined the responses of various pharmaceutical companies, which indicated that the companies found the RDCA's publications useful in spreading awareness on their new products. Moreover, none of the companies indicated that the PIS charge was forced by the RDCA in any manner. Therefore, since the PIS charge met the test of voluntariness, CCI concluded that it was not anti-competitive under the Act.

CCI Dismisses Allegations against Apollo Industrial Corporation and LEEL Electricals Limited for Contravening Section 3⁷

On November 9, 2018, CCI dismissed allegations of contravention of Section 3 of the Act filed by Kelvin India Pvt. Ltd. ('Informant') against Apollo Industrial Corporation ('OP 1') and LEEL Electricals Limited ('OP 2'). It was alleged that OP 1 and OP 2 were engaged in a cartel in rela-

⁶ Case No. 60 of 2015.

⁷ Case No. 33 of 2018.



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tion to tenders floated by Chittaranjan Locomotive Works ('CLW'), Diesel Locomotive Works, Varanasi ('DLW') and Diesel Locomotive Works, Patiala ('DMW') for procurement of oil cooler radiators ('OCRS') for transformers.

The Informant had submitted its bids for three tenders floated by CLW, DLW and DMW in 2018. OP 1 and OP 2 had also participated in these tenders. The Informant raised the allegation that the bid prices quoted by the two OPs were similar on account of their having previously agreed on such prices. To support this, the Informant submitted that there had been an increase in the price of aluminum, but such the effect of this increase was not visible in the bid price submitted by the two OPs.

In its analysis, CCI stated that while the prices of the two OPs were indeed similar, it was pertinent to examine the bids submitted by the third approved provider, M/s. Tesio Cooling ('Tesio'), which were similar to the bids of OP 1 and OP 2. Thus, bidding by Tesio posed competitive constraints on the two OPs. CCI also noted that for DLW and CLW's tenders, Tesio was awarded the highest quantity.

On the issue of the non-effect of increase in aluminium's price on the bids, CCI found that the companies were able to take advantage of economies of scale as the requirement of OCRS had increased over the past few years. Further, the number of approved vendors of OCRS had increased from two to three, making the market more competitive.

On the contention concerning a vast difference between the bids of unapproved vendors from those of approved vendors as indicative of collusive behavior, CCI noted that an unapproved source could be considered for a development order only if its quoted price was lower than the approved vendor's. CCI agreed with the DLW's submission that the rate quoted by unapproved vendors may not indicate the real cost as such vendors are yet to be assessed for capacity, capability and technical know-how to manufacture the product(s). In this regard, CCI stated that high profit by itself does not elicit the competition authority's action unless such profit is achieved by violation of provisions of the Act.

Therefore, the allegation of collusion was held to be untenable, and the matter ordered to be closed in terms of the provisions of Section 26 (2) of the Act.

CCI Dismisses Cartel Allegations against Flashlight Manufacturers

On November 6, 2018, CCI dismissed allegations of cartelization raised by way of a Lesser Penalty Application ('LPA') submitted by Eveready Industries India Ltd. ('OP 1') under Section 46 of the Act.⁸ OP 1 in its LPA had submitted details concerning exchange of information regarding sale and production of flashlights between OP 1, Panasonic Energy India Co. Ltd. ('OP 2') and Indo National Ltd ('OP 3'). The information exchange was facilitated by way of Association of Indian Dry Cell Manufacturers ('OP 5'). Consequently, an LPA was also filed by OP 2, disclosing evidence of information exchange between the OPs in relation to the sale of flashlights. Pursuant to this, CCI directed the DG to institute an investigation against the OPs.

In its analysis, CCI reasoned that the mere exchange of certain information amongst the OPs does not constitute enough evidence for CCI to conclude that the OPs were indeed acting in a coordinated manner contrary to the provisions of the Act. Further, to ascertain whether the agreement to increase prices was implemented by the OPs individually, CCI examined the exchange of commercially sensitive information, which included: (i) printed notes of OP 3 whereby it sought information from OP 1 regarding wholesale price, margins and promotional schemes; and (ii) an e-mail exchange amongst OP 1, OP 2 and OP 3 regarding the entry of a new player, Godrej, in the market. CCI held that while such evidence shows exchange of commercially sensitive information, it was insufficient to establish that the concerned persons agreed upon the actual terms of increasing or determining the prices. Further, while the e-mail exchange between OP 1, OP 2 and OP 3, established that the OPs were monitoring the flashlights market, it did not establish contravention of the provisions of the Act.

CCI concluded that while there was evidence of exchange of production/sales data, draft press release and price information amongst the OPs (indicating the possibility of collusion), there was nothing on record to show that such acts did in fact result in determining the prices of flashlights. Consequently, no violation of Section 3(3)(a) of the Act was found, and the matter was dismissed by CCI.

CCI Reiterates its Findings against Coal India Limited

On December 3, 2018, CCI disposed information filed by Hindustan Zinc Limited ('HZL') against Western Coalfields Limited ('WCL') and Coal India Limited ('CIL') alleging *inter alia* contravention of the provisions of Section 4 of the Act.⁹

HZL is in the business of producing zinc, lead and silver, and WCL is a subsidiary of CIL. On

⁸ *Suo moto* case no. 1 of 2017.

⁹ Case No. 46 of 2018.

August 1, 2017, HZL had entered into three Fuel Supply Agreements ('FSAs') with WCL. However, within a year of the FSAs, WCL failed to supply the agreed quantity and quality of coal, as laid down under the FSA. It was alleged that due to this, HZL had borne losses worth approximately ₹264 crores. HZL drew CCI's attention to the following conduct of WCL:

- i. supply of coal below 30% of the contracted quantity, and diversion of coal supply to Independent Power Producers as also non-payment of compensation therefor;
- ii. unilateral revision of contracted grade of coal from G-9 to G-10;
- iii. lock-in period of 2 years to terminate the contract;
- iv. unilateral appointment of a third party agency by WCL for sampling at the time of delivery of coal; and
- v. failure of WCL to adjust the excess royalty and contributions to District Mineral Foundation and National Mineral Exploration Trust paid by HZL.

Based on the above, HZL alleged that by imposing such unilateral and unfair conduct, WCL was abusing its dominant position, in contravention of Section 4(2)(a) of the Act.

CCI determined the relevant market as the market for 'production and sale of non-coking coal to thermal power producers including captive power plants in India'. In its analysis of the alleged conduct, CCI noted that it had previously found CIL and its subsidiaries to be in a dominant position in the relevant market, therefore there was no need for a separate assessment of dominance in the present case.

CCI noted that in the previous coal cases¹⁰, similar issues as those raised by HZL had been substantially addressed by issuing appropriate directions to CIL and its subsidiaries. On the issue concerning the lock-in period, CCI found that the FSAs entitled HZL to terminate the agreement without being bound by the lock-in period if such termination was occasioned due to the default at the seller's end. On issues regarding excessive royalty, CCI held that they were not competition-related issues, therefore outside the purview of CCI. CCI relied on its previous orders dealing with the conduct of CIL and its subsidiaries to state that CCI's orders are passed *in rem*, therefore, once an order is issued by CCI to address market failure, it need not order investigations based on successive information brought in by different parties agitating the same issues. An action to the contrary is likely to strain CCI's and the DG's limited resources, without achieving any tangible public good. CCI directed CIL and its subsidiaries to abide by the orders of the higher judicial forums in the appeals preferred there. Accordingly, the information was dismissed by CCI.

CCI Dismisses Abuse of Dominance Allegations against GAIL (India) Limited

On November 8, 2018, CCI dismissed a batch of information filed against GAIL (India) Ltd. ('GAIL') alleging contravention of Section 4 of the Act.¹¹ It was alleged that GAIL had imposed unfair and one-sided conditions in gas supply agreements ('GSA') entered into with seven companies ('Informants') in relation to the supply of Re-gasified Liquefied Natural Gas ('RLNG').

The following actions of GAIL were alleged to amount to abuse of dominance under the Act:

- i. suspension of gas supply, without notice, to the Informants¹²;
- ii. denial of dispute resolution mechanism envisaged under the GSA to the Informants¹³;
- iii. arbitrarily and unilaterally doing away with the requirement of seven banking days envisaged under the GSA, after buyer's due date, for issuance of notice for suspension of gas. Further, the invoices issued by the GAIL stated that gas supplies would be disconnected, if the amount due was not paid within three days of receipt;
- iv. GAIL arbitrarily and unilaterally substituted the term 'disconnection' for 'suspension' of gas supplies in its invoices raised on Informants thereby avoiding the compliance requirements for suspension of gas;
- v. Informants were forced to make payments against incomprehensible invoices, drawn up arbitrarily by GAIL, without indicating the requisite details stipulated in the GSA;
- vi. invocation of Letter of Credit by GAIL in respect of amounts beyond time limits prescribed under the GSA;
- vii. imposition of a new arbitrary obligation on the Informants of 'pay for if not taken', computed on a basis not contemplated in the GSA; and
- viii. advancing buyers due date in the invoices.

Based on the above, CCI directed the DG to conduct an investigation against GAIL. In the investigation report ('Report') submitted to CCI, the relevant market was delineated as: (i) the

¹⁰ Case Nos. 03, 11 & 59 of 2012; Case Nos. 05, 07, 37 & 44 of 2013 and Case No. 08 of 2014.

¹¹ Case Nos. 16-20 & 45 of 2016, 02, 59, 62 & 63 of 2017.

¹² Case no. 17 of 2016 and Case no. 18 of 2016.

¹³ Case no. 17 of 2016 and Case no. 18 of 2016.



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‘market for supply and distribution of natural gas to industrial consumers in the district of Gurgaon’; (ii) the ‘market for supply and distribution of natural gas to industrial consumers in the district of Alwar’; (iii) the ‘market for supply and distribution of natural gas to industrial consumers in the district of Ghaziabad’; and (iv) the ‘market for supply and distribution of natural gas to industrial consumers in the district of Rewari’.

In its assessment of GAIL’s dominance, the DG noted that GAIL was the only supplier of natural gas in the relevant geographic markets, and was therefore found to be dominant. Based on this, the DG concluded that GAIL had abused its dominant position by imposing unfair terms on the Informants, in contravention of Section 4(2)(a)(i) of the Act.

CCI, in its analysis of GAIL’s alleged conduct, differed with the DG’s findings.

First, CCI found that the between GAIL and the Informants did not foreclose competition in the relevant market. It noted that clauses, including the ‘take or pay’ liability (“ToP”) are common in energy sector including the natural gas markets, therefore, such contracts cannot be held to be inherently anti-competitive. CCI relied on its decision in the case of *Tata Power Distribution Ltd v. NTPC Ltd*, where it was held that a violation of Section 4(2)(a)(i) of the Act was not made out since: (i) the Informant entered into the agreement with the OP being fully aware of the terms of the agreement, including the long term obligation stipulated thereunder; (ii) there was a rational basis for binding the Informant and other procurers in the long term agreements as the generating companies invest in establishing the generating stations based on allocation and the agreements entered into with the parties (which are to be served through period agreed upon); and (iii) the Informant and other procurers had the option to approach the central government for reallocation of power allocated to them.

Second, there was no evidence to support that GAIL had limited or restricted production of goods/markets by abusing its dominant position. The Informants had not challenged the ToP clause itself, but the calculation of liability by GAIL. GAIL’s conduct to mitigate its losses was found to not raise any competition concerns. Moreover, CCI observed that the Informants had not raised a concern with the ToP till the time GAIL was operating in their favor. The issue was raised only when a ToP was imposed on the Informants. For this finding, CCI relied on its previous decision in on the case of *Paharpur Cooling Towers Ltd. v. GAIL (India) Ltd*, where it was held that “safeguarding commercial interest or invoking contractual cases which are not unfair per se cannot be termed as unfair just because they are invoked by one of the parties to the contract”.

Third, in relation to the Informants’ allegation that GAIL had forced them to maintain a letter of credit (‘LC’) to cover the amount of Minimum Guarantee Offtake (‘MGO’) and ToP, CCI stated that it was incorrect to use MGO and ToP synonymously in the LC. CCI held that GAIL had erroneously used the term ‘MGO’ in the LC, and therefore such a mistake could not be deduced to be a contravention of provisions of Section 4(2)(i)(a) of the Act.

Fourth, CCI differed from DG’s finding against GAIL in relation to the invocation of LCs beyond the contractual terms of the GSA as akin to unilateral conduct. CCI held that while such an invocation of LC was against the terms of the GSA, the Informants had failed to establish the loss caused (if any) by such multiple invocations.

Fifth, CCI held that GAIL had not contravened the GSA in relation to the timelines given to the Informants in making payments, post raising of an invoice. CCI noted that as per the GSA, the payment is to be made within 4 banking days from the receipt of invoice, and GAIL’s invoices had only reduced this time to three days.

Sixth, CCI found no evidence in support of the allegation that GAIL had arbitrarily and unilaterally substituted the term “disconnection” in place of “suspension” of gas supplies in its invoices raised on the Informants, thereby avoiding the compliance requirements for suspension of gas.

Accordingly, the information was dismissed by CCI.

CCI Approves DENSO’s 7% Increase in its Shareholding in Subros

On November 22, 2018, CCI approved the proposed combination of DENSO Corporation (‘DENSO’) to increase its shareholding in Subros Limited (‘Subros’) from 13% to 20%, by way of a share subscription.¹⁴ The transaction would also give DENSO the right to nominate one more director on the board of directors of Subros.

In India, DENSO is engaged in the manufacture and commercial sale of automotive air-conditioning systems. Subros is an integrated manufacturing unit in India for automotive air conditioning systems and engine cooling system. It also manufacturers, *inter alia*, compressors, condensers and heat exchangers *i.e.* all components of an air conditioning system. Subros is a joint venture between Suzuki Motor Corporation, DENSO and the Suri family.

CCI noted that DENSO already held 13% shareholding in Subros along with the right to

¹⁴ Combination Registration No. C-2018/11/614.

nominate one director on the board of directors of Subros. Therefore, the proposed increase in shareholding by 7% and the right to nominate one more director was not likely to have any appreciable adverse effect on competition in India. Accordingly, the combination was approved by CCI.

CCI Approves Liberty House's Acquisition of Amtek Auto Limited

On September 11, 2018, CCI approved Liberty House Group Pte. Ltd.'s ('Liberty House') 100% acquisition of Amtek Auto Limited ('Amtek Auto').¹⁵ Liberty House's resolution plan for acquisition of Amtek Auto filed under the Insolvency and Bankruptcy Code, 2016 ('IBC') was approved by a Committee of Creditors ('CoC') and the National Company Law Tribunal ('NCLT').

Liberty House also submitted details of its resolution plan under the IBC for the acquisition of Adhunik Metaliks Limited ('Adhunik'), which was approved by the CoC and the NCLT. CCI carried out the competition assessment in light of this development.

In its assessment, CCI noted that Liberty House and Amtek Auto overlap in the business of connecting rods. A connecting rod is a component of an automobiles' engine that transfers motion from the piston to the crankshaft and functions as a lever arm. Liberty House submitted that connecting rods differ based on the size of vehicles, like two-wheeler, three-wheeler and a heavy vehicle, and are manufactured for specific model types. It was submitted that the connecting rods supplied by Liberty House are aluminum-based while those of Amtek Auto are micro-alloy and carbon steels based.

Further, the acquisition of Adhunik by Liberty House created a vertical relationship between the parties, since Adhunik supplied alloy based non-flat steel rolled products, which is an upstream business segment to Amtek Auto. CCI noted that this vertical relationship is not likely to result in any competition concern as original equipment manufacturers ('OEMs') largely determine the type and grade of inputs, and there are other players present in this upstream business segment. Therefore, the combination was not likely to cause any appreciable adverse effect on competition in India.

Based on the above, the combination was approved by CCI.



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Supreme Court of India

Supreme Court Rejects Appeal on Cartel Investigation against Airtel, Vodafone and Idea

On December 5, 2018 the SC dismissed CCI's appeal against an order of the Bombay High Court ('BHC') setting aside CCI's order directing the DG to investigate allegations against Bharti Airtel Limited, Vodafone India Limited, Idea Cellular Limited ('IDOs') and the Cellular Operators Association of India ('COAI') ('Impugned Order').¹⁶

It was alleged that IDOs had cartelized to deny Reliance Jio Infocomm Limited ('RJIL') entry in the telecom sector by not providing it adequate Points of Interconnection ('POIs'), resulting in calls failures between RJIL and other networks. POIs are "points between two network operators which allot voice calls originating from the work of one operator to terminate on the network of the other operator." Further, a smooth connectivity amongst different telecom service providers is ensured by unified licenses, which put an obligation over the telecom service providers to interconnect with each other on POIs. This is subject to compliance of regulations and directions issued by the Telecom Regulatory Authority of India ('TRAI').

Meanwhile, RJIL had also filed letters to the TRAI complaining against the conduct of the IDOs. It was alleged by RJIL that IDOs were *inter alia* denying mobile number portability ('MNP') to customers who wanted to switch to RJIL, and that the COAI was acting against RJIL at the behest of the IDOs.

On the basis of four separate writ petitions filed before it, the BHC set aside the Impugned Order on September 21, 2017. The BHC had held that the telecom sector is governed, regulated and controlled by certain special authorities i.e. the TRAI Act and the Indian Telegraph Act, 1885 ('Telegraph Act'), and CCI does not have the jurisdiction to deal with interpretation or clarification of *inter alia* contract clauses, unified license, interconnection agreements, quality of services regulations, which are to be settled by the TRAI/Telecom Disputes Settlement and Appellate Tribunal. The BHC further held that the powers of CCI are not sufficient to deal with the technical aspects associated with telecom sector which solely arise out of the TRAI Act.

The SC held upheld the BHC's finding that the relevant market in the present case being

¹⁵ Combination Registration No. C-2018/09/599.

¹⁶ Civil Appeal No(s). 11847-11851 of 2018.



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the telecom market, was therefore regulated by the statutory regime under the TRAI Act. The TRAI Act establishes the TRAI as the regulator exercising supervision and control and providing guidance to the telecom market, and telecom service providers are bound by license agreements between the central government and the service providers. Further, the functioning of telecom operators, who are granted license under Section 4 of the Telegraph Act, is regulated by the provisions in the TRAI Act.

TRAI's functions include: (i) ensuring technical compatibility and effective inter-relationship between different service providers; (ii) ensuring compliance of license conditions by all service providers; and (iii) settlement of disputes between service providers. In this regard, the sc noted that RJIL's disputes were captured within TRAI's functions. Moreover, RJIL had also specifically approached the TRAI for settlement of these disputes.

The sc further stated that unless the TRAI were to find fault with the IDOs on the allegations raised by RJIL, the matter could not be taken further even if one were to assume that CCI has the jurisdiction to deal with the matter.

The sc also noted that if CCI were allowed to investigate matters that are already being decided by the TRAI, it may lead to conflicting views being given by the two bodies. However, the sc also noted that TRAI does not have the exclusive jurisdiction to deal with competition law issues in the telecom sector. The specific purposes of the TRAI Act and Competition Act have to be kept in mind before deciding on jurisdiction; while CCI has the sole jurisdiction to address allegations of anti-competitive agreements, and investigating against cartels, a comity has to be maintained between CCI and TRAI's roles in the present case. Therefore, once the TRAI deals with the issues of RJIL with a *prima facie* finding of cartelization between the IDOs, the CCI would be allowed to investigate the case.

Separately, while discussing the decision in **Competition Commission of India v. Steel Authority of India Limited ('SAIL')**, the sc disagreed with the BHC's conclusion that the Impugned Order is quasi-judicial. The sc held that a jurisdictional challenge is maintainable in writ petitions even against an administrative order. However, given that the Impugned Order is administrative in nature *i.e.* it only contemplates a direction to the DG to investigate, the sc held that BHC would not be competent to adjudge the validity of such an order on merits.

In light of the above, the sc upheld the BHC's direction to set aside the Impugned Order passed by the CCI.



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Client Service Law Firm of the Year
Chambers Asia-Pacific Awards, 2017

❖
Best Indian Law Firm
International Legal Alliance Summit Awards, 2017

❖
Tier 1 in India M&A Rankings
Asian Legal Business 2018

❖
Ranked No.1
for the Indian M&A Announced Deals League Table by Value and Volume
Ranked No. 1
for the Indian M&A Completed Deals League Table by Value and Volume
Thomson Reuters' Emerging Markets M&A Legal rankings Q1 2018

❖
Ranked No. 1
for India in the M&A Announced Deals League Table by Deal Value and Deal Count
Bloomberg's Global M&A, Legal rankings Q1 2018

❖
Ranked No. 1
for India in the M&A Rankings by Deal Value and Deal Count
Mergermarket's Global and Regional M&A League Tables of Legal Advisors Q1 2018

❖
Ranked No. 1 for PE and M&A Rankings by Deal Count and Deal Value
Venture Intelligence League Tables of Legal Advisors 2017

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