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# CCI *v.* TRAI: Regulatory Framework for Better Coordination and Interoperability

**Ritima Singh***

## Abstract

Section 18 of the Indian Competition Act, 2002 ('Act') holds the Competition Commission of India (CCI) responsible for promoting and sustaining competition in markets in India. This duty of CCI is reinforced through the twin mirror reflection provisions provided in Sections 21 and 21A of the Act. Evidently, the Act holds robust provisions for inter-regulatory consultation and coordination. However, referring to the annual reports of CCI, it appears that, in the preceding 10 years, no reference has been made by any sectoral regulator to CCI. Thus, even though a robust regulatory architecture of interoperability exists, it is not being used to its optimum potential. This lack of inter-regulatory consultation has often resulted in protracted litigation, of which *CCI vs. Bharti Airtel Limited* (2019) is a classic example, wherein the apex court highlighted that comity between the sectoral regulator and the market regulator, i.e., CCI, is a crucial aspect of market regulation and must be exercised effectively. In order to strengthen competition in the market, it is essential that both CCI and the Telecom Regulatory Authority of India (TRAI) function in an atmosphere of mutual cooperation and consultation. This paper seeks to critically analyse the legal and regulatory framework, judicial pronouncements, and recent public policy developments in India to support the coordination and consultation framework between TRAI and CCI, while drawing a comparison to international best practices. The paper attempts to bring forth a potential framework to support and enhance the coordination and interoperability between CCI and TRAI in an effective manner.

**Keywords:** CCI, TRAI, interoperability of regulators, consultation

*Senior Executive, Department of Corporate, Legal and Regulatory Affairs, ASSOCHAM (mailbox.ritimasingh@gmail.com)

## 1. Introduction

Markets in India are governed by sector-specific regulators. While TRAI governs the Telecom sector in India, CCI discharges cross-sectoral functions. CCI's primary function is to promote competition and curb anti-competitive practices in the market; however, this "market" could be anything from food to infrastructure. Hence, it may not be remiss to state that the Competition Act in India is complementary to the existing enactments governing several sectors, here, the Telecom sector. There is a landmark Supreme Court judgement in furtherance to the same in *Competition Commission of India v. Bharti Airtel* (AIR 2019 SC 113), wherein the apex court highlighted that comity between the sectoral regulators and the market regulator, i.e., CCI, has to be enhanced.

While Section 60 of the Competition Act, 2002 ('Act') is a non-obstante clause establishing the supremacy of the Act and the body therein on competition enforcement, Section 62 asserts that the Act ought to work harmoniously with other enactments. In addition, Section 18 of the Act puts the onus on CCI to eliminate practices having adverse effects on competition, and promote and sustain competition in the market to protect the interests of consumers. Without doubt, the Act puts forth an extraordinarily wide mandate. It is pertinent that, though India has a dedicated regulator, i.e., CCI, to look into the domain of competition, the governing statute of TRAI also aims to promote and enhance competition in the sector (Competition Act, 2002, §18). This "golden triangle", comprising Sections 18, 60, and 62 of the Act, are the foundation of the jurisdictional disputes between CCI and other regulators. To build on this, Sections 21 and 21A of the Act are the limbs of the interface between CCI and TRAI.

This paper investigates the above-stated framework in the Indian market to identify the issues responsible for jurisdictional overlaps and inefficient coordination or consultation between TRAI and CCI. The aim of this paper is therefore to suggest a framework that supports efficient and effective coordination and interoperability between CCI and TRAI in the interest of the market players and consumers.

TRAI was established on 20th February 1997 by an Act of Parliament called the Telecom Regulatory Authority of India Act, 1997 ('TRAI Act'), to regulate the telecom sector, inclusive of deciding or revising

tariffs for telecom services that were previously executed by the Central Government. Today, the telecom sector in India has become one of the fastest-growing markets, with the intervention of technology and multiple service providers. TRAI's jurisdiction has expanded with the introduction of various market players and service sectors such as OTT platforms, e-commerce, and the internet. For consumer welfare and protection of the interests of stakeholders and market players in the telecom sector, one of the crucial and controversial areas in effectively regulating the sector is competition. With the emergence of multiple market players and growing anti-competitive practices in the sector, the telecom and competition authorities must rethink their role and function and move towards a more coordinated regulatory framework for better governance. However, in order to build a framework for enhanced cooperation and interoperability between the two organisations, it is necessary to understand the existing legislative framework and the judicial trend in the country governing the telecom sector in general and the competition aspect in the sector in particular.

### 1.1. Legislative Framework

As per the definition of "telecommunication services" under the TRAI Act [§2(k)], the word covers a wide ambit of sectors comprising basic and cellular telecom services, internet access, and broadcasting services (Telecom Regulatory Authority of India, 2016). Over the years, the realm of these sectors has gradually blurred owing to the intervention of technologies such as direct-to-home (DTH) services, enhanced application of new technologies, and relatively cheap internet access and other developments such as blockchain and application of artificial intelligence (AI). TRAI aims to position India as an emerging telecom sector, with one of its main objectives being the provision of a "fair and transparent policy environment which promotes a level playing field and facilitates fair competition" (Telecom Regulatory Authority of India, 2016).

In furtherance to the above objective, the regulator has issued several regulations, notifications, orders, and directives to address issues emerging from market regulation comprising competition issues. The apparent "turf" that has emerged is primarily on the jurisdiction of issues arising in the telecom sector that fall under the purview of the Act. The underlining

cause of the turf in the telecom sector can be traced to Section 11 of the TRAI Act, wherein TRAI has been bestowed with the responsibility "to facilitate competition and promote efficiency in the sector" (TRAI Act, 1997, §11). Previewing Section 14 of the TRAI Act, matters pertaining to "monopolistic, restrictive or unfair trade practices" that fall under the jurisdiction of the Monopolies and Restrictive Trade Practices Commission (present-day CCI) were excluded from the jurisdiction of the Telecom Disputes Settlement and Appellate Tribunal (TDSAT) (TRAI Act, 1997, §14).

In furtherance to this, in 2019, CCI wrote a letter to TRAI highlighting its competence to hear matters pertaining to predatory pricing, as mandated under the Competition Act. The letter was in pursuance of a consultation paper released by TRAI in February 2017 on anti-competitive concerns in tariffs by telecom service providers (TSPs) (Regulatory Principles of Tarif Assessment, 2017). In the letter, then-CCI Chairperson stated that "issues and questions for consultation relating to delineation of the relevant market, assessment of dominance and predatory pricing [are] issues of determination for the Commission" (The Hindu Business Line, 2018). In response to the letter, TRAI stipulated that they had the desired capacity and experience to hear all the matters, including competitive issues arising in the telecom sector in general and the tariff regime in particular (PTI, 2017). In furtherance to its assertion, pursuant to the Telecommunication Tariff (Sixty-third Amendment) Order, 2018 ('Amendment Order'), TRAI amended the Telecommunication Tariff Order, 1999 ('Tariff Order') to regulate tariffs offered by TSPs on the grounds of competition law principles.

By way of the above amendment, TRAI introduced concepts of "significant market power" and "predatory pricing" in the Tariff Order. The legitimacy of the same, as stated by TRAI, was sourced to the governing statute that is the Telecom Regulatory Authority of India Act, 1997, which requires TRAI to take "measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services" (TRAI Act, 1997, § 11). TRAI in its Notification Order inserted several definitions to provide guidance on non-predation (Telecom Regulatory Authority of India, 2018).

It is pertinent to note that the Amendment also refers to the definition of "predatory pricing" as stated under the Competition Act to stress the importance of the intent of indulging in predatory pricing. Also, the order vividly states that the concept of Significant Market Power (SMP) is similar to the concept of "dominance" as stated in the Competition Act. The Amendment also "confers *suo motu* powers on TRAI to examine tariffs for determining the occurrence of any predatory pricing," thereby extending its jurisdiction to ex-post abusive conduct coupled with the power to impose a penalty of up to INR 50 lakh/tariff plan.

### 1.2. Judicial Trend

One of the first judgements to address the turf arising from the jurisdiction issue between TRAI and CCI was *Star India v. Sea T.V. Network* (2006), wherein the Hon'ble Supreme Court of India held that the MRTP Commission (now CCI) does not have jurisdiction that violates the TRAI Act, even though the dispute involves an issue of "monopoly and restrictive trade" (an old provision from the MRTP Act) practices. Going forward, in the case of *Consumer Online Foundation v. Tata Sky* (2011), the complaint was filed before CCI and Dish TV challenged the same, stating that CCI does not hold jurisdiction, as the matter was already pending before the TDSAT and TRAI. The CCI opined that, though TRAI is the market regulator, CCI, being the regulatory authority for competition, has exclusive jurisdiction on matters involving a violation of the provisions of the Competition Act. So far, no conclusive decision has been taken on the jurisdictional turf.

In 2017, Bharti Airtel, in the matter *Bharti Airtel v. Reliance Jio* (2017) raised the following allegations, pointing out violation of the Competition Act by Reliance Industries:

- Reliance Industries (RI) exploiting their financial strength has entered into the telecom market through Reliance Jio. The Act, as alleged, was an abuse of the dominant position by RI and the same being in contravention to Section 4(2)(e) of the Competition Act, 2002.
- The free services such as "Jio Welcome Offer", under which data, voice, video, and a full bouquet of applications were given

free-of-cost to purchasers amounted to predatory pricing and hence, was in contravention to Section 4(2)(a)(ii) of the Competition Act, 2002.

- There stood an anti-competitive agreement between RI and Jio, whereby Jio had access to the humongous resources of RI, leading to an AAEC in the telecom industry, the same being in contravention of Section 3(1) of the Act, 2002.

CCI initiated the proceedings with a preliminary conference, followed by examining each allegation levied. The entire proceedings and investigation were undertaken by CCI without any consultation from TRAI. CCI had narrowly interpreted the term "relevant market" in the present matter, deciding the wireless telecom service to be the relevant geographical market, and analysed the case on the dominance of Jio solely in its individuality. In addition, CCI went on to note that, as per market data, "Reliance Jio does not have a market share of more than 7% in each of the 22 telecom circles in India, and the market consists of several players (such as Vodafone, Idea, Tata, MTNL, etc.)" holding similar financial and technical capacity (Pravankalyan, 2020). Owing to the multiple players in the market, CCI held that consumers were not dependent on any one service provider, and hence, Jio was held to not be in a dominant position. Since it was not in a dominant position, there did not arise any case of abuse of the dominant position through predatory pricing. The judgement was heavily criticised by many, with one prominent effect of the judgement being that, in due course, many of the telecom players were gradually wiped out from the market.

In 2019, Jio filed a complaint against Bharti Airtel, Vodafone, and Idea in *CCI v. Bharti Airtel* (2019) under Section 19(1) of the Competition Act, alleging cartel formation by these three telecom operators and claiming that they were involved in anti-competitive practices. Further, Jio filed an application before TRAI to monitor the conduct of Incumbent Dominant Operators (IDOs) and Cellular Operators Association of India (COAI). While CCI in the above matter ordered an investigation under Section 26(1) of the Competition Act, the same was challenged before the Bombay High Court. The Bombay High Court held that CCI had no jurisdiction in the matter and that the matter should be referred to TRAI, which is technically equipped to deal with the telecom sector. CCI and Reliance

Jio challenged the impugned order before the Supreme Court by way of a Special Leave Petition.

In a pathbreaking judgement, the Supreme Court in the matter dismissed the appeals filed by CCI and Jio and upheld the decision by the Bombay High Court, resolving the long-existing turf for predominance between the cross-regulator, CCI, and the sector-specific regulator, here, TRAI, by deferring the scrutiny by CCI into any possible cartel between the telecom players.

For the first time, by way of the above judgement, the Court made a demarcation between issues that may be examined by CCI in a sector that already has a statutory regulator. The Court adduced the efficient exercise of Section 21A of the Competition Act, which makes it obligatory for CCI to seek the opinion of the sector regulator on sector-specific issues. By invoking the doctrine of harmonious construction, the Court maintained an equilibrium by giving TRAI the authority to determine sector-specific issues first, and evoke the jurisdiction of CCI if it apprehends the existence of anti-competitive practices.

The clarity between promoting competition and checking anti-competitive practices is one of the prominent reasons behind the conflicts in the above cases. It is necessary to understand that, even though CCI and TRAI share a common goal of protecting consumer interest, they differ in their approach and execution (CCI, 2021). For instance, in tariff regulation rates, TRAI would aim to keep tariffs reasonable for the benefit of consumers, whereas this could be viewed by CCI as a case of predatory pricing, which could close the door to potential service providers. In such a situation, parties often "shop" the forum convenient for them. The most plausible solution to the situation is enhanced comity and coordination between the two regulators, as directed in the Bharti Airtel case. The enhanced comity would also effectively play a pivotal role in avoiding protracted litigation in India. As observed in the Bharti Airtel case, both forums were approached to resolve the issue, followed by an appeal in the Bombay High Court and thereafter, in the Supreme Court. Had there been comity and coordination between TRAI and CCI, the years of litigation could have been avoided. The tool to enhance comity is Section 20 and 21A of the Competition Act, which is dealt with in further chapters.

## 2. The Regulatory Architecture in India: Comity Between TRAI and CCI

The market structure in India is dynamic and complex, with new markets emerging with the advent of technology. This structure is characterised under broad sectors such as telecom, IT, power, utility, and financial security. Post the Liberalization, Privatization, Globalization reforms in 1990, various independent regulatory bodies came into being for market regulation of these specific sectors. The establishment of regulatory bodies such as TRAI, CERC, and CCI has proven to be a revolutionary step to revamp the Indian economy. In addition, the Indian economy underwent a paradigm shift post the introduction of the Competition Act, 2002. One of the underlying objectives of introducing the Competition Act in substitution of the MRTP Act, 1969, was to enhance competition across industries. However, the current regulatory structure in India is not complementary to this objective. The case laws stated above prove that the regulatory architecture in India lacks effective collaboration and coordination amongst regulatory bodies. Several functions of these regulators are cross-sectoral, with competition being one of the prime subjects that exist across sectors, although, by the statute, its "regulation" lies with CCI.

### 2.1. Interoperability and Coordination Between CCI And TRAI

In 1999, the Raghavan Committee (Planning Commission, Government of India, 2007) was formed to evaluate the competition law framework in its existing form and suggest a suitable legislative framework for the country. The Competition Act, 2002, was enacted on the basis of the committee report, which was released in 2000. It is pertinent to highlight that the committee report itself pointed to the importance of comity and interoperability among CCI and other sector-specific regulators. Thus, the provision of Sections 21 and 21A was laid down in the Competition Act, 2002, amended in 2007 to widen the scope of the application of Sections 21 and 21A by giving power to the sector-specific regulator/statutory authority as well as CCI to make reference *suo motu*.

The legislative intent behind the introduction of these provisions could be either to give discretionary power to sector-specific regulators and CCI to decide amongst themselves on the jurisdiction of the matter or to allow both parties to concurrently decide on the issue. The first option sounds much less viable and plausible, as it creates room for ambiguities, for

example, which body would be the dominating decision-maker in deciding the jurisdiction, which forum to approach in case of the failure by both bodies to reach a conclusion, and remedies available with the litigant parties if they are not satisfied with the decision on the jurisdiction. Therefore, the second option, wherein both regulators concurrently decide on the jurisdiction or matter, appears more appropriate. The same is facilitated in a time-bound manner in sub-clause 2 of Sections 21 and 21A, wherein the Commission has been held responsible to revert on the reference sought within 60 days from the date of the receiving of the reference.

It would therefore be safe to conclude that the regulatory architecture in India facilitates comity and interoperability between CCI and TRAI. This brings us to analyse the comity through a more practical lens to identify if the regulators are efficiently exercising the provision of seeking reference from each other.

While the provision for inter-regulatory consultation does exist, a review of the annual reports of CCI indicates that, in more than a decade, not a single reference was made by any sectoral regulator to CCI for an opinion on an issue that may have implications of competition in that sector (Bhatia, 2021). CCI also made around seven references to sectoral regulators. Thus, this mechanism has not been used to its full potential. The National Competition Law Policy, 2011, stated that the sector-specific regulations should be consistent with competition law principles. The report highlighted that India needs a more structured mechanism to enhance cooperation between CCI and cross-sectoral regulators. The Competition Law Review Committee, in 2019, investigated into the scope and inter-regulatory consultation between CCI and other regulators as stated in the provision under Sections 21 and 21A of the Competition Act, and observed that there has been sparse use of these provisions (Ministry of Corporate Affairs, 2011). In 2019, the Insolvency and Bankruptcy Board of India published its working group report, which stressed on the need for enhanced coordination between CCI and sectoral regulators. The report recommended that CCI must build capacity in the ecosystem for competition assessment of state interventions (Ministry of Corporate Affairs, 2011). The following section looks at various best practices followed around the world to address the issue of interoperability and coordination between CCI and sector-specific regulators in general and TRAI in particular.

## 3. Regulatory Framework to Enhance Coordination and Interoperability Between CCI and Other Sector Regulators

### 3.1. Best Practices

Table 1 highlights the practices being followed in various jurisdictions to smoothen sectoral interoperability. This information can provide major takeaways for India to enhance sectoral cooperation and mitigate jurisdictional disputes.

**Table 1.** *International Best Practices and Key Takeaways for India*

| S. No. | Jurisdiction | Best Practices | Key Takeaway for India |
|---|---|---|---|
| 1. | Singapore | The Singapore Competition Act empowers the Competition and Consumer Commission of Singapore (CCCS) to sign cooperation agreements with other sector regulators, comprising clauses on information sharing, consultation, etc. | Cooperation agreement between CCI and sector-specific regulator. |
| 2. | UK | The CMA, by way of MoUs with sector-specific regulators, sets out the cooperation mechanism ("MOU dated December 2015 between CMA and Payment Systems Regulator," 2015; "MOU dated February 2016 between CMA and Office of Communications," 2016). Additionally, the Enterprise and Regulatory Reform Act, 2013 ('UK Enterprise Reform Act') empowers the CMA to decide on matters pertaining to jurisdiction in case of jurisdictional overlap following consultation. | The power of deciding jurisdiction may be given to CCI, following consultation, since CCI is the regulator with expertise in competition law issues. |
| 3. | OECD | Timely exchange of information and prior consultation between competition authorities and sectoral regulators is a key element of cooperation on issues that may impact their respective areas of operation (OECD, 1998; UNCTAD, 2006). | Exchange of information and market knowledge of sectors. In India, CCI conducts several sector-specific market studies as part of their advocacy initiative. |

### 3.2. Recommendations

In order to distinctly define the jurisdiction between TRAI and CCI, the following approaches can be adopted:

- It is the need of the hour that the subject matter from the telecom sector that falls under the purview of competition law is predefined. CCI, as part of its advocacy initiatives, conducts market studies of different sectors. A study on the telecom sector was also conducted in 2021. Such studies could lay the groundwork for identifying subject matter that should strictly be dealt with by CCI for two main reasons: firstly, CCI is the designated body for dealing with competition law issues, and secondly, the Commission holds the desired attributes and expertise in the area.

  The telecom sector is very tricky when it comes to identifying the relevant product market or relevant geographic market for identifying dominant practices. High-end services create a natural entry barrier in the field of telecommunication, leaving the market with few market players. For instance, as highlighted in the telecom sector study by CCI, the Indian telecom sector has three major operators—Reliance Jio, Airtel, and Vodafone-Idea—which cover a total of 88.4% of the total market (CCI, 2021).

  In defining the subject matter that may be dealt with by the Competition Commission, representatives from both sectors, along with experts in the telecom and competition areas can jointly decide on the same. Since the telecom sector is an evolving field, the subject matters may be revised every two years to make them more contemporaneous.

- An independent body can be created to act as a bridge between CCI and other sectoral regulators in general as well as TRAI in particular. The intricacies highlighting the formation and role of the body are as follows:
  - **Typology of the entity:** The entity can be created as a society or body corporate, or the same can be outsourced to institutions working under the aegis of the government.
  - **Composition of the body:** The corpus can comprise the Whole-time Members (WTM) of the respective sectoral body. Every regulatory body has a "commission" comprising chairpersons and two WTMs

holding legal and subject matter expertise of the respective sector. For instance, the current commission in TRAI comprises a chairperson, two full-time members, and two part-time members. One of the full-time members holding technical knowledge of the telecom sector can be made part of the independent body. Along with all the sector-specific regulators, CCI's WTM should be part of the body. Hence, the WTM of the sector-specific regulator, along with CCI's WTM, can be part of the governing body.

- **Head of the independent body:** Every regulatory body in India is chaired by IAS, IES, or IRS officers, who comprise the highest bureaucratic group in India. The chairperson is the most senior official, preferably retired from the administrative services, with experience in the competition sector (mandatory) and two or more sectors. Every order and study should be issued under the signature of the chair. The chair has to take decisions based on the majority view of the governing body.
- **Advanced research and policy drafting:** The independent body must comprise researchers, academicians, and professionals from the field of competition and telecom (other sectors as well) to conduct ground-level study and formulate the consultation process from stakeholders, draft recommendations that may be given to the governing body for necessary approval, and review them to be finally sanctioned by the chair.
- **Conduct of the independent body:** The body should be held accountable and should function in a transparent way. It should publish annual reports. The organisation can be jointly funded by all the sectoral members who are part of the independent body. By way of legislative amendments in the governing statute of the regulatory bodies, each body should be mandatorily made part of the independent body to enhance cooperation and interoperability between the sectors and CCI.
- **The objective of the independent body:** The prime objective of the independent body should be to act as a platform where all the regulatory body representatives can reflect upon policy decisions and issue regulations for enhanced outcome. This objective can be achieved by sharing market information as well as adopting an inclusive decision-making process.

- Necessary amendments should be made to the Competition Act and TRAI Act to make provisions for mandatory consultation mechanisms between CCI and TRAI (Ministry of Corporate Affairs, 2011).
- An alternative route for binding MoUs between CCI and TRAI to effectively set out their respective roles should be considered.

## 4. Conclusion

The current uneasy interface between TRAI and CCI is evident from the regulatory architecture in India as well as its complex and ambiguous legislative framework. A closer examination of the interface requires exploratory as well as normative insights. Competition enforcement is a sophisticated and complex process, which gets more dynamic with the interface of the telecom sector, as the sector per se is very intricate and diverse due to technological interventions. The Indian government and several ministries are working together to enhance coordination and interoperability. It is time that the long overdue turf between TRAI and CCI is addressed effectively.

This paper attempted to demystify the turf between TRAI and CCI from legislative and administrative perspectives. Several reports and committees have highlighted the issue in the past and made recommendations for legislative amendments, although without effect. The reference between CCI and TRAI is still at bay, and, to a considerable extent, these organisations are working in silos.

In order to effectively address the issue, this paper proposed a skeleton framework that, if implemented, may have the potential to resolve the turf between CCI and TRAI as well as smoothen the functions between other sector regulators. The framework proposed in this paper could act as a strong foundation on which to build a solution to enhance cooperation and interoperability between TRAI and CCI.

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