COMPETITION MATTERS

Shardul Amarchand Mangaldas

*For Private Circulation only* *January 2021*

# CCI Report on Market Study on the Telecom Sector in India

On 22 January 2021, the Competition Commission of India (*CCI*) published its *Report* summarising the main findings of the *Market Study on the Telecom Sector in India* (*Market Study*).[1]

The Market Study, with the Indian Council for Research on International Economic Relations participating as implementation partner, was launched in January 2020. The Report summarises the main findings of the Market Study (which has not itself been published). The 30-page Report traces the recent history of the telecom industry, highlighting trends and market outcomes. It discusses the key competition issues facing the industry now and in the near future. Finally, it provides a summary of the competition issues, making observations and giving indications of the way forward.

In this briefing we outline the position taken by the CCI in relation to these key competition issues. As will be seen, the Report does not give the CCI's definitive or final view on these issues. Although some helpful indications of its position are given, it often summarises the views of "experts" without giving a view itself. As an exercise in advocacy, it is also concerned to inform the view of sectoral regulators. Important as it is, in many respects the Report is a "work in progress".

## *Market Structure and Nature*

The Report usefully tracks the transformation of the telecom industry over the past two decades in terms of market structure and technology.

The sector is one of the largest and fastest-growing networks in the world, designed to meet the demands of a population of over 1.3 billion people. The period has seen a huge growth in the number of subscribers, with low pricing by telecom providers designed to attract large numbers of new users.

In 2019, with exits and consolidations, the number of operators had reduced to eight. This partly resulted from the aggressive pricing strategy of new entrant Jio in 2016, which led to price-cutting by other operators for voice as well as data. The CCI notes that Jio enjoyed a 'late mover' advantage by offering an all 4G service at significantly lower tariffs, as compared to other network providers who had to build on legacy 2G and 3G networks. At the same time, operators have had to grapple with high costs (including for spectrum and technological upgrading). As a result, the industry is seen as financially distressed and there continue to be challenges to the viability of telecoms businesses. Successfully moving to 5G will be challenging. As matters stand, three operators – Jio, Airtel and Vodafone-Idea - together have nearly 88.4% of the market, raising concerns that the exit of one would result in a virtual duopoly.

The market has also evolved from being one centred on voice to one centred on data. The emergence of over-the-top (*OTT*) services in 2009 initially resulted in disruption in the telecoms market. Telecoms providers now bundle OTT services with their telecoms offering, obtaining access to such services through contractual agreements, buying stakes in OTT companies and even building their own digital content. Increasingly, competition between telecom providers has moved from competition on price to competition on service quality, data speed and bundled offerings.

The fragmented nature of regulation should also be noted. The Department of Telecom (*DoT*) and Telecom Regulatory Authority of India (*TRAI*) are responsible for sectoral regulation, whilst the CCI is responsible for enforcing competition law across the board. Reference should also be made to the envisaged Data Protection Authority which will be responsible for data protection regulation when the new data protection law is adopted.

## *The Parameters of Competition*

The Report addresses the shift from price to non-price competition. Discounted pricing by Jio, a new entrant, in 2016, led to a price war, with several exits and a reduction in industry revenue. Appeals to TRAI to establish a floor price have not been accepted and the CCI has advised against the fixing of retail prices. In the meantime, operators have increased prices from unsustainable levels. The CCI notes that, where there is technological convergence, bundling of services and a pre-eminence of data, telecoms markets have evolved into two-sided markets where telecom companies operate platforms where content providers and subscribers connect. Such markets raise a regulatory challenge for competition law bodies and sectoral regulators.

The CCI points to non-price factors driving competition. Although consumers remain price-sensitive, factors such as quality of service,

1 CCI *Market Study on the Telecom Sector in India*: Key Findings and Observations (22 January 2021). https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-Study-on-the-Telecom-Sector-In-India.pdf.

data speed and bundled offerings influence consumer choice, partially reflecting the maturing of competition and recognising the intrinsic limitations of competition on price. The shift from voice to data is resulting in bundled offerings including voice, data, SMS and content, which will drive differentiation in the market. Service bouquets will be the likely choice for improving customer retention. The CCI further notes that customer retention is a continuous challenge in the telecom industry, due to remarkable product parity between different service providers.

## *Net Neutrality*

The CCI states that, as data-loaded bundled offerings become the norm, adherence to net neutrality principles will be instrumental in ensuring healthy competition. In this respect, TRAI regulations currently impose non-discrimination provisions on telecom service providers (*TSPs*).

Net neutrality principles will gain more prominence where technology convergence results in further integration across the value chain. Where telecom companies invest in digital content companies, payment platforms and social media firms, or *vice versa*, there may be a preference for their own content/network. However, many have argued that such relationships are not anti-competitive, since existing net neutrality rules keep discrimination and anti-competitive conduct in check. The CCI notes the parallel to the principle of search neutrality that bars search engines from promoting their own business. The CCI will be vigilant that such vertically integrated providers do not act to foreclose entry in the application layer. Where any conflict of interest arises, the CCI could look at this on a case-to-case basis under the Competition Act, 2002.

## *Traffic Management*

The CCI states that network capacity management is a key challenge for operators with a rapidly mounting burden of rich content (this was all the more so during the nation-wide lockdown caused by the COVID-19 pandemic). With the growth in data, and a limited number of players controlling a significant proportion of internet traffic, the CCI notes the potential for anti-competitive agreements between Content Delivery Networks (*CDNs*), Internet Service Providers (*ISPs*)/TSPs and internet companies. CDNs are exempted from TRAI regulations on non-discriminatory treatment. As commercial arrangements between these players are not disclosed, monitoring of such arrangements and traffic patterns would help in ensuring net neutrality and fair competition.

Public peering is permitted with the National Internet Exchange of India (*NIXI*) at a fixed charge. Private peering is based on bilateral negotiations, with no regulation and confidential agreements. The CCI notes instances of companies discriminating between internet traffic depending on whether they have a private peering arrangement. It has been reported that some broadband providers are using such arrangements to provide faster speeds to specific services. Morever, with vertical consolidation on the rise and operators building their own over-the-top platforms, traffic management can be used to prioritise own content over that of competitors. The application of net neutrality rules to peering arrangements is still being considered by TRAI. The CCI notes that experts have called for greater transparency in private peering arrangements without compromising forbearance in commercial terms and conditions.

## *Infrastructure Sharing*

Infrastructure sharing avoids unnecessary duplication of infrastructure, helps the roll out of telecom services and improves efficiency. Further enabling infrastructure is needed in the lead up to 5G in order to lower investment costs.

*Passive* infrastructure sharing is seen in terms of the essential facilities doctrine and has long been assured by means of interconnection regulations. Passive infrastructure sharing has been permitted since 2008. There are no significant regulatory barriers to enter the passive business and competition appears to be healthy.

*Active* infrastructure sharing is permitted based on mutual agreements. These commercial agreements do not fall within the scope of the essential facilities doctrine. Stakeholders have highlighted the need to encourage such sharing with minimal regulatory hurdles as a means of providing last-mile connectivity. In this context, the CCI notes that the National Digital Communications Policy (2018) has also underlined the need for sharing of active infrastructure. The CCI considers that policy enabling such sharing under a light-touch regulatory framework might have the desired effect. The CCI also points to TRAI proposals to allow ISPs to share active infrastructure and recommendations for the setting up of Public Data Offices to provide public Wi-Fi services by means of hotspots.

## *Unbundling Infrastructure and Service*

The CCI notes that infrastructure utilisation can be optimised through the unbundling of network components. Most experts are of the view that the various layers – infrastructure, network, service and application – should be completely segregated to induce competition, with differential licensing. Through unbundling, entities would be able to focus on their competitive advantage. Telecom companies could reduce costs by outsourcing services to independent licence holders. It will also increase competition within each layer. The CCI notes that, with the coming of 5G networks, business models based on "network as-a-service" are likely and an unbundled regime may be critical to realise the full potential of these new networks.

## *Spectrum Acquisition*

India has evolved towards a market-based approach to spectrum, through licensed auctions since 2010. With prices exceeding the reserve price in every subsequent auction, spectrum costs have been among the most expensive in the world. However, over the six auctions held during the period 2010-2016, the government has auctioned only subsets of the total frequencies. Indian operators also have a lower than global average spectrum and in some cases spectrum holdings are quite fragmented. Appropriate spectrum allocation will be key for the successful launch of 5G and indications are that spectrum for 5G will be relatively expensive, though the Telecom Regulatory Authority of India has proposed a steep cut in reserve prices for certain bands and that the entire spectrum should be available for auctions.

The CCI notes that ownership of spectrum gives a competitive advantage to operators providing wireless access services and access to larger amounts of contiguous spectrum can increase operational efficiency. Indian operators have lower than global average spectrum holdings and their battered financial health will impact their ability to acquire new spectrum and to launch 5G services.

## *Vertical Integration (M&As)*

The CCI states that technology convergence has inspired vertical integration in the industry, helping to forge strategic partnerships between telecom operators and digital solutions providers (including content providers, e-commerce platforms, payment platforms and cloud-based technology solutions). Resultant "bundling" may create dependency but also enhance welfare by reducing search costs. The challenge for competition authorities is to isolate cases of market abuse to the detriment of competition from cases where consumer welfare is enhanced.

Though it may be premature to say that vertical integration creates a "cul-de-sac" discouraging switching, empirical studies seem to suggest that lock-in can happen even in apparently open ecosystems, with companies working to keep users highly engaged inside their ecosystems. The CCI considers that, with technological convergence, such "walled gardens" may become the standard, with customers staying in because there is no need to leave or because costs of leaving would be too high.

From the competition standpoint, concerns could arise where customers are trapped. It needs to be asked whether there can be effective competition between such "walled gardens" or whether, as a result of network effects, there will be a "winner-takes-all" outcome. In the latter case, a vertically integrated provider will be able to hinder competition. Going forward, the role of competition authorities will be to assess the impact of telecom operators acting as platform to various applications, including entertainment, retail and payment systems. The CCI notes comments from the OECD that the volume of potentially anti-competitive mergers within the technology, media and telecommunications (TMT) sector accounts for 16% of the global total of merger notifications. Although stakeholders do not perceive vertical integration as a threat to competition, largely because of the application of net neutrality rules to telecom operators, the CCI states that cross-country examples suggest a need for greater scrutiny.

In the final part of the Report, the CCI takes a "deeper dive" into the question of the competition assessment of merged/integrated entities in multi-sided markets. It considers arguments that such an assessment must consider the "combined data power" of the new entity in establishing dominance and that access to data has the potential to become a significant barrier to entry. The CCI sounds a note of caution that data is not homogenous and the ability to use it to distort competition is likely to be contextual. Guidelines on competition assessment in such cases are still evolving. Most platforms can effectively act as gatekeepers, able to influence and potentially enter multiple markets by attracting online customers. Notwithstanding possible efficiencies, a high combined data share can result in market power, resulting in entry barriers for potential entrants, increasing switching costs and harming other market players. The CCI will therefore need to examine on a case-by-case basis whether the collection of "excessive amounts" of data can be anti-competitive.

The CCI also notes that the new business models based on vertical convergence in the telecom industry will require competition assessment using tools developed for multi-sided markets. Since the platforms tend to be naturally large, size will cease to be a sufficient condition for antitrust action. The acquisition of data has become an important factor of competition. The CCI believes that the Competition Act, 2002 is robust enough to deal with the new challenges given the built-in flexibilities in the legislation. The CCI refers to ideas of *ex ante* regulation in the UK and the EU, including platform access, data portability, data sharing and non-discriminatory access, but states that new *ex ante* tools should be proportionate in order to avoid the stifling of innovation in the market. It concludes that a balance must be struck between *ex ante* regulation and *ex post* enforcement. The nature of this balance is clearly a work in progress.

## *Same Service Same Rule?*

The CCI also addresses the question whether OTT players should also be subject to regulation. This was called for at the time OTT disrupted the TSPs' business and is the subject of ongoing consultations by TRAI. As seen above, the relationship between telecoms companies and OTT players has evolved from being disruptive to being symbiotic and pro-competitive. The CCI notes that, on balance, experts feel that a separate regulatory framework for OTTs is not necessary and that excessive regulation may stifle technological innovation and be counterproductive. It does, however, appear, that TSPs must pay licence fees on all revenues, including revenues on their own OTT apps, whereas stand-alone OTT companies do not have to pay any part of their revenue to government to stream content. The CCI's own views on the matter are not stated.

## *Data Privacy and Competition*

The CCI finally comments on the relationship between data privacy and competition. It states that low standards of privacy protection by dominant players can be abusive as they imply a lack of consumer welfare. Lower levels of data protection can also amount to exclusionary behaviour undermining the competitive process. Tying with other digital products can further strengthen data advantages enjoyed by a dominant incumbent by the cross-linking of data collected, creating a vicious circle. Though the CCI recognises that there is a school of thought seeing privacy as fundamentally a consumer protection issue, it sees the anti-trust law framework as it stands as broad enough to address exploitative and exclusionary behaviour arising out of privacy standards by entities commanding market power.

Given the evolution of the telecoms industry from a "rudimentary voice service" to a "complex data-centric converged service", the CCI points to the importance of lines of communication between the DoT, the TRAI, the CCI and the envisaged Data Protection Authority to ensure that regulatory decisions are robust and consistent. Overlapping jurisdictions should be harmonised by better regulatory design and improved lines of communication. The inter-regulatory consultation mechanism in Sections 21 and 21A of the Competition Act will be extremely important. Unsurprisingly, the CCI concludes that it will remain the body to resolve antitrust and competition related issues.


## COMPETITION LAW TEAM

**Pallavi Shroff**
*Managing Partner*
pallavi.shroff@AMSShardul.com

**John Handoll**
*National Practice Head - Competition Law*
john.handoll@AMSShardul.com

**Naval Satarawala Chopra**
*Partner*
naval.chopra@AMSShardul.com

**Shweta Shroff Chopra**
*Partner*
shweta.shroff@AMSShardul.com

**Harman Singh Sandhu**
*Partner*
harman.sandhu@AMSShardul.com

**Manika Brar**
*Partner*
manika.brar@AMSShardul.com

**Aparna Mehra**
*Partner*
aparna.mehra@AMSShardul.com

**Gauri Chhabra**
*Partner*
gauri.chhabra@AMSShardul.com

**Yaman Verma**
*Partner*
yaman.verma@AMSShardul.com

**Rohan Arora**
*Partner*
rohan.arora@AMSShardul.com