LAW ET JUSTICIA LAW REVIEW

VOLUME 1 ISSUE 1

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PUBLISHER DETAILS

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"EXISTENTIAL CONUNDRUM OF THE TELECOM SECTOR VIS-À-VIS THE DISPUTE OF ADJUSTED GROSS REVENUE AND DISRUPTION OF COMPETITION"

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Link to paper: https://www.lawetjusticia.com/volume1-issue1/existential-conundrum-of-the-telecom-sector-vis-a-vis-the-dispute-of-adjusted-gross-revenue-and-disruption-of-competition
Link to Volume 1 Issue 1: https://www.lawetjusticia.com/volume-1-issue-1

ABSTRACT

The telecom industry in India has seen in the recent years, what could be called as a revolution for the consumers but a disaster for the industry itself. Since the beginning of the price war back in 2016, numerous companies have gone out of business and due to recent developments, few of the remaining may follow.

In 2018, the Hon'ble Supreme Court gave the verdict in favour of the government in relation to the Adjusted Gross Revenue dispute which arose in the year 2005 as the telecom companies approached the Telecom Disputes Settlement Appellate Tribunal (TDSAT). The present situation is that the telecom companies have registered the highest losses ever and in telecom oligopoly may soon turn into a duopoly or monopoly as the telecom industry becomes less and less lucrative with time, coupled with the failure of Government telecom companies like Bharat Sanchar Nigam Ltd. and Mahanagar Telecom Nigam Ltd.

The purpose of this paper is to study the telecom licensing framework of India and comparing the same with that of other countries. Further, the judgement of the Supreme Court in relation to the AGR dispute would also be discussed along with its repercussions on the telecom

industry while drawing contradictions with the competition law and discussing the probable future of the telecom industry in India.

INTRODUCTION

The telecommunication industry of India is the second largest in the world, employing over 400 million people, with a contribution of 6.5% to the Indian economy.[1] With the 5G technology on the line, the contribution of telecom industry to India's GDP is likely to rise to 8.2%.[2]

The roots of the telecommunication industry in India could be traced back to the year 1851, when for the first time, the telegraph line between Calcutta (now Kolkata) and the Diamond Harbour became operational for the use of the East India Company. The industry, in its modern sense, could be said to have evolved over time. In real sense, the industry started taking its present-day shape after the establishment of the Department of Telecommunications as a separate undertaking. For the purpose of making the department operational and making its operations easier, two Public Sector Undertakings were set up by the Department of Telecommunications, namely, Mahanagar Telecom Nigam Ltd. (MTNL) and Videsh Sanchar Nigam Ltd. (VSNL), in the year 1986. Initially, the Industry remained under the monopoly of the State under the socialist scheme of India and the private sector was allowed entry, gradually over the years 1991-1993.[3] The present-day scenario is, as of 31st December 2019, the private sector had market share of 89.45%, while the two Public Sector Undertaking, i.e., BSNL and MTNL had a market share of only 10.55%.[4]

Recently, many of the telecom companies have gone out of business due to the price war which began after the entry of Reliance Jio in the market. This initially was good for the consumers as India soon had the lowest data prices in the world but as the losses of the companies accumulate due to the loss of revenue on account of severe competition, it seems that the revolution would soon come to an end.

[1] Telecom, Industry in India - Investment Opportunities | Invest India, https://www.investindia.gov.in/sector/telecom (last visited Mar 18, 2020).
[2] ET Bureau, TELECOM INDUSTRY MAY CONTRIBUTE 8.2% TO GDP BY 2020 BY LEVERAGING 5G THE ECONOMIC TIMES (2019), https://economictimes.indiatimes.com/industry/telecom/telecom-news/telecom-industry-may-contribute-8-2-to-gdp-by-2020-by-leveraging-5g/articleshow/70071849.cms?from=mdr (last visited Mar 18, 2020).
[3] Dr. Papori Baruah, *Telecom Sector in India: Past, Present and Future*, 1 International Journal of Humanities & Social Science Studies (2014), http://oaji.net/pdf.html?n=2014/1115-1417594607.pdf.
[4] TRAI, press release no. 17/2020, https://main.trai.gov.in/sites/default/files/PR_No.17of2020_0.pdf

Further, the Supreme Crt, recently in the case of Union of India v. Association of Unified Telecom Service Providers of India[5] ruled in favour of the Government and held that the government's definition of Adjusted Gross Revenue would be the one applicable and ordered the companies to pay a collective due of over Rs. 92,000 crores. But, it is estimated that the actual payout may reach Rs. 1.4 lakh crores as the Government is likely to raise demand for the shortfall in Spectrum Usage Charges, coupled with interest and penalty.[6]

This further increased the burden on the remaining existing telecom companies and is potentially harmful for fair competition.

TELECOM LICENSING FRAMEWORK IN INDIA

In the year 1992, the Department of Telecommunications invited bids for licenses for the first time, across the four metro cities; namely, Bombay, Delhi, Calcutta and Madras. A minimum annual license fee was specified for each metro city. Initially it was, Rs. 3 crores, 2 crores, 1.5 crores and 1 crore for the cities of Bombay, Delhi, Calcutta and Madras but it was revised till the seventh year up to Rs. 24 crores, 16 crores, 12 crores and 8 crores respectively.

By the National Telecom Policy, 1994, the entry of private sector firms was encouraged[7] in the industry and in the following year, the Department of Telecommunications allowed bidding for cellular and wireline licenses. The license fee in this new model was based on a revenue projection model. Though in the year 1998, out of the 34 licensees, eight service providers defaulted in the payment of the license fee. It was subsequently found out by the Bureau of Industry Cost and Prices (BICP), that 13 of the service providers were operating in loss due to high license fee, spectrum usage and interconnection charges imposed by the Department of Telecommunications. Thus, it was evident that the Department of Telecommunications had failed in estimation of revenue generation of the service providers and the NTP, 1994 was a failure.

For the purpose of providing relief to the service providers in respect of the steep licensing fee, the National Telecom Policy, 1999 was introduced. Under the new regime, the operators had to pay their dues in the license fee till 31st of July, 1999 on *pro rata* basis. Subsequently, the operators had to pay 15% of their Adjusted Gross Revenue (AGR) and in addition to it, the

[5] Civil Appeals Nos. 6328-6399 of 2015 (SC); 2019 SCC OnLine SC 1393

[6] Yuthika Bhargava, Why is the telecom sector under stress? The Hindu (2019), https://www.thehindu.com/business/Industry/why-is-the-telecom-sector-under-stress/article29865316.ece (last visited Mar 18, 2020).

[7] National Telecom Policy, 1994, https://dot.gov.in/national-telecom-policy-1994

spectrum usage charges. Though this new licensing regime provided relief to the loss-making telecom industry, disputes arose between the Government and the companies with respect to the definition and the components of 'Adjusted Gross Revenue'.

With the advancement in technology and the development of telecommunication infrastructure, the Department of Telecommunications brought about various new licenses, like the License National Long Distance Telephony in 2000, License for Basic Telephone Services using Wireless Local Loop (WLL) in 2001 and the License for International Long Distance Telephony services in 2002.

The Department of Telecommunications, on the recommendations from Telecom Regulatory Authority of India (TRAI) introduced the Unified Access Service Licensing in the year 2003. This new licensing regime allowed the service provider to offer both fixed and/or mobile services under the same license, using any technology.

The National Telecom Policy, 2012 is the latest one and it has simplified the licensing framework to a great extent. It provides for unified licensing and delinking of spectrum from the license.[8]

DUBIETY IN ADJUSTED GROSS REVENUE'S DEFINITION – A TUSSLE BETWEEN THE GOVERNMENT AND TELECOM SERVICE PROVIDERS

Adjusted Gross revenue is inclusive of the spectrum usage charges and licensing fees, them being 3-5% and 8% respectively.

The dispute of Adjusted Gross Revenue between the Government and the service providers emerged by the National Telecom Policy, 1999. The dispute was in relation to the meaning of the term *'gross revenue'* as defined in clause 19.1 of the Draft License Agreement of the new licensing regime. The clause read,

"The Gross Revenue shall be inclusive of installation charges, late fees, sale proceeds of handsets (or any other terminal equipment etc.), revenue on account of interest, dividend, value added services, supplementary services, access or interconnection charges, roaming charges, revenue from permissible sharing of infrastructure and any other miscellaneous revenue, without any setoff for related item of expense, etc."

[8] National Telecom Policy 2012, available at https://pib.gov.in/newsite/PrintRelease.aspx?relid=93289

Herein, the telecom companies are to pay 15% of their "Adjusted Gross Revenue" as the license fee though the same was decreased to 8% in 2013.[9] The issue regarding this was, for the purposes of calculating the gross revenue, the revenue from those activities of the companies were also included which were not in relation to the license granted. Such activities included, revenue on account of interest, dividend and other miscellaneous revenue. This led to the dispute between the telecom companies and the Government of India.

Supreme Court's verdict in relation to the dispute of Adjusted Gross Revenue

The Supreme Court in the case of Union of India v. Association of Unified Telecom Service Providers of India[10] gave the decision in favour of the Government and held that:

"The definition in agreement is unambiguous, clear, and beyond the pale of doubt, and there is no confusion in the definition of gross revenue, which is the basis for realisation of the license fee. Licensees have made a futile attempt to wriggle out of the definition in an indirect method, which was rejected directly in the decision of 2011 between the parties and it was held that these very heads form part of gross revenue."

This came as a setback to the telecom industry as the industry has been reporting diminishing revenue since the price war began after the entry of Reliance Jio in the market, in 2016.[11] This overburdened the companies with excessive losses and increased debt.[12]

The contentions of the service providers were, that the term *'service'* as has been recognised by various professional bodies like ICAI, SEBI and the Stock Exchanges, do not include Income from interest, dividend, etc. No license fee is levied on such income and thus shouldn't be inclusive in *'revenue'* for the purpose of calculation of license fee.

The accounts similar to the nature of bad debts recovered, write back of provisions and other debits from earlier years are also proposed to be included in *'revenue'* but the deductions on account of bad debt provisions, etc. for the current year are not allowed while computing *'revenue'*. Various elements of income were included in the definition of the term "AGR" which are not related to the operations under the license, like, dividend income, interest income on short term investment, discounts on calls, revenue from other activities separately licensed,

[9] TRAI, Recommendations On Definition of Adjusted Gross Revenue (AGR) in Licence Agreements for provision of Internet Services And minimum presumptive AGR, 2014, https://main.trai.gov.in/sites/default/files/AGR%20ISP%20recom%201%20May%202014.pdf

[10] Civil Appeals Nos. 6328-6399 of 2015 (SC); 2019 SCC OnLine SC 1393

[11] PTI, Telecom companies' revenue to decline for third consecutive year: Report @businessline (2019), https://www.thehindubusinessline.com/info-tech/telecom-companies-revenue-to-decline-for-third-consecutive-year-report/article26633789.ece (last visited Mar 18, 2020).

[12] Gulveen Aulakh, Carriers owe government nearly Rs 1.47 lakh crore: Telecom Ministry The Economic Times (2019), https://economictimes.indiatimes.com/industry/telecom/telecom-news/carriers-owe-government-nearly-rs-1-47-lakh-crore-telecom-ministry/articleshow/72141671.cms?from=mdr (last visited Mar 18, 2020).

reimbursements under the Universal Service Fund (USF), etc. Thus, the definition of the term *'revenue'* should be the one as provided under Accounting Standard 9.

Further, the definition of *'revenue'* should be a comprehensive one and not merely indicative as it may lead to unnecessary disputes in the future, which would be detrimental to the licensees in the long run.

The service providers also contended that the Telecom Regulatory Authority of India (TRAI) had already agreed upon the telecom sector's demand in relation to narrowing of the definition.[13]

The Hon'ble Supreme Court held the submissions by the service providers to be baseless and held that the Government has the absolute rights with respect to defining the terms in relation to a contract of licensing as under Section 4(1) of the Telegraph Act, 1885. Also, the recommendation of Telecom Regulatory Authority of India under Section 11(1)(a)(iii) would not prevail over the decision of the Central Government. Also, the Telecom Disputes Settlement Appellate Tribunal would have no jurisdiction to decide upon the validity of the terms and conditions of a licensing agreement made under Section 4(1) of the Telegraph Act, 1885.

The Supreme Court also held that the definition of *'revenue'* under the Agreement is independent of Accounting Standard 9 and the same could not govern Clause 19.1 of the license agreement.

Thus, the definition of the term *'revenue'* would be having its contractual definition, which has already been accepted by the parties and the service providers have already benefitted from the same.

Issues of Competition Law and Policy and the recent developments in the Telecom Sector

The primary goal of Competition law in India, as has been mentioned in the Preamble of the Act of 2002 is, *"'...keeping in view of the economic development of the country ... to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect interests of consumers and to ensure freedom of trade ..."*

The Competition Act, 2002 intends to check such economic activities, which could be detrimental to consumer welfare and fair competition. The telecom industry of India could be

[13] Explainer: SC's decision on adjusted gross revenue to lead to Rs 92,000 crore hit for telcos, Moneycontrol, https://www.moneycontrol.com/news/business/explainer-what-is-adjusted-gross-revenue-and-why-has-the-agr-dispute-reached-sc-4570091.html (last visited Mar 18, 2020).

called an Oligopoly as the big four, namely Reliance Jio, Vodafone-Idea, Bharti Airtel and BSNL-MTNL have a collective market share of 99.72%.[14] Since after the price war emerged in 2016 by the entry of Jio, numerous firms closed their business in the telecom industry on account of destructive failure, namely, Reliance Communications, Telenor, Tata Teleservices, Aircel and Videocon.

There is no shred of doubt that Reliance Jio has acquired a dominant position in the telecom industry in India, the question which ensues is, whether there is an abuse of such dominant position as enshrined under section 4 of Competition Act 2002? It is necessary for the government authorities to look into this question and thoroughly scrutinize it. It's not a camouflage that Jio entered the market with schemes like offering data and tariffs free of cost and since then it has been trying to take over the market with such tactics which has adversely affected the rate of competition, it barely suffered any losses due to the AGR judgement of Oct 2019 and is still growing further, it's a matter of time before it takes over the control of the whole telecom industry and even if one or two more companies manage to survive in this oligopolistic set up, chances are it will lead to quasi-monopoly pricing system and the benefits that the consumers have been enjoying for the past few years will be in dust before dawn.

CONCLUSION

India is currently world's second largest market in the field of telecommunications with a strong subscriber base of over 1.20 billion. The telecommunication services contribute largely tour GDP, but recently this sector has been in a major slapdash. If India really wants to improve it's ranking in the World Bank's Ease of Doing Business list then the government needs to come up with policies to bring the telecom sector out of the rubble it's drowning in. On one hand the government claims to boost the economy through projects like Digital India while on the hand we witness this severe disarray in the telecom sector which clearly hampers the vision towards such growth.

The major telecom companies in India as of now includes, Reliance Jio, Bharti Airtel and Vodafone Idea, with government companies BSNL/MTNL struggling to revive and other private companies like Telenor blown out of the water. Amongst the companies still in competition, the only one which keeps to be indeed flourishing is Reliance Jio, after unravelling

[14] TRAI, press release no. 17/2020, https://main.trai.gov.in/sites/default/files/PR_No.17of2020_0.pdf

of cheap data tariffs, Jio successfully drove the smaller rivals out of business and forced the larger ones (like Vodafone and Idea) to merge.

With the merger of Idea and Vodafone, the Vodafone Idea Ltd emerged to be India's largest telecom operator, but now with the passage of time, Jio has again reserved the driving seat becoming the largest telecom player in both revenue and market. It is pretty evident that this growth of Jio's subscriber base is predominantly at the cost of Vodafone-Idea Ltd. There have been significant rumours regarding Vodafone leaving the Indian telecom market and with the statement of KM Birla, Chairman of Vodafone-Idea, "If we are not getting anything, then I think it is end of story for Vodafone-Idea" talking about getting relief in the payment of statutory dues. Amongst all this haphazard the only company which seems to be standing on its legs in competition with Reliance Jio is Bharti Airtel, but again this still reflects a duopoly, and it is obvious that a system of monopoly/duopoly in this sector will not be good for consumers.

However, with all the uncertainty in the market there seems to be no clear winner of this telecom war, one can predict that these top players might continue to bleed one another until others are left high and dry and there is only one surviving or maybe they will find a way to band together and exploit the oligopoly which would then exist. Anyhow, the future of the telecom market seems highly unforeseeable and India's statist politicians seem to assume that every sector is a cash cow for their welfarism (which precisely seems to be their priority as always), and that foreign investors can't quit India. Well, they better think again. Aviation has already been decimated by state action and with the ongoing shambles that this economy is in, it looks like telecom is next. The government's claims about making India a $5 trillion economy and a magnet for investment seems way too farfetched and awfully hollow with no real steps being taken. The need of the hour to come up with plausible measures is indeed audibly clear looking at our bleeding economy.