



SUBMISSION OF COMMENTS

CONSULTATION PAPER ON REGULATORY PRINCIPLES OF TARIFF ASSESSMENT

COMMENTS ON CHAPTER 3: ANTI-COMPETITIVE BEHAVIOUR IN TARIFF OFFERS

Consultation Questions 4-8: Relevant markets, dominance, predation and significant market power

CUTS Comments: There is need for the Telecom Regulatory Authority of India (TRAI) to ensure that there is harmony and uniformity in the way in which competition issues are handled in India. Having a template that assesses competition issues by TRAI that is different from the one that CCI uses is bound to create unnecessary conflicts, forum shopping and reverse some of the gains that CCI had gained in enhancing a competition culture in India. It is therefore important that for all competition issues, the Competition Act remains the guiding principle and TRAI can enforce competition issues in the same manner that CCI would also have done so.

Coming to the specific issues, there are always different cases which would justify the need for defining the relevant market for telecommunication services. For example, if the regulator is dealing with a dispute involving two fixed line service providers, then including other services might unnecessarily broaden the product market. Having a generalized standard geographic or product market for telecommunication services might serve little purpose as there is always a need to redefine the market in relation to the specific case that the regulator is dealing with. Thus, there might be no need for TRAI to have defined rules for defining relevant market for the whole industry, since there are several submarkets in the telecommunication industry.

Rather, as rightly observed, the Competition Act, 2002, should remain the guiding principle as far as defining the relevant market is concerned. On a case to case basis, the relevant market should be defined based on the Competition Act, 2002 guidelines and definition, focusing on identifying a market comprising of all those products or services which are regarded as interchangeable or substitutable by the consumer, by reasons of characteristics of the products or services, their prices and intended use. The criteria for doing this that are listed under the Act, such as the physical characteristics or end-use of the goods or services, pricing of goods or services, customer preferences, exclusion of in-house production, existence of specialised producers and classification of industrial products should be the guideline.

In sum, the regulator should avoid having a template somewhere which has predefined the relevant market. This would result in a lot of challenges when parties to the transaction being investigated

would use the template to try to broadly define the relevant market so as to dilute the significance of the issue on competition. Dominance for telecommunication services is also not straightforward given the existence of several competing services. For example, mobile data firms also offer internet services, such that it would be difficult to classify an internet service provider as dominant without taking into account the existence of the mobile service providers as they offer the same service. Thus, the identification of the relevant market would be central to depiction of a firm as being dominant or not.

The definition of dominance as given under the Competition Act, together with the criteria for determining it given under section 19 of the Act should be the guiding principle for defining dominance. The regulator should also try to avoid having in place a template that is precast, where dominance for the telecommunication services is predetermined. This removes flexibility when a case develops, which can easily be manipulated by the parties being investigated.

Significant market power should also be reviewed along the same lines that it is used in competition assessment; the ability of the individual firm to be able to influence the market price and outcome. However, this would also be defined differently depending on the submarket that is being assessed. Predation for the telecommunication industry is very frequent, especially since many promotions can be predation that is in disguise. In the physical goods market, charging below average variable costs is mostly defined as predation.

TRAI should be able to ensure that all promotions be approved first, where the onus is on the player that is engaged in promotions to demonstrate that the costs that are incurred in promotions can be recovered by the increase in volume of traffic. Promotions that are designed to result in losses should be deemed to be predation, unless it can be shown that market penetration was the intended objective, where the losses would be offset in the long term. Technical details on how the predation guidelines have to be worked out by TRAI, especially whether there is a measure that can be equivalent to average variable costs for the physical goods market.

Question 8: Any other issue relevant to the subject discussed in the Consultation Paper may be highlighted

CUTS Comments: There is need to ensure that the interface between TRAI and CCI remains cordial and working for the benefit of the industry in application of competition rules to the telecommunication sector by TRAI. In that regard, there should always be a culture of consultations between TRAI and CCI to ensure that the application of competition rules in the telecommunication s sector remains similar to those in the rest of the economy. In the same manner, where CCI is dealing with cases in the telecommunication sector, cooperation and consultation with TRAI should also be mandatory.

General Comment on Bundling

CUTS Comments: One important issue that the consultation paper touched upon but failed to appreciate its significance from the competition angle, is the issue of bundling, and by extension, the issue of vertical integration/concentration. Bundling of various telecommunications services has always been a feature of telecommunications markets since incumbent operators have always offered end-users fixed access with different pricing plans for fixed voice telephony. However, with the digitalisation and convergence, the number and the range of bundled offers has significantly

increased. Bundling can be economically be attractive for a number of reasons. Some of them are legitimate and pro-competitive, while others may harm consumers. Firms, for example, may be interesting in bundling because it can lead to cost reductions in the production and distribution, quality improvements or because it allows price discrimination. However, bundling can also be used to leverage market power, thereby increasing barriers to entry for new firms. Moreover, there is a risk that consumers may be locked in with a sub-optimal service choice if switching is impossible, difficult or costly. Finally, the complexity of bundled offers makes it difficult for consumers to compare prices across different firms, in turns affecting the issue of "transparency" addressed by the consultation paper.

General Comment on importance of innovation in the telecom sector

CUTS Comments: The telecommunications sector, similar to other high-tech industry, is characterised by a very high pace of innovation. The consultation paper has briefly pointed this out, to the effect that telecom services no longer comprise only of voice services, fixed-line or wireless, but now include also video, data and other value-added services. When assessing competition in the telecom market segments, thus, the regulatory authorities should pay attention to issues such as the existence of entry barriers, network effects, switching costs and lock-in characteristics. What should also be noted is that over time, there may emerge disruptive innovation/technologies and/or new, alternative products/services, which could result in significant changes in market structure and make market power transient.
