

## ***Even apex telecom body couldn't overrule Trai's ill-conceived Rs 3,050cr-penalty suggestion, had to send it back to Trai to review***

**Trai's track record is so poor, it has been pulled up by Tdsat & SC and even the telecom panel has asked it to justify its recommendations in the past; in this case, Trai didn't even wait long enough to examine all the data**

An unfortunate consequence of a system where even legitimate decisions are looked at suspiciously is that even a body like telecom's Digital Communications Commission—among others, DCC members are the telecom, industry and finance secretaries and the CEO of NITI Aayog—couldn't overrule Trai's ill-conceived recommendation of a Rs 3,050 crore penalty on Airtel, Vodafone and Idea, and, instead, just sent it back to Trai for review; it okayed the penalty but asked Trai to relook the amount as Rs 3,050 crore is the highest possible penalty. But without any firm direction from DCC, it is not clear if Trai will change its mind. So, while the government has to be focussed on trying to resuscitate an industry that it—and Trai—have driven to the ground, precious time will be wasted dealing with this. Indeed, given Trai's track record of imprudent decisions—and second thoughts—and being pulled up by various bodies including the TDSAT, the Supreme Court, and even DCC, it is unfortunate that DCC has had to put its faith in Trai taking the right decision this time around.

The current case pertains to RJio asking Airtel etc for Points of Interconnection (Pols) in June 2016 to enable its subscribers to talk to those on Airtel etc's networks. Though a limited number of Pols are provided during the testing phase—RJio had not, till then, announced a launch date—RJio asked Airtel for 5,246 Pols. Under the rules, these had to be provided within 90 days of RJio making a payment and four weeks were allowed for the bill to be raised and the payment to be made. Since RJio's Pol demand was far greater than that given during testing

and even relative to what other incumbents had—Airtel had given Vodafone 22,645 Pols for its 200+ million subscribers—the incumbent telcos questioned why so many Pols were needed. It didn't help that, in the test phase itself, RJio offered free services and got millions of subscribers.

All these issues—including those of fair play and predatory pricing—were raised before the government since there was no clarity on them; no telco had ever wanted so many Pols so fast, no telco had offered free services and got millions of subscribers ... even so, the telcos reported that they provided RJio the Pols within the stipulated time, even if kicking and screaming. As telecom regulator, Trai was aware of all these issues, but it still decided to recommend the highest penalty of Rs 50 crore per telecom circle be levied on Airtel etc since, due to their alleged delays in providing Pols, RJio's network was congested.

While not giving Pols stifles competition—if RJio didn't get enough Pols, its service would never have taken off—it is worrying that neither the government nor Trai provided clarity on the issues raised and, more important, while the Quality of Service rules mandate congestion be measured over 90 days, Trai took data for just one or two days to make its recommendation. Ironically, it later started a consultation on whether 90 days for providing Pols was too long; if it was settled law, why have a consultation?

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Indeed, when the matter was in the Bombay High Court—RJio petitioned the Competition Commission of India and alleged cartelisation by Airtel, Vodafone and Idea as it was not getting the Pols it wanted—the court also commented on there being “no such clear terms and obligations provided and/or crystallized at any earlier point of time”. Indeed, it is because Trai took such an extreme stance that over two-and-a-half years, the DCC never acted upon this; indeed, an internal ministry panel ruled against the fine.

Though the government was impressed enough with Trai to give its chairman an extension—no regulators are, by law, given an extension as this is seen as an attempt to influence them—this is not the first time Trai has got it horribly wrong. When Trai continued to recommend higher and higher reserve prices for spectrum—as a result of which so many auctions failed—DCC asked Trai to explain how it reached the conclusions it had on spectrum pricing, but Trai refused to do so.

At another point, Trai suggested large penalties on telcos for call drops and, a month later, it issued a technical paper that explained why telcos weren't entirely responsible for the call drops! When SC ruled on this, it said "a legislatively pre-determined penalty, without fault or loss being established ... (is) manifestly arbitrary and unreasonable"; it went on to say '(Trai) must respond in a reasoned manner to (comments) that raise significant problems, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule... including a rational connection between the facts it found and the choices it made".

And when Trai was examining the issue of predatory pricing, it said a telco must have a market share of at least 30% to be even investigated for predatory-pricing. While ruling on this, TDSAT said Trai's definition of significant market power (SMP) showed "a degree of pre-determination to dilute the entire concept of SMP", it was "arbitrary without any deliberation and effective consultation", that it was "not backed by any intelligible and objective criterion nor any convincing reason" and so was "an extreme step and unnecessary abdication of its regulatory powers by TRAI". TDSAT went on to add that the Trai's ruling provided "artificial protection to a TSP (telecom service provider) who may have the capability and intent to destabilise the sector through predatory-pricing".

Given this history, DCC needs to ponder over what it will do if Trai doesn't reduce its penalty recommendations dramatically. It is obvious that telcos like Airtel and Vodafone-Idea will take the matter to court, and that the Supreme Court will finally decide the issue, but if the government hopes to revive investments, it needs to take some firm decisions, not leave everything to be decided by the courts, especially since there is no saying how long this will take.