

YOUR CELLULAR SUBSCRIPTION HAS BEEN CANCELLED- A CONSPIRACY OF THE TELECOMS

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ABSTRACT

Telecom subscribers across the length and breadth of India have been left dumbfounded for the past few days. The reason for this sudden surprise is not good news this time around. While the customers were anticipating year-end offers by telecoms, they were shocked after receiving texts alerting them of impending cancellation of subscriptions by the country's top service providers. The notification as read verbatim stated that the customers faced probable discontinuation of outgoing call services provided that a certain minimum amount is not paid within a specified period. People at first shrugged these notifications as hoax and pranks, but after witnessing similar phenomenon across the entirety of the country it became fairly evident that the threat was not hollow. Amid growing fears, the telecom authority directed the telecoms not to terminate subscriptions without proper notice. But this matter as it stands can be summed up as being obscure at best. The current state of affairs has posed serious questions to be answered. What does this mean for the average citizen? What were the circumstances under which such dire steps were taken by the companies? Are they even empowered to pass such a

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resolution? Is the resolution a mere eyewash and a medium for profiteering by the operators, if so, what are its effects on the market and other competitors? This research paper tries to answer these questions and uncovers the legality of the actions taken by the operators. Reliance has been placed on company disclosures, journals, judicial precedents and legal principles for the purpose of research. The key findings have been extrapolated in analysing the factual matrix and finding a probable solution for the same.

1. THE NOTIFICATIONS IN DISPUTE- WHAT DO THEY MEAN?

In the month of November 2018, two telecom operators, namely Airtel and Vodafone Idea came out with a notification that the facility of outgoing calls provided by the network operators will be discontinued as of 13/12/2018 if not recharged with a plan with a minimum validity of 28 days. It further stated that the users with subscriptions to the unlimited combo pack would not be able to make outgoing calls from the 15th day of the expiry of the pack. This scheme has the further effect of restricting the customers from availing the calling facility even if they possess any amount of talk time balance in their account.¹ In simpler terms, this notification is a compulsion imposed by telecom operators to push forth the subscription of the unlimited prepaid plans which would translate into greater margins in the upcoming quarters. But such a restriction will have an adverse effect on customers especially the ones from the rural

¹ Chakri Kudikala, *Airtel, Vodafone Idea Prepaid Users Baffled as They Receive Outgoing and Incoming Voice Calling Expiry Notice*, TELECOM TALK (Nov. 21, 2018), <https://telecomtalk.info/airtel-vodafone-idea-outgoing-calling-expiry/183713/>.

background because of the increased rates of recharge for incoming calls. Moreover, the fact that a significant part of talk time balance will remain unused is a cause of worry for the average consumer. While it may be interpreted that this move will lead to an increase in revenue, it must also be remembered that the profit comes at the cost of customers.

2. THE RATIONALE BEHIND THE NOTIFICATION

In a statement released post-notification, the companies have imputed their decision on the declining Average Revenue per Unit (hereinafter referred as ARPU), stating further that this move would weed out dormant subscribers and, in turn, increase the ARPU. They have cited intense competition in telecom industry followed by the entry of Reliance Jio as the sole reason for the state of affairs.² It remains to be seen that whether the argument presented by Airtel and Vodafone Idea are in-line with the aforementioned treatment. In-depth discussion regarding the veracity of the claim will be done at a later stage in this research paper.

3. IS THE NOTIFICATION *ULTRA VIRES*?

It is imperative to answer the question that whether the telecom operators were empowered to pass the disputed notification. For the furtherance of the aforementioned cause, we must look into the terms and conditions imposed by Airtel and Vodafone Idea.

While Airtel does not explicitly state its intention to terminate or modify outgoing call facility under the ambit of prepaid services, certain

² Abhinaya Prabhu, *Yahoo, Airtel and Vodafone to block calls if you don't recharge; 60 million subscribers to be affected*, YAHOO FIN. (Nov. 24, 2018), <https://in.finance.yahoo.com/news/airtel-vodafone-block-calls-don-054540150.html>.

conditions are led down in case of offers, contests, and post-paid subscriptions. The terms and Conditions for the Secure Offer provided by Airtel empowers it to postpone, modify or cancel the offer partly or to its entirety with or without notice to the customer in case of unforeseeable circumstances inclusive but not limited to acts of god, technical difficulty or business exigency. It further provides immunity to the operator from claims of compensation arising directly or indirectly from the postponement or cancellation of the offer.³ Moreover, while setting out the terms applicable on Telenor customers (Airtel has merged with Telenor w.e.f. 14 May 2018), Airtel has explicitly expressed its intention to have complete discretion with respect to modification or cancellation of any prepaid/ postpaid offer.⁴ The word ‘any’ used in the terms and conditions can be construed for being applicable to all offers whatsoever, and not limited to the ones issued to the Telenor customers. In a move similar to that of Airtel, Vodafone Idea has also included terms and conditions with regard to the cancellation and modification of offer under its jurisdiction.⁵

Consequently, it can be interpreted from this discussion that these telecom operators are well within their power to deprive the customers of their right to make outgoing calls. They further are not liable to reimburse the subscribers for the loss of any amount of talk time balance.

³ *Terms and Conditions*, AIRTEL, <https://www.airtel.in/airtel-secure-terms>.

⁴ *Terms and Conditions*, AIRTEL, <https://www.airtel.in/mobile/terms-conditions>.

⁵ *Vodafone, Terms and Conditions Governing the Offer “Talk non-stop with Vodafone Unlimited calls”*, VODAFONE, <https://shop.vodafone.in/shop/traiDocs/Unlimited%20product%20t&C.pdf>.

4. CAN LEGALITY OF A NOTIFICATION BE CONSTRUED FROM THE POWER TO ISSUE NOTIFICATION?

The fact that the operators were empowered to pass the disputed notification is firmly established. But does that prove the correctness of the notification? The test for verifying the validity of the notification hinges on the interpretation of the terms and conditions. While the telecom operators can justify the claim by reiterating their power to enforce such notice vide the terms and conditions, the extent of communication of such conditions to the consumers is important for discussion.

For the purpose of answering the question that whether the terms and conditions were communicated to the consumer, and if so, to what extent, it is imperative to understand the environment in which these telecom providers operate. The total wireless subscriber base over the entirety of India stood at 1,183.41 million as of 31st March 2018. While rural subscribers accounted for 521.3 million people, the number of urban subscribers stood at 662.18 million. Tele-density for the country closed at 91.09%. The market was divided into public and private players, with the majority of the market being controlled by the private players (90.26%) and minority share was held by the public operators (9.74%).⁶ Telecom sector, in general, follow a structured supply chain. The offers drafted by telecom operators can be availed by the subscribers via two mediums namely offline and online. The offline mode includes subscription through retail stores engaged in the occupation of selling recharge plans and company produced or sponsored products. While Vodafone Idea hosts

⁶ Telecom Regulatory Authority of India, *The Indian Telecom Services Performance Indicators January – March 2018* (June 27, 2018).

9800 stores across the territory of India,⁷ its rival Airtel houses a comparable number of stores. Apart from the official stores, thousands of private stores sell recharge subscriptions through registered agents. Online mode, on the other hand, provides options for recharge via official websites.

Having discussed the business environment and the mode of subscriptions, we must now shift our focus on the fundamentals of a cellular subscription itself. A cellular subscription is a contract entered between the subscriber and the mobile operator. Cellular contract per se come under the ambit of a special type of contract namely standard form of contract. These types of contracts take stem from the generic nature. Since telecom offers are meant for a large number of people, they essentially form a similar structure and hence can be a standard contract.⁸ The offer and the terms and conditions form the contents of the contract, while the amount to be paid forms the consideration for the same. Moreover, the act of payment of prescribed amount forms implied assent to the contents of the contract. The important requisite for a contract to be enforceable is *consensus ad idem* i.e. meeting of minds. This legal maxim means that parties to a contract must have the same understanding of the terms of the contract. For the purpose of reaching consensus, it is imperative that the parties are aware of the terms and conditions applied to a contract. If either of the party is unaware of a term in the contract, it can

⁷ Imon, *Vodafone, Vodafone is now one of India's largest retailers with over 9800 retail stores*, TELECOM TALK (Sep. 2, 2018), <https://telecomtalk.info/vodafone-is-now-one-of-indias-largest-retailers-with-over-9800-retail-stores/142164/>.

⁸ Shyama Nair, *Legal Service, Standard Form of Contract-A Comprehensive Analysis*, LEGAL SERVICES INDIA, <http://www.legalservicesindia.com/article/1161/Standard-Form-Contract.html>.

be concluded that *consensus ad idem* is not reached. A contract that does not fulfil the condition of consensus cannot be held to be a valid contract.

The discussion regarding the telecom environment and fundamentals of a contract has an important bearing in understanding the effect of terms and condition. It further aids in augmenting the case of consumers. For the ease of convenience, the rationale is divided into-

4.1 SUPPRESSION OF MATERIAL FACTS

Brick and mortar stores launched by telecom operators are usually managed by people vying to sell offers and luring new customers. After all, that's what the companies expect from their sales executive. The motive of increasing revenue through sales has been given primary importance by the operators while defining the very purpose of hiring sales personnel.⁹ With the entry of Reliance Jio, leading telecom operators have become even more aggressive about acquiring new consumers. This is clear from the move of Vodafone Idea to increase the incentive from measly ₹ 70-80 to ₹ 180-250 for every new customer brought in by retailers.¹⁰ While this may seem to be perfectly rationale given the fact that any company would like to expand, but it has a direct effect on the contract itself. Walking into a telecom shop, it is not uncommon to see retailers jump over customers in order to earn their hefty commission. In an attempt to impress the prospective consumers, they focus on advocating the benefits of the offer and clearly skip out the terms and conditions.

⁹ *Vodafone, Job Description- Sales Executive*, VODAFONE, vodafone.taleo.net.

¹⁰ Devina Sengupta, *Vodafone, Idea throw down the gauntlet at Reliance Jio, Airtel with eye-catching incentive offers*, THE ECON. TIMES (Aug. 16, 2018), www.economictimes.indiatimes.com.

This, in turn, vitiates the concept of consensus in a contract. Moreover, with almost one in two customers hailing from rural background¹¹ there exist chances of duping. The act of concealment of terms and conditions form the suppression of material facts and is bad under the law. A person who conceals such information leading to the detriment of the parties is liable for committing the offence of fraud.¹² In the present instance, the act of concealment of terms and conditions is injurious to parties because of extinguishment of the right to information. Had it been the case that the customers were informed of the conditions beforehand, they might have chosen not to avail the offer owing to the exclusion of liability of the operators. Furthermore, deceitful acts which lead to the procurement of a thing (in this case, sim card) has been held to be a fraudulent act.¹³ Hence the act permeated by the retailer takes away the enforceability of terms and conditions as set by Airtel and Vodafone Idea.

4.2 THE COMMUNICATION OF TERMS AND CONDITIONS

Terms and conditions to a contract are usually mentioned in fine print and in a manner that usually does not pique the interest of the reader.¹⁴ Due to the sole reason of them being illegible, their enforceability is more often than not controversial. Taking this anomaly into account, courts have devised special provisions for the purpose of protection of consumers in case of a standard form of contract. These provisions provide a shield to

¹¹ *supra* note 6.

¹² A. Ayyaswamy v A. Paramasivam, (2016) 10 S.C.C. 386.

¹³ Amit Kapoor v Ramesh Chandar, (2012) 9 S.C.C. 460.

¹⁴ Alex Hudson, *BBC News, Is small print in online contracts enforceable?*, BRITISH BROADCASTING CORP. (June 6, 2013), <https://www.bbc.com/news/technology-22772321>.

the consumer from being harassed by mighty corporations. It further leverages his standing in the perpetually lopsided contract. One such instrument is the act of reasonable notice under which corporation is obliged to notify the consumers about the terms and conditions. In the case of *Henderson v. Stevenson*,¹⁵ it was held that the parties to a contract must be reasonably notified about the conditions for the purpose of making it binding in nature. Such a notice even if not expressed explicitly, shall be construed to have been notified if directions to the terms are mentioned in the contract.¹⁶ Judicial precedents have evolved over the years with the incorporation of stricter tests with respect to the enforceability of terms and conditions. Courts have come down heavily on insurance companies owing to the small print of exemption clauses and non-disclosure by the insurance agents.¹⁷ In the present case, neither do the recharge catalogues of Airtel and Vodafone Idea mention the terms and conditions¹⁸ applied nor are the consumers informed about them by the retailer. Moreover, while dealing with the transactions made via online mode, a quick perusal at the Vodafone Idea webpage brings out the fact that there is no mention of the conditions relating to offers provided by the operator.¹⁹ The facts pertaining to the current situation more than suffice in proving that no notification of terms and conditions whatsoever were provided to the customers. It can thus be construed that the conditions set forth by the

¹⁵ *Henderson v Stevenson*, [L. R. 2 H. L. 470].

¹⁶ *Parker v. South Eastern Railway Co.*, (1877) 2 C.P.D. 416.

¹⁷ *Asha Garg v. United India Insurance Co.*, 2005 SCC Online N.C.D.R.C. 37.

¹⁸ *NDTV Profit, Reliance Jio Vs Airtel Vs Vodafone: Prepaid Recharge Plan With 2GB Per Day Data Compared*, NDTV (Jan. 5, 2018), <https://www.ndtv.com/business/reliance-RelianceJio-vs-airtel-vs-vodafone-prepaid-recharge-plan-with-2gb-per-day-data-compared-1796239>.

¹⁹ *Vodafone, Best Prepaid Recharge Plans*, VODAFONE, <https://shop.vodafone.in/shop/prepaid/best-prepaid-plans.jsp#Unlimited>.

companies do not form a part of the contract and are not binding on the parties. Hence the act of restraining the customers from making outgoing calls is ultra vires.

4.3 UNILATERAL AGREEMENT

A contract as defined under Indian Contract Act, 1872, is an agreement enforceable by law.²⁰ Apart from legality, the key requisite for an agreement is the presence of two parties, i.e. the promisor and promisee.²¹ Hence, any agreement whatsoever is bilateral in nature and the exit of one party would mean the agreement being non-existent. In the present context, the so-called terms and conditions have the same effect as making the contract unilateral in nature. A quick look at the terms drafted by Vodafone Idea and Airtel brings forth the term “with or without notice”²² being in common. The clause of revocation of the contract without the notification to the consumer provides unilateral power to the operator. Furthermore, a telecom contract essentially being a contract of sale must be bilateral in nature and not unilateral in nature.²³ Unilateral cancellation of a contract of sale has been held to be invalid.²⁴ A unilateral agreement if detrimental to the party can be revoked at the option of the aggrieved.²⁵ As has already been discussed before, the wording used in the terms and condition makes the contract unilateral. Moreover, the immunity from any damages arising out of the conditions increases the

²⁰ Indian Contract Act, 1872, § 2(h).

²¹ *Id.*, § 2(c).

²² *supra* note 3.

²³ Aloka Bose v. Parmatma Devi, (2009) 2 S.C.C. 582.

²⁴ Thota Laxmi v. Govt. of Andhra Pradesh, (2010) 15 S.C.C. 207.

²⁵ Suresh Wadhwa v. State of Madhya Pradesh, (2017) 16 S.C.C. 757.

apprehension of injustice meted out on the consumers. Relying on the judicial precedents, it can be inferred that the terms and conditions are void owing to the unilateral construction. Furthermore, it can be concluded that the action taken by Vodafone Idea and Airtel on the basis of such arbitrary clause must also be not binding on the consumers.

5. FALLING ARPU-ADJUDGING THE VERACITY OF THE CLAIM

The above discussions have focused on the legality of enforcement of notification in relation to the empowering terms and conditions. It has been sufficiently proven that the notification loses its binding power owing to the unjust clause. Now, what needs to be observed is that whether the reason for bringing in the notification was genuine in the first place. For the purpose of adjudging the real intent behind the said action, the purported reason must be analysed in isolation to the law and in conjugation to the telecom market. In an attempt to understand the scenario the question that must be answered is that whether there was a fall in ARPU in the first place, and if so was the decline so steep that it compelled the companies to take such drastic a step?²⁶ Reliance on key financial statements and company disclosures will be placed for scrutinizing this claim. For the sake of convenience, the analysis is divided into four halves namely-

²⁶ *supra* note 2.

5.1 BHARTI AIRTEL

The company has experienced lean quarters for the past two financial years. It has been relenting amid the pressure from a reduction in International Termination Rates (ITR) and steep rate cuts due to the disruptive market approach employed by Reliance Jio. The biggest headache for the company though is the failure in the translation of growing customer base into revenue. This has left a dent in the profit margins and free cash flow. While the customer base of the company increased from 355.67 million FY17 to 395.72 in FY18,²⁷ total revenues registered a dip of 18% from 5,65,511 million to 4,62,639 million in the preceding fiscal year.²⁸ The Earnings before Interest, Tax, Depreciation, and Amortization (EBITDA) plummeted 34% from 5, 65, 511 million to 462,639 million in the same period. Furthermore, in the quarter ending March 2018, the company saw a fall in ARPU to an all-time low of ₹ 116,²⁹ from ₹ 123 in the previous quarter.³⁰ FY19 provided a glimmer of hope for the company with consolidated total revenue on an underlying basis witnessing a surge of 0.5% and closing in at ₹ 20, 422 crores in its

²⁷ The Statistics Portal, *Number of Bharti Airtel mobile services customers in India from FY 2013 to FY 2018 (in millions)*, STATISTA, <https://www.statista.com/statistics/740370/india-number-of-bharti-airtel-mobile-services-customers/>

²⁸ Airtel Annual Report, 2018.

²⁹ *ET Markets, Bharti Airtel's India operations post first loss in 15 years*, THE ECON. TIMES (Apr. 25, 2018) <https://economictimes.indiatimes.com/markets/stocks/earnings/airtel-consolidated-4q-profit-falls-78/articleshow/63898251.cms>.

³⁰ Danish Khan, *ET Markets, Bharti Airtel's blended ARPU to improve in FY19; pressure to ease: Fitch*, THE ECON. TIMES, (Jan. 25, 2018), <https://telecom.economictimes.indiatimes.com/news/bharti-airtels-blended-arpu-to-improve-in-fy19-pressure-to-ease-fitch/62603618>.

2nd quarter.³¹ ARPU, however, painted a grim picture settling in at ₹ 101, four rupees lower than the preceding quarter.³² Predicting against the flow of the tide, some analysts believe that the average may grow to levels of ₹ 140-145 in the coming year.³³ The financial statements make it quite clear that Airtel is struggling to hold its ground in the volatile market but may witness a recovery in the near future.

5.2 VODAFONE IDEA

The company faced pressure from the volatility in the market and rate cuts due to the rise of Reliance Jio. While service revenue for the company showed a decline of 18.7% from 5,834 million euros in 2017 to 4,643 million euros in 2018, EBITDA regressed from 1596 million euros to 1030 million euros (change-34.5%) in the same period.³⁴ The ARPU also showed a recession dropping from Rs.114 to Rs.105 QOQ.³⁵ All was not lost for the company, as it added 0.5% more active customers in Q4FY17 compared to Q3FY17. Furthermore, net debt in India saw a reduction from 8.7 billion euros in FY17 to 7.7 billion euros in FY18 owing to the sale of standalone towers to American Tower Corporation among an array of factors.³⁶ The company's fortunes did not shine brightly, as service

³¹ Bharti Airtel Limited – Media Release October 25, 2018.

³² *Telecom Services, Airtel Capex, Opex, ARPU and revenue and profit for Q2*, TELECOMLEAD (Oct. 25, 2018) <https://www.telecomlead.com/telecom-services/airtel-capex-opex-arp-revenue-and-profit-for-q2-87132>.

³³ *supra* note 29.

³⁴ Vodafone Group Plc- Annual Report 2018.

³⁵ *ET Markets, Vodafone India's service revenue drops to Rs 7,902 crore in Q4, FY 2017-18*, THE ECON. TIMES (May 16, 2018), <https://telecom.economicstimes.indiatimes.com/news/vodafone-indias-service-revenue-drops-18-9-in-fy-2018/64171921>.

³⁶ *supra* note 34.

revenue eroded 31% closing in at 955 million euros in its first quarter of FY19. The ARPU also marked a shoddy performance followed by a marginal decrease from Rs.105 to Rs.102 in the first quarter of 2019.³⁷ This index continued its free-fall throughout the fiscal year closing in at Rs.88 at the end of third quarter.³⁸ On losing ground to other telecom operators, the company merged with third largest telecom Idea in order to maintain a foothold in the industry and to compete with its rivals. While the near-term prospects of the company look bleak, analysts believe that its future is well-secured owing to the merger.

5.3 RELIANCE JIO

A discussion on the finances of Reliance Jio is imperative for better understanding the claim of Airtel and Vodafone Idea. It further would aid in investigating its effect on the purported parties. It is important to mention beforehand that the analysis of the Reliance Jio will be restricted to FY18 and some quarters of FY19 since the company did not post mentionable figures in FY17 owing to its extended free offers until March'18. A perusal at its financial statement highlights the total income at Rs.20158 crores, while the profit before tax closed in at Rs.1109 crores.³⁹ The ARPU, however, saw a decline from ₹ 157 to Rs.134.50 year-on-year (YOY), while eking out a loss of 2.5 rupees on a quarterly

³⁷ Devina Sengupta, *ET Markets*, *Vodafone Q1 service revenue falls 31% on year amid tariff wars, cheaper data*, THE ECON. TIMES (July 26, 2018), <https://telecom.economictimes.indiatimes.com/news/vodafone-q1-service-revenue-falls-31-on-year-expects-idea-merger-to-close-in-aug/65130608>.

³⁸ *Telecom Services*, *Vodafone Idea revenue, Opex, ARPU, Capex and profit*, TELECOMLEAD (Nov. 15, 2018), <https://www.telecomlead.com/telecom-services/vodafone-idea-revenue-opex-arpu-capex-and-profit-87469>.

³⁹ Reliance Jio Infocomm Ltd, Financial Statements, 2017-18.

basis.⁴⁰ The fairy-tale run of the company continued in FY19 with a strong showing in the quarter ending July'18. Its net profit increased from Rs.510 crores to Rs.612 crores translating to the gains of 19.9%. There was also a rise in revenue of 14% at Rs.8109 crores.⁴¹ Reliance Jio's second quarter ended on a high note with a profit increase of Rs.681 crores and customer addition of 37 million compared to 28.7 million in the preceding quarter. But amid increased stress, the company's ARPU took a blow and closed in at Rs.131.7.⁴² The near-term prospects for the company look strong, but its mettle is surely up for a test in the incoming fiscal years.

5.4 COMPARISON- AIRTEL, VODAFONE VIS-À-VIS RELIANCE JIO

The statistics until now clearly paint a dismal run for Vodafone Idea and Reliance Jio. But a conclusion drawn that the move by the telecoms was genuinely for the increase in ARPU based solely on these financial indicators would be incorrect. There is no denying the fact that the finances of the incumbents look pale in front of the entrant, but certain other factors need to be considered before making an inference. First of all, we must analyse the factors that led to the loss of ARPU in these companies. While it has been already discussed that the steep cost cuts

⁴⁰ *ET Markets, Reliance Jio net profit up 19.2% in June quarter; ARPU declines*, THE ECON. TIMES (July 28, 2018), <https://telecom.economictimes.indiatimes.com/news/reliance-Reliance-Jio-net-profit-up-19-2-in-q1-arp-134-5/65166155>.

⁴¹ *Reliance Jio Q1 profits rises 20% to Rs.612 crore*, LIVEMINT (July 27, 2018) <https://www.livemint.com/Companies/xXKGSBAEcTBBHuZaGbxYKL/Reliance-Reliance-Jio-Q1-profit-rises-20-to-Rs612-crore.html>.

⁴² *Reliance Jio Q2 results 2018: Mukesh Ambani's Reliance Jio posts Rs 681 cr PAT, ARPU at Rs 131.7 per user*, ET NOW (Oct. 17, 2018), <https://www.timesnownews.com/business-economy/companies/article/reliance-Reliance-Jio-q2-results-2018-mukesh-ambanis-Reliance-Jio-posts-rs-681-cr-pat-arp-131-7-per-user/300810>.

lead to the decline in revenue, but the focus must also be given on the reduction of Mobile Termination Rates (MTR). In a notification vide September 2017, the TRAI issued a notification slashing the MTR from Rs.0.14 to Rs.0.06.⁴³ Market leaders Bharti Airtel and Vodafone Idea housing huge subscriber base have perpetually netted a huge profit in interconnection charges. For instance, Airtel earned 75 million dollars from Reliance Jio in the form of interconnection charges in the quarter ending June'17. These earnings were instantly wiped off owing to the cut resulting in pressure on EBITDA, ARPU of 3-6% in between the two companies.⁴⁴ Reliance Jio, on the other hand, did not feel the heat owing to the minuscule market share of 13% in February'17.⁴⁵ Secondly, it must be noted that every telecom operator faced a decline in ARPU. While the decline for Reliance Jio was 16.11%,⁴⁶ it showed negative growth of 17.88%,⁴⁷ 24.13%,⁴⁸ for Airtel and Vodafone Idea respectively. The percentage of decline in Reliance Jio is lower than the other two operators, but as discussed earlier the decline in ARPU is not affected by MTR cut. Hence it can be construed that the three telecom operators are at comparable terms in terms of decrease in ARPU. As far as the variation in the price of ARPU goes, it is hinged on the fact that Reliance Jio was a 4G

⁴³ *supra* note 34.

⁴⁴ *Intel, Fitch: India Teleco Incumbents hit by Mobile Termination Rate Cut*, REUTERS (Sep. 20, 2017), <https://www.reuters.com/article/fitch-india-telco-incumbents-hit-by-mobi/fitch-india-telco-incumbents-hit-by-mobile-termination-rate-cut-idUSFitbyVX42>.

⁴⁵ *ET Markets, Airtel leads telecom market with 25.85% share, Reliance Jio sees highest growth in wireless subs: Trai Dec data*, THE ECON. TIMES (Feb. 16, 2018), <https://telecom.economicstimes.indiatimes.com/news/airtel-leads-telecom-market-with-25-85-share-rReliance-Jio-sees-highest-growth-in-wireless-subs-traidec-data/62947738>.

⁴⁶ *supra* note 40.

⁴⁷ *supra* note 34.

⁴⁸ *supra* note 38.

only service, to begin with, while its peers provided 2G and 3G services as well. The change in technology brought about a shift in people's interest to 4G services, which lead to loss of revenue in 3G contours thus varying the price. The next area of focus is the financial holding of the enterprises. In terms of EBITDA, Vodafone Idea and Bharti Airtel are comfortably placed with showings of Rs.7766 crores,⁴⁹ and Rs.18040 crores⁵⁰ respectively. Reliance Jio lags in this parameter with a figure of ₹ 2,694 crores in FY18.⁵¹ This factor clearly outweighs in favour of Airtel and Vodafone. In judging the ability to compete, one must look into the prevalent pricing of services offered by the telecoms. In this case, both Vodafone and Airtel have more than fared this test. The affordable tie-in benefits including a subscription to entertainment majors like Amazon Prime, Netflix and Zee 5 are a testimony of the company's ability to shed money to lure in consumers. This has been made possible by Airtel and Vodafone's market standing post-merger. While the Airtel merger gave it additional spectrum and consumers,⁵² Vodafone has greatly benefited from being the biggest operator in terms of market share post-merger.⁵³ The inference that can be drawn from the post-merger standing is that these companies can more than operate in the industry.

⁴⁹ Muntazir Abbas, *ET Markets, Vodafone India revenue drops 29% in FY18*, THE ECON. TIMES (May 26, 2018), <https://economictimes.indiatimes.com/markets/stocks/earnings/vodafone-india-revenue-drops-29-in-fy18/articleshow/64172503.cms>.

⁵⁰ <https://economictimes.indiatimes.com/bharti-airtel-ltd/yearly/companyid-2718.cms>.

⁵¹ *ET Markets, Reliance Jio posts profit of Rs 510 crore in Q4*, THE ECON.TIMES (Apr. 27, 2018), <https://economictimes.indiatimes.com/markets/stocks/news/reliance-Reliance Jio-posts-profit-of-rs-510-crore-in-q4/articleshow/63942217.cms>.

⁵² Hitesh Kumar Jain, *Mergers India, Airtel Acquires Telenor*, M&A CRITIQUE (May, 2017), <https://mnacritique.mergersindia.com/airtel-telenor-merger/>.

⁵³ Merger of Vodafone India and Idea: creating the largest telecoms operator in India, Vodafone India-Idea Press Release, (Mar. 20, 2017).

The above discussion proves beyond reasonable doubt that the telecom bigwigs are at comparable terms on all the counters. It can thus be inferred that these companies can equally battle it out in the telecom sphere. Consequently, the excuse of ailing ARPU for the restraintment of outgoing calls stands negated. A hypothesis for the probable cause of action is explained in detail in the next section.

6. CONCERTED ACTION OF TELECOMS- MISCHIEF IN PLAY

The above discussions have successfully rebutted the claim made by Airtel and Vodafone Idea. But it does raise serious questions that need to be resolved. What was the reason for passing such a resolution if it did not aid in increasing ARPU? Was it a method to consolidate market share? What can be the probable effects on the market? For the purpose of answering this question, the researcher has drafted a hypothesis investigation on the probable intention of telecoms.

Bharti Airtel and Vodafone Idea have been losing ground to the entrant Reliance Jio of late. The statistics justify this trend. While Vodafone registered a market share of 19.2%, Reliance Jio caused an upset in the individual ranking with a share of 22.4% in the quarter ending June'18. Airtel comfortably led the pack with a showing of 31.7% in the same period. It was only after the inclusion of Idea's share at 15.4% that Vodafone could maintain its lead claiming 34.6% of the pie.⁵⁴ The

⁵⁴ Kalyan Parbat, *ET Markets*, *Reliance Jio inches closer to Bharti Airtel in terms of revenue market share*, THE ECON. TIMES (Aug. 28, 2018), https://economictimes.indiatimes.com/industry/telecom/telecom-news/reliance-Reliance Jio-inches-closer-to-bharti-airtel-in-terms-of-revenue-market-share/articleshow/65556052.cms_

statistics have left these bigwigs in complete disarray. With Reliance Jio breathing down their necks, these telecoms have taken proactive steps like the introduction of tie-in plans, slashing prices existing offers, and continuous increase in capex.⁵⁵ While these may look good on paper, even the companies know deep down that it might not be enough to stop the rampaging Reliance Jio. It is obvious that these telecoms would have better prospects without the headache of dealing with Reliance Jio. Since the exit of Reliance Jio is practically impossible given its stature and growth, these enterprises hatched a plan to eventually knock it out of business. The current notification is a medium for these telecoms to achieve this goal. Restraining dormant callers from making outgoing calls to increase ARPU may look good at first, but previous discussions have clearly thrown that claim out the window. What these companies actually intend to do is bring their combined market share of 66.3% into play. By restraining the customers from making calls, the companies leave the consumers with a choice to either recharge or switch operator. With similar plans being offered at a fairly same range by all the operators, the customer has the option to decide for himself. This may look like a gamble at first but it is worth taking given the fact that the companies have tried to lure in consumers with its attractive subscriptions on offer. Furthermore, the companies do not intend to compel the customers to switch to a premium plan, all they require is to recharge with a minimum fee to avail their services. It is interesting to note that the price band set by the telcos is virtually the same, thus raising doubts of a concerted decision. Owing to the prevalent practice that people, in general, prefer having separate

⁵⁵ *supra* note 34.

numbers for office and residence, this notification has the effect of either consolidation of business or charging a higher fee to avail subscription for the services. While the former will affect the business of Reliance Jio, the latter is sure to have an adverse effect on the consumers.

The impugned notification is clearly in conflict with the law established by the state. Any action that restrains the free trade and curbs the competition is in violation of the provisions of Competition Act, 2002. This case gives an indication of a cartel between Bharti Airtel and Vodafone Idea. A cartel is an agreement or a collective action to restrain reciprocal business activities among plural independent entrepreneurs competing in the same level in a business industry to prevent competition thereby securing extra profit.⁵⁶ The true purpose of a cartel is to prevent competition by means of regulation on production, price fixation etc.⁵⁷ Competition per se is important for the markets as it provides quality products at an affordable price to the customer. The provision prohibiting the formation of cartels comes under the ambit of Section 3(3) of Competition Act, 2002. It covers acts done in conjugation with other parties in similar business which has the effect of limiting the production, determination of the price of a product and so on.⁵⁸ Since this notification has a multifaceted effect on parties, it is divided into two parts for the purpose of research namely-

⁵⁶ J.S. Lee, *Strategies to Achieve a Binding International Agreement on Regulating Cartels*, SPRINGER NATURE SINGAPORE PTE LTD. (2016).

⁵⁷ U.S. v. Nat'l Lead Co., 332 U.S. 319.

⁵⁸ Competition Act, 2002, § 3(3).

6.1 PRICE FIXATION

In a case of price fixing by a cartel, the prerequisite that must be met is the existence of an agreement either express or implied by the parties.⁵⁹ Circumstantial evidence that excludes the possibility of the independent action of parties has been held to be sufficient for the purpose of proving an act of price fixation.⁶⁰ Since agreements entailing cartels are often executed behind closed doors, no document to testify the same sees the light of the day. Hence, the actions of parties form the basis for closing in on a cartel involved in anti-competitive trade. Consequently, in the present case, perusal on the actions of Vodafone Idea and Airtel will aid in the construction of a hypothesis regarding the purported agreement and provide circumstantial evidence for price fixation. A look at the recharge plans of the telecoms will aid in substantiating this argument. The lowest price for availing the monthly benefit of making calls in Airtel and Vodafone Idea is set at Rs.35.⁶¹ If that doesn't prove the similarity index between the telecos, then the same price set for talk time offers at Rs.65, Rs.95, Rs.169, Rs.199 does hit the nail in the coffin.⁶² Furthermore, it must also be noted that these plans were introduced by telecos in quick succession. While Airtel came out with plans starting at Rs.35 on the 4th of September,⁶³ Vodafone Idea emulated the same twenty days later.⁶⁴ This,

⁵⁹ *Union of India v. Hindustan Development Corp.*, (1993) 3 S.C.C. 499.

⁶⁰ *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

⁶¹ *Vodafone, Best Prepaid Recharge Plans*, VODAFONE, <https://shop.vodafone.in/shop/prepaid/best-prepaid-plans.jsp#Bonus>.

⁶² *Airtel, Recharge Online*, AIRTEL, <https://www.airtel.in/recharge-online>.

⁶³ Sumit Chakraborty, *NDTV, Airtel Rs. 35, Rs. 65, Rs. 95 Combo Recharge Packs Offer Up to 500MB Data, 28 Days Validity and Voice Calls to Take on Reliance Jio*, GADGETS

in turn, strengthens the suspicion of background scheming way before the disputed notification was incepted. Coming to the minimum price of the recharge itself, a huge spike of 71.42% from Rs.10 to Rs.35 can be seen.⁶⁵ At times of falling call rates, the unreasonable increase does stick out like a sore thumb. Moreover, the increment in rates goes against the obligation of telecom operators to provide services at affordable and reasonable prices under Indian Telegraph Act.⁶⁶ The above-mentioned facts and arguments aptly establish a case of price fixing by the telecos.

Courts have heavily come down on cartels involved in price fixation over the past decades. The mere existence of tampering with price is enough to prove an adverse appreciable effect on competition.⁶⁷ Moreover, the legislation has been construed in a manner not only to protect consumers from unfair pricing but also to deter enterprises from entering into anti-competitive agreements.⁶⁸ Penalization of firms dealing with hiking prices for their benefit leads to a reduction of rates.⁶⁹ The present case fulfils the criterion for price fixation. Previous discussions have already proved the existence of an agreement of sorts, with the aid of circumstantial evidence. Given the fact that the price affects the majority of customers, it further increases the gravity of the offence. Hence in light

360 (Sep. 4, 2018) <https://gadgets.ndtv.com/telecom/news/Reliance-Jio-effect-airtel-rs-35-65-95-combo-recharge-packs-data-validity-voice-calls-1911179>.

⁶⁴ Sumit Chakraborty, *NDTV, Vodafone Idea Launches 6 Combo Recharge Packs With Up to 2GB Data and 84 Days Validity to Take on Jio*, GADGETS 360 (Sep. 25, 2018), <https://gadgets.ndtv.com/telecom/news/jio-effect-vodafone-idea-active-recharge-all-round-combo-pack-data-voice-calls-validity-1921730>.

⁶⁵ *Id.*

⁶⁶ Indian Telegraph Act, 1885, § 3(1A).

⁶⁷ *supra* note 60.

⁶⁸ *Excel Crop Care Ltd. v Competition Comm'n of India*, (2017) 8 S.C.C. 47.

⁶⁹ *Rajasthan Cylinders v Union of India*, 2018 S.C.C. Online S.C. 1718.

of the facts of the case, this notification must be struck on grounds of affecting prices by the medium of a cartel.

6.2 MARKET SHARING

The price fixation by the firms can be interpreted in a different light in the present case. Apart from compelling the subscribers to pay a higher fee for the services, the same pricing strategy has the effect of monopolizing the telecom industry. In simpler terms, the same price offered by the telcos gives an indication that they do not intend to compete with each other. Airtel and Vodafone Idea have very well realized the fact that the infighting would lead to losses apart from the ones faced by the entry of Reliance Jio. This act would benefit the companies in the consolidation of market share and a decline in losses incurred. While this plan of action entails benefits to the telcos, it is disadvantageous for Reliance Jio because of the probability of stagnation or loss of market share. Reliance on the remarks expressed by Supreme Court in the case of Competition Commission of India v Bharti Airtel⁷⁰ will aid in understanding this rationale. The concerned parties, in this case, were the same as in the present scenario. While passing its decision, the court opined that the overall productivity increases with the inclusion of a firm more efficient than the average incumbents. It is quite clear that the entrant referred to in the aforementioned case is Reliance Jio, while Vodafone Idea and Bharti Airtel being the incumbents. Construction of the court's opinion means that the former is efficient than the latter. This has in fact been proven via an array of statistics in the earlier discussions. Being inefficient at the

⁷⁰ Competition Comm'n of India v Bharti Airtel, 2018 S.C.C. Online S.C. 2678.

current stage, it is rational enough to surmise that these telecoms have decided to combine their forces in a fight against Reliance Jio. Though there is a scope that the customers might switch between the two telecoms, the operators are willing to stomach the loss of a handful number of customers in return for restricting the growth of Reliance Jio. Additionally, the increase in capex and bountiful offers offered by both the telecoms can cause an upset for the latter. Moreover, the restraint placed on outgoing calls in lieu of charging higher revenue gives a clear indication of a cartel among operators.

A similar question arose before Competition Commission of India in *Re: Alleged Cartelisation in Flashlights Market in India*,⁷¹ while adjudging a claim of the existence of a cartel in the zinc cell industry. The Director-General in its investigation found out that that the parties had co-ordinated amongst them to set the maximum retail price for the batteries. The investigation unearthed that generally after agreeing to raise the prices, Eveready, being the market leader would have announced an increase in price. This would be followed by Indo National and Panasonic. It was further uncovered that the Parties co-ordinated regarding trade discounts, retailer margins, promotional schemes, etc., to ensure that the price-fixing arrangement in between the Parties was never rendered ineffective. The Parties were also found to be distributing the market amongst themselves geographically, or in terms of the type of the batteries sold to maximize profit margins. While the commission assented to the probability of collusion between the parties, it could not find evidence on the resultant

⁷¹ *Re: Alleged Cartelisation in Flashlights Market in India*, *Suo Motu* Case No. 01 of 2017.

effect on the price of flashlights. Hence the petition was dismissed.⁷² In the instant case, there has been a direct influence of the telecom operators in determining the prices. Moreover, the restraint on outgoing calls is for the sole purpose of hiking prices. It can be reasonably construed that the sole motive of the company was market consolidation at the cost of Reliance Jio. This, in turn, is a restrictive practice. Hence such a notification is liable to annulled and the parties concerned must be penalized at the discretion of the court.

7. CONCLUSION

The in-depth research conducted as a part of the paper has shed light on the impugned notification passed by the telecom operators. For the purpose of analyzing every facet of the notification, the researcher has taken the aid of company disclosures, financial statements, and judicial precedents. While unearthing the truth behind the notification, the empowering provisions, the legality of the contract, financial standing and its effect on the competitiveness in the telecom industry has been scrutinized. All these factors have collectively pointed out the existence of illegality in the notification. The telecom operators have clearly defrauded the consumers with the commission of the notification. Moreover, the impugned act has an adverse effect on the functioning of other players in the telecom industry. The effect of the notification in the fixation of price and market sharing will surely affect the revenue of the other telcos. In the light of the findings and rationale presented by the author, such an

⁷² Anshuman Sakle & Soham Banerjee, *Leniency Regime Takes a Step Forward — Reduction in Penalty for Battery Manufacturers*, (2018) PL (Comp. L) June 85.

action must be struck down at the earliest. This will lead to the welfare of people and act as a deterrent for potential miscreants.