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The essence of time and timing. TDSAT's latest judgment quashing TRAI's Feb 2018 tariff order pertaining to issues like definition of significant market power (SMP), predatory pricing and selective pricing plans makes some very pertinent observations, especially on SMP and predatory pricing. The trouble is that the water has already flowed under the bridge. Timing is important and so is time, not just in this case, but also on some of more material variables shaping the industry. Timing of ARPU inflection and the time it takes for ARPU to move up 'materially' are critical, for example.

The background – TRAI's Feb 2018 Tariff Amendment Order

Quick background – the TRAI had, in Feb 2018, issued a tariff amendment order with the following key amendments –

- ▶ Change in definition of predatory pricing to 'selling below average variable cost' from a test of IUC-compliance (voice pricing had to be above IUC rates in the earlier test of predation).
- ▶ Change in definition of significant market power to a two-parameter construct (revenue share and subs share) from a four-parameter one – revenue share, subs share, capacity share and traffic share. We note that the definition of SMP is important as only operators deemed to have SMP can be tested for predatory pricing. TRAI had noted – "the ability to engage in anti-competitive behavior...derives from SMP dominance... (only) an incumbent telecom operator who enjoys SMP can distort the market". We had disagreed with the TRAI view even then. From our Feb 2018 note ([link](#)) – "...that only the incumbents can distort a market is a framework that fails to capture the current reality across many industries..."
- ▶ Tighter non-discrimination norms – tariff order amendments essentially sought to curb the use of 'selective offers' by the incumbents. We note that selective tariffs have been a critical component of the incumbents' pricing construct and a curb on these would have impacted their competitiveness in the market.

The event – TDSAT sets aside the TRAI Feb 2018 order

The telecom appellate authority TDSAT set aside TRAI's tariff amendment order recently asking TRAI to reconsider provisions pertaining SMP, non-predation and other areas. More than the order, which is at best a marginal positive for the incumbents insofar as it allows them to continue with selective tariffs, we find some of TDSAT's observations more interesting. We reproduce some of them, paraphrased, below:

On segmented offers – "...the reply on behalf of the Authority (TRAI) does not meet the genuine concern of the petitioners that segmented offers as existing from before are accepted to be confidentially designed trade practices and therefore, when they do not amount to a tariff plan, they should not be made known to the rival service providers..."

On predatory pricing and SMP –

- ▶ "...the old requirement that all tariff plans of all TSPs be non-predatory was replaced (in the amendment order) by proposing that 'the anti-competitive behavior in the context of tariff setting can be through predatory pricing by the dominant market player'..."
- ▶ "...the purpose of TRAI in fixing 30% of total activity for a SMP is not backed by any intelligible and objective criterion nor (is) any convincing reason discernible..."

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- ▶ "...TRAI is expected to be aware of ground realities, the ups and downs faced by the TSPs, reduction in their numbers in recent times and its various reasons... the impugned order does not show application of mind to the relevant objective data, facts and figures to support the significant changes under challenge"
- ▶ "...to allow freedom (to a new operator) from requirements of non-predation till acquisition of 30% of total activity in a given market prima-facie appears to be an extreme step and unnecessary abduction of its regulatory powers by TRAI..."
- ▶ "...since the concept of predation under the Competition Laws requires consideration of many issues based upon enquiry report/evidence, **it would not be proper to adopt a definition which provides artificial protection to a TSP who may have the capability and intent to destabilize the sector through predatory pricing before it attains the defined status of SMP...**"
- ▶ "...the total activity test existing in the earlier regulation has been given a go-bye by excluding the criteria of (a) switching capacity and (b) volume of traffic... **there is no reasonable and acceptable criteria for similar treatment to the test of volume of traffic, more so when Jio had become an SMP on this criteria as indicated in the judgment of this Tribunal dated Feb 1, 2018...**"

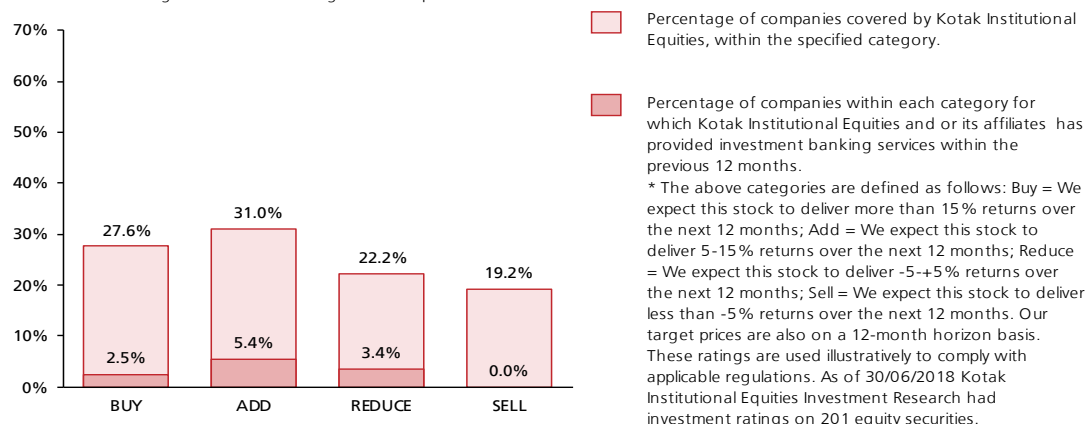
Interesting, valid, in-sync-with-reality observations, but too late

Jio continued its free services for a while after having attained SMP on the 'volume of traffic' (in a relevant market) criterion and free is predatory by definition, for example. TDSAT observations make a note of this but this is now purely academic. The damage to the incumbents has happened and the shape of the industry has changed. Time and timing are of utmost essence, as the title of this note reads. Not just on regulatory aspects but also on business decisions (pricing, network investments, capital raise, etc.). Time and timing are also critical to investment view on the sector – the timing of ARPU inflection and the time it takes to reach levels that support above-cost-of-capital return for the survivors!

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