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Reliance Jio: A Distinct Player or a Dominant Entity

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ABSTRACT

'Power tends to corrupt, and absolute power corrupts absolutely'.

The above quote by Lord Acton beautifully sums up the practice of dominance and its abuse in the markets. Following the aegis of the duly established Competition and Anti-trust law regime globally, The Indian Competition Act 2002 in its Section 4 resonates the same principle. Just and fair competition is the backbone of a healthy market. It along these lines properly follows that the Act does not deny the pleasure regarding market dominance, monopoly, or a place of strength by a venture. Nonetheless, practically like the object of some other law, it expects to bring about a level playing field by confining the misuse or rather abuse of such dominance against a non-predominant market player. In the Era of liberalization, the markets achieved a higher position in terms to attract consumers whether it is physical or electronic. The state has the duty to preserve and procure the markets from bad practices. To certain the things in the markets and make a market distinctive in nature the competition plays a very important role. Hence it is the duty of the producers, distributors to align the things which are contrary to the anti-competitive practices. The foremost duty of every company that they must not act as dictator in the market and must not try to make the market an anti-competitive field is primary. Accountability of a firm with respect to its dominant position in the market is in itself a hefty task to be held. The regulators need to be alert with their approach otherwise they themselves might end up being a blockage to a developmental process. In this paper we analyse that when the telecom services of Reliance Jio entered the market, did they adopt such practices which led to the abuse of dominance. This paper investigates the contemporary telecom players reacted to the arrival of Jio and how section 4 of the Competition Act was called into picture in the same scenario.

Keywords: *Dominance, Fair Competition, anti-competitive practices, telecom players.*

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I. INTRODUCTION

If we open a business under the aegis of it being commercial, earning profits out of it would be always a major factor; irrespective of howsoever one wants the same to be more towards philanthropy. But a thin line draws between making commercial gains and moving towards acquiring a position where no one else can stand against the enterprise. Boundaries are drawn by the law for the market players to function, but the flouting of those rules invites liability for anti-competitive practices.

Sometimes, an entity may unintentionally indulge in practices which lead to abuse of dominance because the difference between dominance and its abuse is very miniscule and due to such practices, often, the dominant entity must face the repercussions. The same was very categorically laid down in the Verizon Case³ where the US Supreme Court prominently observed that “the opportunity to charge monopoly prices – at least for a short period – is what attracts “business acumen” in the first place, it induces risk-taking that produces innovation and economic growth”.

When it comes to India, the Competition Commission of India (CCI) is the authority vested with the powers to conduct investigation and hold a market entity liable for abuse of its dominant position. In the same regards, it is pertinent to note that the liability under Section 4 of the Competition Act is also drawn after consideration of the various factors by the Competition Commission of India.

In this paper, we examine how Section 4 of the Act is dynamic enough to cover various instances of dominance and its abuse and establish the same with respect to the practice adopted by Reliance Jio when it entered the telecom sector. In order to do so, firstly we deal with the advent of Jio as a new entity in the market. Second, we establish the relevant market for the same purpose and study whether there was scope for dominance in the same or not. In the same regard, we categorically study the case levied against Reliance Jio for their practices. Thirdly, we specifically establish whether Reliance Jio indulged in practices which led to dominance and hence its abuse. In the same lines, we also study the stand of the TRAI and the issue of penetrative pricing. Fourth, we conclude whether Reliance Jio flouted rules or not and that any further regulation is required or not.

(A) The Advent of Reliance Jio

As the world becomes more and more interconnected, technology has begun to be considered

³ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 US 398, 407 (2004)

as a helpful and valuable apparatus for correspondence between people, a situation that has encouraged cooperation in a portion of the commitment that were testing at times. The telecom sector faces different difficulties as to how to attract the consumers in the dense arena of companies present. The Telecom Regulatory Authority of India (TRAI) is the body vested with the functions of regulation of this sector. There are various laws which concern the sector such as the TRAI Act⁴, the Information Technology Act⁵ and its Rules etc.

Reliance Jio Infocomm Limited (RJIL), an auxiliary of Reliance Industries Limited (RIL), India's biggest private sector organization, is the principal telecom administrator to hold pan India Unified License. This permit approves RJIL to give all media transmission administrations aside from Global Mobile Personal Communication by Satellite Service.⁶ Prior to going into the exchanges that the organization has done we should look for the historical backdrop of this telecom goliath and how it was set up which shook the telecom market. In June 2010, Reliance Industries (RIL) purchased a 96% stake in Infotel Broadband Services Limited (IBSL) for ₹4,800 crore (US\$740 million). Albeit unlisted, IBSL was the solitary organization that won broadband range in every one of the 22 circles in India in the 4G sale that occurred before that year. Later proceeding as RIL's telecom auxiliary, Infotel Broadband Services Limited was renamed as Reliance Jio Info-comm Limited (RJIL) in January 2013⁷.

In June 2015, Reliance Jio made a public declaration that it would start its exercises all across the country before the ending of 2015. In any case, following four months in October, the association's agents passed on a public articulation communicating that the service launch was conceded to the first quarter of the financial year 2016–2017.

The industry finally started its services on 5 September 2016. In less than a month from the launch, Reliance Jio declared that it had procured 16 million users. This was the quickest increase by any telecom service provider across the whole globe.⁸ Reliance Jio crossed 50 million users mark within eighty-three days from its effective launch, consequently crossing 100 million endorsers on 22 February 2017. By October 2017 it had around 130 million users.

With the advent of its services in the market the Reliance Jio has presented a RELIANCE JIO Welcome Offer under which internet, voice, video and the full bundle of Reliance Jio

⁴The Telecom Regulatory Authority of India Act, 1997 (Act No. 24 of 1997).

⁵The Information Technology Act, 2000 (Act No. 21 of 2000).

⁶Reliance JioInfo-comm Limited, Cellular Operators Association of India, *available at*: <https://coai.com/content/reliance-jio-infocomm-limited> (last visited on December 24, 2020).

⁷PTI, Jan 31, 2013, *available at*: <https://www.gadgetsnow.com/tech-news/RILs-Infotel-Broadband-renamed-Reliance-Jio-Infocomm/articleshow/18271907.cms> (last visited on December 16, 2020).

⁸<http://indianexpress.com/article/technology/tech-news-technology/reliance-jio-creates-world-record-16-million-subscribers-in-one-month-3073468/> (last visited on December 16, 2020).

applications and substance was accessible to the users totally free initiating from 5th September 2016 and extending till 31st December 2016. By noticing the market complexities Reliance Jio made this proposal to dispose of the competitors in the telecom markets, it is the overall conduct of the purchaser that he will utilize the services which will not cost him anything. Accepting this thought as competitors notified the Telecom Regulatory Author of India to which the authority recommended to keep the proposal till 3rd December 2016. Unexpectedly, Reliance Jio disregarded this order and proceeded with the same offer as earlier stipulated.⁹ As a result, there was much chaos within the other service providers and eventually, the doors of the Competition Commission of India were knocked. Bharti Airtel Limited was the primary contender in the same regard and they alleged that the practices adopted by Jio were disturbing the flow of the market and the pre-established reputations of Reliance Industries was being misused to lure customers by offering free services as Reliance Jio was an auxiliary to it.

(B) Establishing the Relevant Market

“Relevant market” as used under Section 4¹⁰ is an aggregation of relevant product market and relevant geographic market¹¹. It will however be as finally determined by the CCI with reference to either relevant product market or relevant geographic market or both.¹²

The relevant product market is defined “as a market for all those products or services regarded as interchangeable or substitutable by the consumer, based on the characteristics of the product, its price and its intended use”¹³ which must be read in line with Section 19 (7).

(C) Test of substitutability

Basically, in light of the fact that numerous wholesale merchants of grains are alongside the wholesale merchants of vegetables doesn't suggest that grains and vegetables are substitutable or that grains and vegetable *mandis* are interchangeable.¹⁴ This narrative of the CCI sets out the quintessence of substitutability test.

Substitutability of items was being referred to again in Schott Glass¹⁵ issue where transparent and golden cylinders made of a similar sort of glass and for a similar reason (storage of chemicals), were held to be non-substitutable on the grounds that light sensitive synthetic

⁹<https://www.indiatoday.in/technology/news/story/jio-4g-welcome-offer-ends-on-december-3-says-trai-347628-2016-10-20> (last visited on December 18, 2020).

¹⁰*Supra* note 2.

¹¹*Id.*, s. 19(5).

¹²*Id.*, s. 2(r).

¹³*Id.*, s. 2(t).

¹⁴*MCX Stock Exchange v NSE*, Case 13 of 2009.

¹⁵*Kapoor Glass v Schott Glass*, Case 22 of 2011.

compounds could not be put away in transparent cylinders.

(D) Test of Demand and not supply

The CCI was of the view that relevant product market is to be taken a gander at from both demand and supply points of view in view of the qualities of the item, its cost and proposed use.¹⁶ However, if one somehow happened to see the meaning of relevant product market, there gives off an impression of being an uneven definition. From the demand perspective, items should be substitutable from the purchaser's point of view. Overlooking from supply view, dealers should be included who produce or could without much of a stretch change creation to the important item or close substitutes. Firms are dependent upon three fundamental sources or serious limitations: demand substitutability, supply substitutability and expected rivalry. From a financial perspective, for the meaning of the relevant market, demand replacement establishes the most quick and compelling disciplinary power on the providers of a given item, specifically corresponding to their valuing choices. The relevant geographic market is characterized as a market including the territory where there exist unmistakable homogenous competitive conditions regarding the demand and supply of products or services that can be recognized from the conditions going around in the neighbouring zones.¹⁷ Section 19(6) states that a geographical market will be resolved having respect to all or any of the accompanying elements:

- a. regulatory trade barriers,
- b. local specification requirements,
- c. national procurement policies,
- d. adequate distribution facilities,
- e. transport costs,
- f. language,
- g. consumer preferences,
- h. need for secure or regular supplies or rapid after-sales services.

(E) Concept of multi sided markets

Market definition is an instrument utilized in setting up the constraints of competition amongst various firms.¹⁸ First, deciding dominance and its abuse requires meaning of relevant market, and what the relevant market is can be combative. While there are different devices and

¹⁶*Surinder Singh Barmiv BCCI*, Case 61 of 2010.

¹⁷*Supra* Note 2, s.2(s).

¹⁸<https://www.wipo.int/edocs/lexdocs/laws/en/tr/tr131en.pdf> (last visited on January 3, 2021).

techniques accessible to characterize relevant markets, they are largely dependent upon their own reactions and may not fit well in all market circumstances. For example, utilizing the Small yet Significant and Non-passing Increase in Price (SSNIP) Test (without any changes) in non-conventional markets, for example, platform markets may cause an extremely limited market definition, subsequently prompting incorrect ends in anticompetitive studies. SSNIP has every now and then been utilized as an apparatus for appraisal for market predominance isn't liberated from its own difficulties.¹⁹ A market is characterized as an item or gathering of items and a geographic region in which it is created or sold with the end goal that a speculative benefit augmenting firm, not subject to value guideline, that was the lone present and future maker or dealer of those items in that territory probably would force at any rate a "little however critical and non-brief expansion in cost," expecting the terms of offer of any remaining items are held consistent.

II. CCI, TRAI AND RELEVANT MARKET

Remarkably, CCI had, through a letter to TRAI, featured its ability to investigate matters identifying with market practices. The letter was an after-effect of a consultation paper put forth by TRAI in February 2017 on anti-competitive practices in taxes by Telecom Service Providers (TSPs)²⁰. In his letter, the CCI Chairperson specified that "issues and inquiries for counsel identifying with outline of relevant market, evaluation of dominance and predatory pricing" are "issues of adjudication for the Commission".²¹

As indicated by TRAI, the effective powers of looking over such practices are set out under the Telecom Regulatory Authority of India Act, 1997 (the TRAI Act), which expects it to take "measures to encourage competition and advance productivity in the activity of telecommunication services in order to encourage development in such administrations". Adding to this, in order to proceed and facilitate competition, TRAI in its Amendment Order has given direction on non-predation, through the inclusion of the following definitions:

- (a) "Non-predation" has been defined as not indulging in predatory pricing by a service provider having significant market power,
- (b) "Significant market power" has been defined as a TSP holding a market share of at least 30% in the relevant market, which is to be determined based on either subscriber

¹⁹Competition Law Reports (May-June 2011).

²⁰Telecom Regulatory Authority of India *available at*: http://www.trai.gov.in/sites/default/files/Consultation_paper_03_17_feb_17_0.pdf (last visited on January 3, 2021).

²¹The Hindu Business Line *available at*: <https://www.thehindubusinessline.com/info-tech/turf-war-rages-between-cci-and-trai-over-telecom-tariffs/article9791247.ece>. (last visited on January 5, 2021).

base or gross revenue. The Amendment Order simultaneously recognizes that the concept of ‘SMP’ flows from the concept of ‘dominance’ under competition laws,

- (c) “Predatory pricing” has been defined as the provision of a telecommunication service in the relevant market at a price which is below the average variable cost, with a view to reduce competition or eliminate the competitors in the relevant market— Interestingly, the Amendment Order also refers to the definition of “predatory pricing” under the Competition Act, 2002 (the Competition Act) to emphasise that intent is the key,
- (d) “Relevant market” has been defined as the market which may be determined by TRAI with reference to the relevant product market for distinct telecommunication services (such as Wireline Access Service, National Long-Distance Service, International Long-Distance Service) and the relevant geographical market,
- (e) “Relevant product market” has been defined as the market in respect of a distinct telecommunication service for which the licensor grants license to the TSP,
- (f) “Relevant geographic market” has been defined as a market comprising the respective licence service area for which the licensor grants licence to the TSPs to provide distinct telecommunication services.

(A) The relevant market for Reliance Jio

Jio initiated its operations in September 2016 as a new contestant in the market which previously had a few sets up players. Its USP since the start was the amazingly appealing element of zero cost for 4G internet services and free calling plans. Such existent cheaper practices will undoubtedly raise cautioning signs to different telecom service providers because of the propensity of a solitary player to rule the telecom market. In spite of the fact that Jio had entered quite recently, however because of its costing techniques and client plans, it obtained a large chunk of share in what could be called, a shockingly little time. Regarding broadband supporter base and internet usage, it held 85% of the piece of the pie. Nevertheless, despite what might have been expected, it was additionally obvious that in the larger telecom operations market, Jio's share was lesser than that of Airtel's. Ultimately, the entirety of this examination reduced to one inquiry, in particular, regardless of whether the relevant market for Jio's situation market for 4G information and broadband operations was or was a more extensive cell usage market.

III. INVESTIGATION OF THE RELEVANT MARKET: WHETHER 4G IS A RELEVANT PRODUCT MARKET IN ITSELF?

At the point when the conduct of an endeavour in dominant position is, for example, to impact the structure of a market where, because of the very presence of the endeavour being referred to, the level of competition is debilitated and which, through response to strategies unique in relation to those which condition typical competition in goods or services based on the exchanges of business administrators, has the impact of thwarting the balancing of the level of competition actually existing in the market.²² Before drawing the conclusion that any enterprise has embraced the act of predatory pricing, it must be set up that the particular firm was in a dominant position in a relevant market and abused the same. Jio held the biggest portion of range in the 2300 MHz class and the 800 MHz classification and further its endorser base of 72.4 million as on 31st December 2016 was the most noteworthy in the versatile broadband client base.²³ As a matter of fact, the market for 4G services is very unique in relation to the customary market for 2G or even 3G services. This can be said because of the presence of highlights like faster downloads, increased voice clarity, progressed framework prerequisite and the particular requirement for endorsers of 4G to have viable supportive mobile handsets. There are cases decided by the CCI itself which propose that administrations for 4G can be taken as a different relevant product market itself other than the expansive range of services which incorporate 2G, 3G and voice-calling services.²⁴

The CCI, in any case, noted, considering Airtel's Annual Report, that it is wrong to recognize wireless telecommunication services based on the techniques and methods used to offer such types of services. Additionally, the CCI did not abide upon the way that Jio is offering their calling administrations through the 4G-empowered LTE innovations and is not offering services in the 3G area. Accordingly, it is not understood how Jio's services fall in the broad relevant market of wireless telecommunication services and not just inside the 4G LTE services product market.

²²*Hoffman-La Roche & Co. AG v. Commission of the European Communities*, [1979] ECR 461.

²³Mobis Philipose, 'Will Reliance Jio's latest free offer salvo force Competition Commission's hand? *available at*:<http://www.livemint.com/Companies/cD87baoZA1SZgGQGsLXd6J/Will-Reliance-Jios-latest-salvo-force-competition-watchdog.html> (last visited on January 5, 2021).

²⁴*Shree Gajanana Motor Transport Company Limited v. Karnataka State Road Transport Corporation*, [2016] Case No.85.

Exclusive Motors Private Limited v. Automobili Lamborghini S. P. A., [2012] Case No.52.

Ravi Beriwalla v. Lexus Motors Limited and Another, [2016] Case No.79.

IV. ESTABLISHING THE DOMINANCE OF AN ENTERPRISE: STATUTORY PROVISIONS AND APPROACH

For obligation to emerge under Section 4, the pre-essential is that such firm or company (upon whom the allegation of abuse of dominant position has been levied) should really be a dominant player, in the relevant market, in India. The Explanation to Section 4 expresses that 'dominant position' signifies a position of upper hand or strength, appreciated by the firm under consideration, in the relevant market, in India, which empowers it to:

- a) Operate independently of competitive forces prevailing in the relevant market; or
- b) Affect its competitors or consumers or the relevant market in its favour

Section 19 (4) further stipulated about 13 components to be taken into consideration while deciding 'dominant position' including share in the market, financial power, size and assets (of both the enterprise and counterparts), reliance of buyers, passage boundaries, market structure, relative preferred position, social commitments and costs, vertical joining/deal/service network and whatever other factor which CCI may consider as significant for the end purpose.

(A) Formulating an End-Effect Approach

While Section 4 gives a 'formalistic' evaluation, Section 19 appears to move towards an 'impact' based methodology, but partly. A structure-based approach in taking up abuse of dominance examination is planned with a 'pre-imperative' of factually proving dominance, which is debatable. For example, the most ordinarily utilized measurement, size and holding in the market, is an insufficient measure to prove dominance, and utilizing merely this can lead to critical irregularities as there is no acknowledged benchmark available market share cut-off past which a firm will be viewed as dominant. The view was embraced in *Mr. Ramakant Kini v Dr L H Hiranandani Hospital, Powai, Mumbai*.²⁵

V. RELIANCE JIO: DOMINANT OR NOT?

The Bharti Airtel Limited filed a case upon both Reliance Jio Limited and Reliance Industries Limited under Section 19(1) (a) of the Competition Act, 2002 stating the grave infringement of section 3 and section 4 of the said act. The informant made allegations on Reliance Industries as the telecom company i.e., Reliance Jio was the subsidiary of the Reliance Industries which is termed as the largest private sector company to feature in the Fortune Global 500 list of 'World's largest companies'. The Reliance Industries contained 99.44 percent stake

²⁵*In Re Shri Shamsher Kataria v. Honda Siel Cars India Ltd. &Ors*, Case No. 03 of 2011.

in Reliance Jio and invested approximately ₹1,60,000 crore for setting up the infrastructure of the telecom company which subsequently helped its subsidiary to attract the customers by providing them free services as Reliance Industries operated in every sector and hence used its financial strength to destroy the competition in the market.

(A) Assessment of dominant position

To elaborate that how dominant position is defined we analyse the parameters given in section 4 and 19(2) of the said Act:

- (a) Position of strength,
- (b) Ability to operate independently or competitive forces prevailing in the relevant market; and
- (c) Ability to affect its competitors or consumers or the relevant market in its favour.

1. Market share of the enterprise

Though the market share itself may not indicate dominance, however, it is one of the most important factors in determining dominance of an enterprise.²⁶ As per the TRAI press release dated 17th February 2017, the wireless subscriber base of private telecommunication players at pan-India level constituted 91.09% as against 8.91% held by public sector undertakings. The market was led by Bharti Airtel with a market share of 23.5% followed by Vodafone (18.1%), Idea (16.9%), BSNL (8.6%), Aircel (8%), RCOM (7.6%), Reliance Jio (6.4%), Telenor (4.83%), Tata (4.70), Sistema (0.52%), MTNL (0.32%) and Quadrant (0.27%)²⁷. Further, in none of the 22 telecommunication circles, the Reliance Jio had a market share higher than 7%. The above-mentioned statistics implied that Reliance Jio nowhere stood at par with the Big telecom giants.

2. Size and resources of the enterprise

Reliance Jio deployed the largest amount of spectrum for 4G LTE services in India. It also entered into network and spectrum sharing arrangements with Reliance Communications Limited (hereinafter, "RCOM"). As per media reports, RCOM itself announced that it had virtually merged with Reliance Jio. It had an overall spectrum holding of 1107.8 MHz across all 4G-LTE bands and in all the bands, Reliance Jio held the largest spectrum i.e., 50 per cent in 2300MHz band, 56 per cent in 800MHz band (shared with RCOM) and 28 per cent in 1800MHz band. It offered seamless 4G services using LTE technology in 800MHz, 1800MHz

²⁶Supra note 14.

²⁷*Bharti Airtel Limited v Reliance Industries Limited & Another*, CCI, Case No. 03 Of 2017.

and 2300MHz bands through an integrated ecosystem. These bands were the most efficient bands for offering LTE services in any part of the world. Further, the telecom network of Reliance Jio comprised of approximately 2.43 lacs Base Transceiver Stations (BTS), which was approximately 18 per cent of the total BTSs installed by the entire industry and 66 per cent of the overall 4G LTE BTS in the country. Reliance Jio Limited also owned and held the largest Optical Fibre Cables (OFC) network in the country. Based on the press release dated 16th January 2017 of Reliance Jio, it was evident that it had a subscriber base of 72.4 million as on 31st December 2016, which made it India's top carrier by mobile broadband user base, surpassing the Informant and all other telecommunication service providers in the country. These facts demonstrate the dominant position enjoyed by Reliance Jio in the relevant market.

3. Size and importance of the competitors

There are 9 or 10 telecom operators are present in the relevant market and they are providing services to the consumers on basis of the notifications or rules settled by regulation i.e., TRAI. They are providing both 2G, 3G and 4G services to the consumers. The importance of these competitors is that they while being in competition introduce various services like providing data 1gb/per day , lower call rates to the consumers which subsequently helps them to capture large customer base.

4. Economic power of the enterprise including commercial advantages over competitors

Reliance Industries Limited holds 99.44 per cent stake in Reliance Jio Limited and Reliance Industries has invested approximately ₹1,60,000 crores in Reliance Jio Limited. It has recorded the highest net addition of 21.48 million subscribers²⁸. Through their 'Welcome offer' they are providing free calls, free internet services with no cost.

5. Vertical integration of the enterprises or sale or service network of such enterprises and dependence of consumers on the enterprise

There is a high degree of vertical integration present. The distribution mechanism i.e., the distribution of the Sim cards is done only Reliance Digital which is also a subsidiary of Reliance Industries Limited. The sim card only works in the 4G compatible handset. A dominant position exists where the entity concerned is in a place of financial strength which empowers it to forestall viable competition being kept up on the relevant market by enabling it to act to a calculable degree autonomously of its competitors, its clients and, at last, buyers; to

²⁸26th March 2018, The Indian Telecom Services Performance Indicators ,October - December 2017.

set up that a dominating position exists, the Commission does not have to exhibit that an enterprise's rivals will be abandoned from the market, even in the larger term.²⁹

Jio began its activities with questionable "Zero Pricing" policy and proceeded with the equivalent even after TRAI requested to stop it after December 2016. Jio kept on providing services at no expense till March 2017, going against the order of TRAI. Also, Jio disregarded the essential prerequisite of not giving tax which is lower than Interconnect User Charges (IUC) as chosen by TRAI in its system named 'The Telecommunication Interconnection Usage Charges (IUC) Regulation, 2003 (1 of 2003).' In 2004, the controller changed the prior structure, and presented distance based IUC, which was later settled at 20 paisa for every minute, and in 2015, scaled down to 14 paisa for each minute.³⁰ Moreover, the CCI has consistently held that the pith of predatory pricing is evaluating underneath one's expense with the end goal of wiping out a rival.³¹ The entire technique of Jio of first offering all the services at zero cost for a considerable measure of time and afterward abusing the request and system of TRAI clarifies its goal to manhandle its situation in the market.

These techniques brought about Jio catching a huge lump of market in 4G classification in an exceptionally limited capacity to focus time and in any event, abandoning the fundamental player "Airtel" in this classification. Utilization of intensity in this manner to toss different contenders out of market or hurting them by and large can be named abuse of dominant position in the market.

VI. PENETRATIVE PRICING: THE SEARCH FOR CLARITY AND DAWN OF ITS UNDENIABLE EXISTENCE

In contrast to predatory pricing, penetrative pricing is not a lot of mainstream in the field of Competition law. Competition Act, 2002 which directs competition in India is quiet upon this issue to the degree where there is no unequivocal notice about it in the whole Act. Certain points with respect to penetrative evaluating are talked about underneath trying to clear the mist:

(A) Definition

Penetrative Pricing is a typical advertising and estimating procedure. Only here and there has a reasonable and brief definition been given in the cases or the directing bodies which envelops

²⁹*France Telecom SA v. Commission of the European Communities*, [2007] ECR II-107.

³⁰Mohul Ghosh, "Can Reliance Jio legally offer free voice calls? Rule says tariff cannot be below interconnect charges!" available at: <http://trak.in/tags/business/2016/10/14/reliance-jio-free-voice-calls/> (last visited on January 6, 2021).

³¹*In re: Johnson and Johnson Ltd.*, [1998] 64 Comp Cas 394.

greater part of the parts of penetrative evaluating concerning competition law. A theoretical definition is being given here:

Penetrative pricing can be characterized as bringing down (normally) of costs of things or services by a non-dominant enterprise to set up, advance and feature its personality and presence in the market, where numerous players as of now exist, with the expectation, planning and objective to quickly draw in the purchasers' consideration to the detriment of enduring initial losses which might be recovered once their personality is set up through this momentary motivation-based system.

It was first effectively applied and acknowledged by Competition Commission of India (CCI) in the Jio case. It was additionally the first time where they valued its essential worth and gave certain measures, nonetheless, these were mentioned in the obiter dicta part and not in the ratio decidendi one, which shows that it is yet not set up to officially acknowledge it as a favourable to serious and major vital improvement in the Indian competition law area. This makes it equivocal in nature as the assessment of the commission stays muddled as it did not set conventional rules, keeping it open to future understandings.

(B) Nature

The very pith of penetration is to build market variety and offer better options to the purchasers which can be named as pro-competitive in nature.

A remarkable component of the Jio case is its underlying zero pricing system. It was accursedly utilized in the NSE case³², however NSE being the dominant entity was not considered under the ambit of penetrative pricing yet was somewhat monopolistic in nature. In any case, in the Jio case it was effectively acknowledged by the Commission because Jio was a new entity. Regardless, certain relevant inquiries stay questionable concerning the time span of this technique, its expectation, its situation with respect to the pricing issue and its effect in causing brief disturbance of the norm. In Jio case, zero costing drove the whole spotlight on the quality which the buyers had the free decision to test and look at. While zero costs will in general keep firms from contending on value, they welcome competition on quality. Entities can create more prominent quality at zero costs and endure losses incidentally; on the off chance that they are prevalent they will pick up piece of the overall industry later on and recover the misfortunes. It exposes the hypothesis which labels zero pricing as an enemy of serious impasse in competition law.

³²*Supra* note 14.

(C) Criteria

The CCI hinted at certain criteria as observed in the Jio case. They include non-dominant nature of the offering company, intent of incentivization, absence of competition reducing approach and its short time span. The Commission expressed its opinion as follows:

“providing free services cannot by itself raise competition concerns unless the same is offered by a dominant enterprise and shown to be tainted with an anti-competitive objective of excluding competition/ competitors, which does not seem to be the case in the instant matter as the relevant market is characterized by the presence of entrenched players with sustained business presence and financial strength. In a competitive market scenario, where there are already big players operating in the market, it would not be anticompetitive for an entrant to incentivize customers towards its own services by giving attractive offers and schemes. Such short-term business strategy of an entrant to penetrate the market and establish its identity cannot be anti-competitive in nature and as such cannot be a subject matter of investigation under the Act.”

VII. CONCLUSION

The patterns in CCI's decisions are intelligent of the change in outlook in its way to deal with liability under section 4. The CCI appears to have settled a more modernized methodology in treatment of competition law questions. However, as Robert Frost properly stated, woods may be lovely, dark, and deep, there are promises yet to keep and miles to go before any sleep. In this case, it is far forward, and few pointers that should be routed to make the whole competition structure more viable in India can be summed up as follows:

(A) Restricting the all-encompassing command of CCI

The powers of the CCI are somewhat multi layered. For one, CCI goes about as the controller of inner business. Second, it additionally takes up the job of an investigative office. Third, CCI itself reports over to itself over the investigative reports. Finally, it is the implementation organization. However, CCI's essential function remains to check government and business mediations in the economy against similarity with undistorted competition. Consequently, it is contended that CCI looks over the space where guideline, strategy and policies regularly cooperate with one another and meet towards shared objectives.

(B) Conflict of stands

The exceptional idea of CCI's clashing adjudication of dynamic business sectors in the Ola case (2015), or the Google case or Airtel and Reliance Industries issue (2017) feature the lacunae in

giving some level of consistency to the market as a rule. This likewise identifies with particular acknowledgment of the 'objective justification hypothesis' in particular issues.

(C) New types of dominance abuse

Section 4 does not give a thorough rundown of examples of abuse of dominance. The idea of 'penetrative pricing' for example does not discover place hitherto which has prompted close to syndication of Jio, as a model, in the telecom area. Strangely, the matter was set out to not be anticompetitive in nature.

(D) Expanding the 'impacts' precept

In conclusion, CCI needs to expand utilization of the impacts precept in conference with monetary specialists and grow more unique tests and factors for assurance of (a) the relevant market itself (b) the positive and antagonistic impacts of an activity by the undertaking.

(E) Conflict in Jurisdiction

The preamble of the Competition Act, 2002³³ read with section 18 of the Act delegates to the Competition Commission of India the obligation of "advancing and maintaining competition" in the Indian economy. This infers that the CCI will have head purview to control conditions of competition in the relevant market of India. Though, the goal of Telecom Regulatory Authority of India Act, 1997³⁴ is to sustain conditions fundamental for the development of telecom industry. Section 11 of the TRAI Act delegates capacity to the Telecom Regulatory Authority of India to "encourage competition and advance effectiveness in the activity of media transmission benefits in order to encourage development in such administrations".

The goals of both enactments, when perused together, mean to establish a climate that may encourage reasonable competition. In satisfying the concerned goal, the powers and jurisdiction of both the legislations overlap. In spite of the fact that both share a common objective, they vary in their order and approach. The distinction in methodology embraced by the CCI and TRAI towards a comparable target prompts instances of jurisdictional clashes.

(F) Resolving the Jurisdiction

On 5 December 2018, a two-judge bench of the Supreme Court in Competition Commission of India v. Bharti Airtel Limited and Others³⁵ addressed and settled the issue of the ongoing

³³Supra note 2.

³⁴Supra note 4.

³⁵Competition Commission of India v. Bharti Airtel Telecom Ltd. available at: https://www.sci.gov.in/supremecourt/2017/40072/40072_2017_Judgement_05-Dec-2018.pdf (last visited on January 7, 2021).

jurisdictional battle between the CCI and TRAI. As per the judgment, TRAI will be the principal power to practice jurisdiction though the CCI will consistently have a follow-on purview in issue identified with telecommunication industry. Further, the jurisdiction of the CCI cannot be called except if TRAI makes its "last decision". The aforesaid rule is against the intent behind section 21 of the Competition Act. This is on the grounds that the said provision permits legal specialists to refer an issue to the CCI, if the issue is in contradiction to any of the provisions of the Act. Subsequently, considering section 21, TRAI can make a reference to the CCI preceding the "last decision" being made. Jio fulfilled all its clients for a brief timeframe, yet very less people know the value they might have to pay in future to be with Jio. The uncanny evaluating system of Jio has become an exemplary instance of ruthless conduct that in the end got away from charges of predatory pricing methodologies. CCI in its request supported Jio by saying that Jio is definitely not a dominant player, thoroughly keeping itself separated from the way that its strength ought to be decided about just in the 4G area and not in the entire telecom area. All items or administrations considered reciprocally or substitutes by the customer by reason of attributes of the item or administrations their costs and expected use, comprise the relevant market share.³⁶ Characteristics or cost of 3G and 4G cannot be viewed as exchangeable in the genuine sense. Hence the distinctness of Jio has been established but the tussle between CCI and TRAI still needs an answer.

³⁶T. Ramappa, *Competition Law in India*, (Oxford Publications, 3rd Edition) 166.