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Evolving Principles of Dominant Posititon and Predatory Pricing in the Telecommunicatior Sector: Revisiting Bharti Airtel Ltd v. Reliance Industries Ltd.

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ARTICLE

Evolving Principles of Dominant Position and Predatory Pricing in the Telecommunication Sector: Revisting *Bharti Airtel Ltd.* v. *Reliance Industries Ltd.*

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Over the years, predatory pricing has become an important subset of abuse of dominant position in the global competition law regime. Particularly in the telecommunication sector in India, the issue of predatory pricing has acquired great significance with the entry of Reliance Jio into the market, and the subsequent onslaught of allegations regarding anti-competitive behaviour. In this paper, we present a critique of the Competition Commission of India's assessment of dominant position and predatory pricing in the judgment of Bharti Airtel Ltd. v. Reliance Industries Ltd. & Anr. *We argue that CCI's analysis in the case was flawed on three counts: first, what would be the relevant market in the case; second, the ascertainment of Reliance Jio's dominance in the relevant marker; and third, whether or not Reliance Jio abused its dominant position by indulging in predatory pricing.*

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I. Introduction

The increasing digitization of the market economy poses problems that increasingly perplex us, and it is one of those problems that lie at the heart of this paper. While technologically disruptive corporations create market efficiencies and promote consumer welfare, they might also make such a corporation dominant in the market. While dominance *per se* is not wrong, abusing such market position might attract anti-competition allegations. In the presence of such evolving technological disruptions, what trajectory should the Indian competition law jurisprudence take? In the last few years, several new principles have been discussed by Competition Commission of India ('CCI'), be it in the context of network effects in multi-sided platforms,[1] platform neutrality, deep discounts,[2] or anything else. This paper shows how some of these new principles and standards can be applied in the context of digitized markets through a critique of the CCI's decision in *Bharti Airtel Ltd. v. Reliance Industries Ltd. & Anr*[3] ('Airtel-Jio').

Predatory pricing in the telecommunications sector became significant in India in 2016 with the disruptive entry of Reliance Jio and subsequent allegations regarding anti-competitive behaviour. In light of the various jurisprudential and regulatory developments resulting from the *Airtel-Jio* case,[4] this paper attempts to critique the decision as well as subsequent developments. Under Section 4 of the Competition Act, one of the ways to abuse dominance is by adopting predatory pricing.[5] The Act defines predatory pricing as "*the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors*." In *Airtel-Jio*, Bharti Airtel's allegation was primarily that Reliance Jio was offering services below its cost.

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1 Aditya Bhattacharjea, 'Predatory Pricing in Platform Competition: Economic Theory and Indian Cases' in Ashish Bharadwaj, Vishwas H. Devaiah and Indranath Gupta eds, Multi-dimensional Approaches Towards New Technology: Insights on Innovation, Patents and Competition (Springer, 2018) 211.

2 Competition Commission of India, 'Market Study on E-commerce in India: Key Findings and Observations' <https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf> accessed 15 November, 2021.

3 *Bharti Airtel Ltd v Reliance Industries Ltd & Anr* Case No 03 of 2017 (Competition Commission of India) [16].

4 For instance, the Telecom Regulatory Authority ('TRAI') in 2018, through a ruling, amended the predatory pricing rule, providing for an interesting perspective. The amendment permitted Jio to continue offering its services at a low price, while simultaneously banning the other market players from reducing their existing prices to combat competition, using the reasoning that Jio, as a new entrant, would be incapable of predation, while the others would be. See The Telecommunication Tariff (Sixty Third Amendment) Order, 2018 (No. 1 of 2018) <https://trai.gov.in/sites/default/files/TTO_Amendment_Eng_16022018.pdf> accessed 28 August 2020.

5 Competition Act 2002, s 4(2)(c).

To briefly state the facts relevant for this paper, in *Airtel-Jio*, the Informant Bharti Airtel had filed a case against Reliance Industries Limited (OP-1) and Reliance Jio Infocomm Limited (OP-2) alleging predatory pricing in contravention of Section 4(2)(a)(ii) of the Competition Act, 2002. The specificity of the allegations was that Reliance Jio had announced an offer named 'Jio Welcome Offer', which entailed free data, voice and video call services till 31st December 2016. Thereafter, this offer was extended for applicability till 31st March 2017. This offer was made irrespective of the fact that Reliance Jio would have had to pay an interconnection charge of 14 paisa per minute for calls made by its subscribers to subscribers of other networks. Hence, despite incurring such costs, Reliance Jio was providing free services, thereby providing services below cost. This paper proceeds as follows. In Section II, it makes a case for how CCI's analysis of relevant market and dominance was flawed because of an incorrect understanding of the different services being offered in the telecommunication sector. This paper argues that the appropriate relevant product market to be considered in this case ought to have been determined as the provision for wireless 4G LTE services, contrary to the finding of the Commission. Following this, the question of dominance is examined through an analysis of the factors enumerated in Section 19(4) of the Act, *inter alia*- market share, entry barriers and countervailing buying power. In Section III, this paper discusses the concept of predatory pricing and the legal framework governing it in India. The strength of arguments in the decision of the Commission in the *Airtel-Jio* case is then evaluated to identify whether the same were rightly considered. The paper finally examines the merits of using the Long-run Average Incremental Cost ('LRAIC') over the Average Variable Cost ('AVC') to measure utility rates, by listing both its advantages for and its suitability to the telecommunications sector in India.

II. Relevant Market and Dominant Position

Digital economy leads from the forefront in terms of innovation, as new-age corporations emerge, and existing ones try to get ahead of their competitors. A benefit of digitization is that where digital services and products are nearly identical, corporations compete extensively to bring forth the next generation of digital products.[6] The competition, then, becomes about innovation in digitization, and not simply about the identical prices. In such circumstances, relying on a very simplistic price-basis to determine the market would be limiting.[7] Similarly, the market might favour a corporation that incentivizes its customers to use its products. This is done through deep discounts, offers, and other financial incentives, even if the products are not technologically

[6] Janice Hauge and Mark Jamison, 'Identifying Market Power in Times of Constant Change' <https://bear.warrington.ufl.edu/centers/purc/docs/papers/1607_Jamison_Identifying%20Market%20Power%20in%20Times%20of%20Constant%20Change.pdf> accessed 15 November, 2021.

[7] ibid.

superior to those of its rivals.[8] It can, in fact, be a combination of all these factors that determine the ability of a firm to capture market.

A. Incorrect Ascertainment of Relevant Market

Under the Competition Act, an analysis of an entity's dominant position commences with an analysis of "relevant market" because "dominant position" refers to a position of strength enjoyed by an enterprise in the relevant market.[9] Under Section 2(r) of the Act, relevant market refers to the market that may be determined by CCI with reference to the relevant product market or relevant geographic market or both.[10] Relevant geographic market has been defined under Section 2(s),[11] while relevant product market has been defined under Section 2(t).[12]

In order to ascertain whether the conduct of a dominant group or enterprise is abusive, it is important to accurately determine the relevant market, assess the level of dominance of the alleged firm and effectively assess the conduct termed as abusive.[13] While there is no existing bright-line test for dominance or its primary indicator, the CCI is required to take a comprehensive look at the firm and the market structure, in accordance with Section 19(4). Under the said Section, CCI can examine factors such as market share of the enterprise,[14] resources and size of the enterprise,[15] importance and size of competitors,[16] economic power of the enterprise,[17] dependence of consumers on the enterprise,[18] other aspects of market structure, barriers to entry,[19] and so on.[20]

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8 Smriti Parsheera, Ajay Shah and Avirup Bose, 'Competition Issues in India's Online Economy' (2017) No. 194 NIPFP Working paper series 1, 4.

9 Competition Act 2002, s 4.

10 ibid, s 2(r).

11 ibid, s 2(s). The Section reads- '"relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.'

12 Competition Act 2002, s 2(t). The Section reads- ' "relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.'

13 Cyril Shroff and Avaantika Kakkar, 'India: Abuse of Dominance' (*The Asia-Pacific Antitrust Review 2019*, 19 March 2019) <https://globalcompetitionreview.com/insight/the-asia-pacific-antitrust-review-2019/1188990/india-abuse-of-dominance> accessed 25 February 2020.

14 Competition Act 2002, s 19(4)(a).

15 ibid, s 19(4)(b).

16 ibid, s 19(4)(c).

17 ibid, s 19(4)(d).

18 ibid, s 19(4)(f).

19 ibid, s 19(4)(h).

20 These factors had also been discussed in *Shri Ramakant Kini v Hiranandani Hospital,* 2015 SCC OnLine Comp AT 1166.

In the *Airtel-Jio* case, the CCI held that the relevant product market is '*provision of wireless telecommunication services to end users*', while relevant geographic market is '*each of the 22 telecommunication circles in India*'.[21] CCI did not explicitly rely on any of the factors listed in Section 19(6) and 19(7) for the determination of the same, but made implicit references to the same through its discussion of cost of services, nature of service provided, etc.[22] Nevertheless, without contesting the relevant geographic market determined by the CCI, this paper argues that the CCI's delineation of the relevant product market was incorrect.

In its analysis, the CCI stated that any telecom service provider in India, like the Bharti Airtel (Informant) and Reliance Jio, provided its services in a bundled form. This bundle includes voice services as well as internet services, which are used through the same mobile handset.[23] The Commission added that various telecom service providers are also similarly placed to offer internet-only services, along with the bundled services. Therefore, there was no requirement to distinguish between the two, making the relevant product market the broad market for '*wireless telecommunication services*.' The CCI gave consideration to the fact that over the years, the evolution brought about in these services has been one pertaining to the internet services.[24] For instance, 2G offers voice and basic data services, 3G offers voice and enhanced data services and 4G (technically known as 4G LTE) mainly offers much more advanced data services. Further, after the launch of its 4G services, OP-2 itself expected *data* to be its primary source of revenue, rather than calls, indicating the significance of data services.[25] Yet CCI did not agree with the reasoning that wireless telecommunication services can be sub-divided on the basis of the superiority of the internet technology. Hence, it dismissed the Informant's argument that there exists a separate relevant product market for 4G services on the premise that 3G and 4G services are comparable.

However, this paper argues that 4G services will form a separate relevant product market for the following reasons:

First, there is an absence of demand-side substitutability between 3G and 4G services. Under Section 19(7) of the Act, relevant product market is to be determined on the basis of factors such as **physical characteristics or end use, consumer preferences, price of goods or services**, etc.[26] These factors help

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21 Airtel-Reliance Industries (n 3) [16].

22 ibid [15-16].

23 ibid [15].

24 ibid [16].

25 Jai Bhatia & Advait Rao Palepu, 'Reliance Jio: Predatory Pricing or Predatory Behaviour?' (2016) 51(39) Economic and Political Weekly <https://www.epw.in/journal/2016/39/web-exclusives/reliance-jio-predatory-pricing-or-predatory-behaviour.html#:~:text=When%20a%20firm%20not%20only,behaviour%20is%20considered%20%E2%80%9Cpredatory.%E2%80%9D> accessed 28 August 2020.

26 Competition Act 2002, s 19(7).

ascertain whether, from the point of view of consumer demand, the products in question are substitutable. With respect to substitutability of 3G and 4G services, it can be said that the distinction between 3G and 4G is primarily of speed, the latter being much higher (around 5 times). As research shows, the principal determinant of consumer decisions to buy any broadband service is the high bandwidth (the rate of data transfer that determines speed) offered by the service.[27] For instance, in *Wanadoo Interactive*,[28] the European Commission also drew a distinction between high speed and low speed internet (an issue not appealed later). Although both high speed and low speed internet offer some common features, the Court recognized that some applications available with high-speed internet are usually not feasible with low-speed access.[29] To present some examples of our own, live streaming any video is usually possible only with high-speed connectivity of 4G. Further, 4G service is believed to be used for high-definition television streaming and video conferencing which are not possible through 3G.[30]

It is also crucial to note that the explanation behind the failure of wide-scale 3G adoption in India is that the difference between 2G and 3G speed was not completely discernable in several areas, deterring consumers from switching to 3G.[31] This implies that it is the difference in speed that incentivizes consumers to move to a more advanced data service, highlighting the importance of data speed in consumer preferences. Therefore, it can be reasonably argued that the reason for the rapid wide-scale adoption of 4G (drastically wider than 3G) in a very short time-span is a result of 4G's high speed, clearly distinguishing 4G from 3G. Another reasoning given by CCI was that the tariff for 3G and 4G services are similar, making them substitutable.[32] However, the reason for identical prices for the two services is not that the cost and features of these services is identical. On the contrary, the reason for such identical prices is the large scale mobile broadband investment over the course of past few years.[33] Therefore, despite the evolved equipment and spectrum requirements in 4G, their price charged to the end user could be substantially reduced. However, the reduced prices of 4G services have turned out to be unsustainable for telecom companies in the long run. Recent hike in tariffs of 4G services had been done on the reasoning that telecom companies need to get a decent

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27 Robert Crandall, 'The Empirical Case Against Asymmetric Regulation of Broadband Internet Access' (2002) 17(1) Berkeley Technology Law Journal 953, 963.

28 Wanadoo Interactive- COMP/38.233 (2003) (European Commission)

29 ibid [175].

30 'First 4G data service launched in India' (*British Broadcasting Corporation*, 10 April 2012) <https://www.bbc.com/news/world-asia-india-17662393> accessed 28 August 2020.

31 Saptarishi Dutta, 'India might be moving to 4G era, but 3G hasn't really taken off' (*Quartz India*, 14 August 2014) <https://qz.com/india/240506/india-might-be-moving-to-4g-era-but-3g-hasnt-really-taken-off/> accessed 28 August 2020.

32 Airtel-Reliance Industries (n 3) [16].

33 GSMA, The Mobile Economy India 2015 (Newsletter, 2015) <https://www.gsma.com/asia-pacific/resources/the-mobile-economy-india-2015/> accessed 28 August 2020.

return on their capital so as to maintain a healthy business model.[34] This only goes to show that similar tariffs on 3G and 4G services was a due to increased investment in the beginning, but now, in the long run, the same tariff range cannot be maintained for 4G services.

Second, there is a lack of supply-side substitutability between 4G and 3G services. Section 2(t) of the Act says that for products to be within the same relevant market, they have to be substitutable by reason of their characteristics.[35] Additionally, *notice on the application of the competition rules to access agreements in the telecommunications sector* ('*Notice for the telecommunications sector*') also takes into account supply-side substitutability.[36] In this regard, CCI noted:

"*From the supply side, any new entrant in the telecom market is likely to adopt the technology available at that time and* ***later upgrade its network from time to time to migrate or additionally offer services based on newer technologies****. In this ongoing process of evolution, it is not appropriate to differentiate wireless telecommunication services based on technologies used for providing such services*"[37]

Although 2G and 3G equipment can be updated to some degree, they cannot provide the same performance/cost ratio offered by equipment designed specifically for more evolved technology like 4G.[38] Newer mobile technologies also require much greater access to spectrum without which the newer networks would be unable to deliver adequate internet service altogether.[39] This reflects a lack of supply-side substitutability between equipment used for varying telecommunications standards.

Third, CCI's analysis fails the test for relevant product market provided in *Notice for the telecommunications sector*. Under this test, it must be asked that if all suppliers of the service in question increased their price in the range of 5% to 10%, would their collective profit rise. If yes, then the service in

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34 Sameer Bhardwaj, 'Bharti Airtel's Tariff Hike Paves The Way For Higher Telecom Pricing In India' (*Bloomberg Quint*, 22 November 2021) <https://www.bloombergquint.com/business/bharti-airtels-tariff-hike-paves-the-way-for-higher-telecom-pricing-in-india> accessed 23 December 2021.

35 Competition Act 2002, s 2(t).

36 Official Journal of the European Communities, 'Notice on the application of the competition rules to access agreements in the telecommunications sector', (1998) OJ C 265/2 [40, 41]. The Notice states, "40. Firms are subject to three main sources of competitive constraints; demand substitutability, supply substitutability and potential competition…41. Supply substitutability may in appropriate circumstances be used as a complementary element to define relevant markets."

37 Airtel-Reliance Industries (n 3) [16].

38 Nokia/ Alcatel-Lucent-COMP/M 7632 (2015) (European Commission) [21].

39 Pau Castells and others, 'The Mobile Economy India 2016' (2016) GSMA.

question forms a separate relevant market.[40] While mobile broadband service was not considered as a 'necessity',[41] it has become increasingly useful to end consumers and its price elasticity of demand has become considerably inelastic. The implication of this inelastic elasticity of demand is that if the price of service increases by x%, the fall in demand for that service would be *less* than x%. Hence, there is no equivalent reduction in demand of the service because of the critical usefulness of high-speed broadband service.[42] A conservative estimate of price elasticity of demand for mobile broadband service has been -0.5.[43] Therefore, assuming other things to be constant, an increase in price of 4G services would not lead to an equivalent decrease in internet subscription, causing a rise in profits. It should also be noted that an increase in price by a 4G service provider 'Y' would not automatically lead to people resorting to 3G services by 'Y'. Instead, a reasonable course of action would be to first switch to 4G services offered by some other service provider (considering the singular benefits of 4G- high speed coupled with relatively lower prices), provided that the cost of switching to any other service provider is not high enough to deter the switching altogether.

Hence, in *Airtel-Jio*, the relevant market should have been determined as 'provision for wireless 4G LTE services to end users in each of the 22 telecommunication circles in India'.

B. Establishing Dominant Position

Considering the relevant market delineated above, it is necessary to assess Reliance Jio's (OP-2) dominant position from a renewed perspective. Section 19(4) of the Act states that while assessing whether or not an entity enjoys dominant position, the Commission must give due regard to **all or any** of the factors stated therein. These factors include market share of the enterprise,[44] barriers to entry in the market,[45] countervailing buying power,[46] etc. It is a

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40 Notice (n 36) [40].

" This test, albeit not the same as the SSNIP-test, works on the same *principle* as the SSNIP-test which asks "whether the customers of the undertaking(s) concerned would switch to readily available substitutes or to suppliers located elsewhere to such an extent that it would be unprofitable to implement a small but significant (normally in the range 5%-10%), non-transitory increase in relative prices for the products and the areas being considered."

41 Rajeev Goel, Edward Hsieh, Michael Nelson and Rati Ram, 'Demand Elasticities for Internet Services' (2006) 38(9) 975.

42 Catherine Rampell, 'Does Lowering the Price of Broadband Increase Its Use?' (*Economix, The New York Times*, 22 May 2009) <https://economix.blogs.nytimes.com/2009/05/22/does-lowering-the-price-of-broadband-increase-its-use/> accessed 28 August 2020.

43 William Lehr, 'Benefits of Competition in Mobile Broadband Services' (2014) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2420488> accessed 28 August 2020.

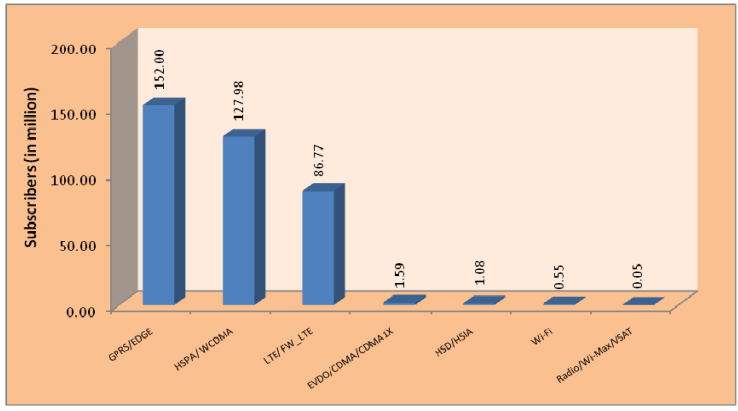
44 Competition Act 2002, s 19(4)(a).

45 ibid, s 19(4)(h).

46 ibid, s 19(4)(i).

well settled judicial principle,[47] that market share is not to be the sole decisive factor for establishing dominant position. Further, we contend that CCI's determination of relevant product market was incorrect, which led to a faulty analysis of market shares of each of the service providers in the market. This, in turn, led to a faulty assessment of dominant position by CCI too. CCI relied on the market shares of the service providers in the broader market of wireless telecommunication services, which not only encompassed all levels of internet services, but also encompassed all telecommunication services even without data services.[48] After the official launch of 4G LTE services by OP-2 on September 1, 2016, the total number of 4G subscribers in India at the end of September amounted to 26.73 million, out of which OP-2 had a share of 15.98 million.[49] At the end of December 2016 (a little before the *Airtel-Jio* case had been decided) total 4G subscribers were 86.77 million, out of which OP-2 alone had 72.15 million subscribers.[50]

Chart 1.18 : Technology trend for Wireless Internet Access – Dec-16



The third bar shows the number of LTE subscribers (86.77 million) out of total number of wireless internet subscribers

Source: TRAI

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47 *M/s Kansan News Pvt Ltd v M/s Fast Way transmission Pvt Ltd & Ors* Case No 36 of 2011 (Competition Commission of India); *Belaire Owner's Association v DLF Ltd & Ors,* 2011 Comp LR 239 (Competition Commission of India).

48 Telecom Regulatory Authority of India, 'Yearly Performance Indicators of Indian Telecom Sector 2016' (2017) 1st ed Performance Indicator Reports.

49 Telecom Regulatory Authority of India, 'The Indian Telecom Services Performance Indicators July – September, 2016' (2016) Performance Indicator Reports.

50 Yearly Performance Indicators of Indian Telecom Sector 2016 (n 47).

Table 1.26: Internet Subscriber Base and Market Share of top 10 Service Providers – Dec-16

S.No	ISP	No. of Subscribers	Share (%)
1	Bharti Airtel Limited	84832577	21.67
2	Reliance Jio	72157644	18.43
3	Vodafone	65054343	16.62
4	Idea Cellular	48600920	12.41
5	BSNL	32897750	8.40
6	Reliance Communications	32086668	8.20
7	Aircel Ltd	18162631	4.64
8	Tata Teleservices	14772934	3.77
9	Telenor	13463218	3.44
10	MTNL	1993640	0.51
	Total of Top 10 ISPs	**384022325**	98.09
	Others	7479788	1.91
	Grand Total	**391502113**	**100**

Source: TRAI

In the table above ("Internet Subscriber Base and Market Share of top 10 Service Providers- Dec 2016"), the number of subscribers of all service providers do not reflect the number of 4G LTE subscribers, but reflect the **total** number of subscribers (4G, 3G and 2G). However, an exception to this is Reliance Jio (OP-2) as it provides *only* 4G LTE services. Therefore, analysing the two images above, total number of 4G LTE subscribers is 86.77 million, and total number of Reliance Jio subscribers (all 4G LTE subscribers) is 72.15 million. Consequently, the rest of the service providers share the remaining 14 million 4G LTE subscribers amongst themselves.[51] Therefore, Reliance Jio's market share before the decision of *Airtel-Jio* in the relevant product market was approximately 83%. Size and resources of the all the competitors in the relevant market, a crucial factor under Section 19(4)(c), becomes an insignificant 17%. In the light of the same, CCI's reasoning that "*Even if one were to consider 4G LTE services as the relevant product market, OP-2 is not likely to hold dominant position in such market on account of the presence of the Informant, Vodafone, Idea, etc.*,"[52] seems weak.

There are also significant barriers to entry in the market, making it probable for OP-2 to retain its dominant position. One such barrier, as recognized under Section 19(4)(h) is economies of scale.[53] Presence of economies of scale would mean that a doubling of output requires **less than** a doubling of cost.[54]

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[51] 'India had 86.77 million 4G subscribers in 2016: TRAI', (*telecomlead*, 3 July 2017) <https://www.telecomlead.com/telecom-statistics/india-86-77-million-4g-subscribers-2016-trai-77616> accessed 28 August 2020.

[52] Airtel-Reliance Industries (n 3) [21].

[53] Michal Gal, 'Below-Cost Price Alignment: Meeting or Beating Competition' (2007) 28(6) European Competition Law Review <https://works.bepress.com/michal_gal/17/> accessed 25 February 2020.

[54] Robert S. Pindyck and Daniel L. Rubinfeld, *Microeconomics* (8th edn, Pearson) 25.

In telecommunications sector, there are high investment costs in the beginning arising out of establishing the necessary infrastructure, purchasing equipment, marketing, etc. Nevertheless, the established infrastructure can generate a substantial number of services- after a point, the variable cost of each output can be negligent. The high investment costs in the beginning would make it difficult for any new entrant to penetrate the market unless they had sufficient economic backing like OP-2 did.[55] Sometimes, the conduct being investigated can *itself* become a barrier to entry.[56] For instance, the very fact that a market player is charging zero prices and capturing the market can be intimidating and have the effect of deterring firms from entering the market on the belief that they would not be able to charge such low prices and, hence, would be unable to attract customers. Therefore, a zero-pricing strategy can itself have the effect of deterring entry into the market. Apart from structural barriers like economies of scale, such *behavioural* barriers are also being recognized.[57] The CCI failed to take any of these into account.

It is significant to note that dominant position, as defined under Section 4, is a **position of strength** which also enables an enterprise to **affect its competitors in its favour**.[58] As a response to OP-2's zero pricing policy, multiple other telecom operators also had to lower their own prices. Informant Bharti Airtel announced that it would slash its 3G and 4G internet charges by up to 80% to as low as ₹51 per GB.[59] Airtel had also announced a singular 4G data pack which would offer "free" internet services for a 90-day period.[60] Vodafone also resorted to revising its prices for data offerings downwards. Resultantly, these service providers were led to face massive revenue losses,[61] clearly showing the ability of OP-2 to affect its competitors in its favour. In *MCX v. National Stock Exchange* ('NSE'),[62] CCI had held that this position

[55] Jai Bhatia & Advait Rao Palepu, 'Reliance Jio: Predatory Pricing or Predatory Behaviour?' (2016) Economic and Political Weekly 51(39) <https://www.epw.in/journal/2016/39/web-exclusives/reliance-jio-predatory-pricing-or-predatory-behaviour.html#:~:text=When%20a%20firm%20not%20only,behaviour%20is%20considered%20%E2%80%9Cpredatory.%E2%80%9D> accessed 28 August 2020.

[56] Robert Anderson and others, 'Abuse of Dominance in A Framework for the Design and Implementation of Competition Law and Policy' (*The World Bank and OECD,* 1999) 72.

[57] Ibid.

[58] Competition Act 2002, s 4.

[59] Sundeep Khanna and Kalpana Pathak,'Reliance Jio sends a message to rivals: It's war' (*Livemint*, 2 September 2016) <https://www.livemint.com/Companies/D4leWGTopPio6OYUQg2CEP/Mukesh-Ambani-kicks-off-Reliance-Jio-services-at-company-AGM.html> accessed 28 August 2020.

[60] Surajit Dasgupta, 'Airtel Launches Special 90-Day Free Data Pack For 4G Customers' (NDTV, 23 September 2016) <https://www.ndtv.com/business/airtel-launches-special-90-day-free-data-pack-for-4g-customers-1465486> accessed 28 August 2020.

[61] Kiran Rathee,'Reliance Jio effect: Bharti Airtel's net profit down 76% to Rs 343 crore' (*Business Standard*, 1 November 2017) <https://www.business-standard.com/article/companies/reliance-jio-effect-bharti-airtel-s-net-profit-down-76-to-rs-343-crore-117110100046_1.html> accessed 28 August 2020.

[62] *MCX Stock Exchange Ltd v National Stock Exchange of India Ltd & Anr,* Case No 13 of 2009 (Competition Commission of India).

of strength under Section 4 should not necessarily *make* the enterprise affect its competitors in its favour. On the other hand, it is sufficient even if the enterprise just has the *ability* to affect its competitors in its favour.[63] If an enterprise has adequate financial backing, it can take the risk of deferring its profit and indulge in market expansion through zero pricing. "*The greater the financial and commercial strength of an enterprise, the longer it can wait and the greater risks it can take*",[64] added CCI. OP-2 has been repeatedly claimed to be the "world's largest startup", with a huge financial backing,[65] clearly showing its ability to defer profits and take long-term risks for capturing market. This shows a clear position of strength.[66]

There is also a lack of countervailing buying power, a factor crucial for dominance under Section 19(4)(i).[67] It refers to the power that consumers of a product hold in terms of being able to switch to the product of a rival firm. In the relevant market in the instant case, there was an absence of countervailing buying power because if a customer wished to switch from OP-2 to any other service provider, the customer would have to pay to the new service provider for the services, unlike what was required in the business model of OP-2. This switching cost would disincentivize customers from shifting to new service providers, making them incapable of exercising any countervailing buying power. Assuming *quality* of service to be stable, unless OP-2 increased its prices to a level higher than the switching cost of switching to a new service provider, customers would have no incentive to switch. Holistically considering the above-mentioned reasons, it can be concluded that OP-2 was in a dominant position in the relevant market.

III. Predatory Pricing Analysis

Under Section 4 of the Act, predatory pricing means sale of goods or provision of services at a price "below the cost". Under section 4 of the Act, explanation (b) lays down a two-tier test to assess if the conduct of a dominant enterprise is abusive by way of its predatory prices. The first requirement is that the price must be below cost which is determined by CCI regulations and the second requirement is that the dominant enterprise must have the intent

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63 ibid [10.38]. While the Supreme Court had put a stay on the penalty that had been imposed by CCI in this case, the jurisprudential aspects of the case remain unquestioned.

64 ibid [10.40].

65 Muntazir Abbas, 'Reliance Jio is world's largest startup with Rs 150,000 crore investment: Mukesh Ambani' (The Economic Times, 30 March 2016) <https://economictimes.indiatimes.com/industry/telecom/reliance-jio-is-worlds-largest-startup-with-rs-150000-crore-investment-mukesh-ambani/articleshow/51613248.cms?from=mdr> accessed 28 august 2020.

66 MCX Stock Exchange (n 62) [10.40].

67 Competition Act 2002, s 19(4)(i).

to reduce competition or eliminate competitors.[68] According to Regulation 3 of Competition Commission of India (Determination of Cost of Production Regulations), 2009 ('Regulations'), "cost" has been *generally* interpreted to mean Average Variable Cost (AVC).[69]

This standard is akin to the well-established *Areeda-Turner Test*. In order to prove predatory pricing as per the *Areeda-Turner test*, two elements have to be established. *First,* it must be proved that the market structure and organisation of entities were in a manner so as to cause a reasonable likelihood of the success of the predatory pricing strategy. This recoupment standard requires for the plaintiff to demonstrate that the strategy of the dominant firm was a sound investment. This is done so by establishing that it could have reasonably anticipated the recovery of the costs of predation by a future period of monopoly profits. *Second*, it must be proved that the dominant firm's prices over a number of transactions were below a chosen measure of cost, being marginal costs in the short-run or average variable cost.[70] Since marginal cost data is difficult to obtain, average variable costs are generally used by courts as a proxy.[71]

This implies that if prices charged are below AVC, the conduct amounts to predatory pricing. In India, this interpretation had been reiterated in *H.L.S. Asia Limited, New Delhi v. Schlumberger Asia Services Ltd. Gurgaon and Anr.*[72] However, the Regulations give adequate discretion to the CCI to consider any other standard for cost which the specific fact situation requires. Yet CCI has repeatedly failed to evolve such different standards. Further, the Telecom Regulatory Authority of India ('TRAI'),[73] also sought to establish AVC as the appropriate standard for ascertaining predatory pricing behaviour in the market for telecommunications services.[74]

However, *Whish* and *Bailey* argue that an AVC threshold is incorrect for telecommunication markets. This is because in such markets, due to

[68] Competition Act 2002, s 4; Shweta Shroff Chopra, 'Dominance – India' (*Getting the Deal Through,* April 2019) <https://gettingthedealthrough.com/area/10/jurisdiction/13/dominance-india/> accessed 25 February 2020.

[69] The Competition Commission of India (Determination of Cost of Production) Regulations 2009, reg 3.

[70] Herbert Hovenkamp, 'Predatory Pricing Under the Areeda-Turner Test' (2015) University of Iowa Legal Studies Research Paper 1.

[71] See T Calvani and J Siegfried, *Economic Analysis and Antitrust Law.* (Little Brown Publ., New York. 1979).

[72] *H.L.S. Asia Limited, New Delhi v. Schlumberger Asia Services Ltd. Gurgaon and Oil & Natural Gas Corp. Limited, New Delhi,* 2013 SCC OnLine CCI 6.

[73] Telecom Regulatory Authority of India, Telecommunication Tariff (sixty third Amendment) Order 2018 <https://trai.gov.in/sites/default/files/TTO_Amendment_Eng_16022018.pdf> accessed 7 November 2021.

[74] Average Variable Cost best way to determine predatory pricing: TRAI' (*BusinessLine,* 16 February 2018) <https://www.thehindubusinessline.com/economy/average-variable-cost-best-way-to-determine-predatory-pricing-trai/article22777230.ece> accessed 28 August 2020;

the presence of economies of scale,[75] high investments are required in the beginning for setting up the infrastructure.[76] However, after such infrastructure has been put in place, the cost of adding one additional customer is almost zero.[77] Therefore, the AVC of having one additional user would be zero too. Therefore, for such platforms, it is more practicable to employ the long-run average incremental cost (LRAIC) method[78] than the AVC method. As the next Section shows, the LRAIC would have been an appropriate standard for CCI to consider in *Airtel-Jio* case too.

A. Appropriateness of LRAIC

New economy firms, like telecommunication, are described by declining marginal and average costs.[79] It has been widely accepted that utility rates ought to be based on LRAIC over short-run costs.[80] It can be defined as the additional cost incurred by the firm in the long-term while providing a specific service and is based on the assumption that all other production-related activities being carried out will remain untouched. LRAIC pricing is a method of dealing with the issues of diminishing average and marginal costs at enterprises where losses occur while pricing as per long term marginal expenses. It can also be defined as the total cost that could be avoided by a firm in the long term if it chose not to provide that specific service. Upon examination, it is clear that the two definitions are complementary in nature.[81] LRAIC models are, therefore, used in order to efficiently establish costs for price regulation in the telecommunications industry. Competition and regulation are sought to be introduced to the telecom industry in order to avoid the undesirable result of a deadweight loss arising if the industry were to become monopolistic in nature.[82] The adoption of LRAIC models would therefore be particularly appropriate for recently privatized utilities, especially for those with high fixed costs and quick technological changes, and to foster

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[75] See Robert S. Pindyck (n 54).

[76] Richard Whish and David Bailey, *Competition Law* (7th edn, Oxford University Press 2009) 11.

[77] Michal Gal, 'Below-Cost Price Alignment: Meeting or Beating Competition' (2007) 28(6) European Competition Law Review <https://works.bepress.com/michal_gal/17/> accessed 7 November 2021.

[78] David S. Evans and Richard Schmalansee, 'The Industrial Organization of Markets With Two-Sided Platforms' [2007] 3(1) Competition Policy International 151.

[79] AE Kahn and WB Shew, 'Current Issues in Telecommunications Regulation: Pricing' (1987) 4 Yale Journal On Regulation 191.

[80] Paul Noumba Um 'A Model for Calculating Interconnection Costs in Telecommunications' (World Bank, 2004)<http://documents1.worldbank.org/curated/pt/993401468779995571/pdf/280390PAPER0Model0for0calculating0costs.pdf> accessed 28 August 2020

[81] Roger L Conkling, *Marginal Cost in the New Economy* (first published 2004, Routledge 2015) 63.

[82] Richard B McKenzie and Dwight R Lee, *In Defense of Monopoly: How Market Power Fosters Creative Production* (University of Michigan Press 2008) 25.

competition among older and new participants.[83] The EU Commission is of the opinion that pricing below LRAIC is capable of foreclosing competition to efficient competitors more than any other standard.[84]

The telecommunications industry is characterized by high fixed costs in the beginning, including costs incurred in establishing the original infrastructure of wires and cables. However, once this infrastructure is in place, the AVC of providing can be as low as zero. As Whish and Bailey write, "*The AVC of telephone calls is so low that there would hardly ever be predatory prices if the AVC standard were to be applied*".[85] Therefore, the price which covers the variable cost of providing additional services will be substantially lower than the price needed to cover the cost of producing the *increment*.

With respect to the Indian telecommunication industry, a strong argument can be made for the adoption of an LRAIC model upon considering the abovementioned factors. Reliance Jio's financial statements of FY 2016-17 show that Jio had over 100,000 sites, substantially more than any other operator had at any point. In addition to fibre backhaul, Jio also had significant technological innovations needed for setting up of the infrastructure.[86] Furthermore, it was regularly incurring variable expenses in the nature of Operating Expenses, Depreciation and Amortisation expenses, etc.[87] All of these infrastructural expenses along with variable expenses, guide us towards the conclusion that its LRAIC is significantly high, even if the AVC of providing 4G services to customers is equivalent to zero. Considering LRAIC as the cost threshold, and assuming that the same is high implies that Jio's zero pricing strategy could have been predatory.

B. Other Factors Considered by CCI

CCI also noted that a question of examining abuse would not arise, since Jio did not occupy a dominant position in the market. It was alleged that Jio's introductory offer would fall under the definition of below-cost pricing which resulted in a huge shift in consumer base and would amount to predatory pricing behaviour. In response to this, CCI highlighted that Airtel had not demonstrated the fact of reduction or elimination of competitive players in the market, nor was there any proof as to intent. It went on to hold that providing free services alone would not be a cause for anti-competitive

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83 Colin Blackman and Lara Srivastava eds, 'Telecommunications Regulation Handbook' (World Bank, 2011) < http://documents1.worldbank.org/curated/en/527131468338984285/pdf/NonAsciiFileName0.pdf> accessed 28 August 2020.

84 Guidance on Article 82, para 67. "Normally only pricing below LRAIC is capable of foreclosing as efficient competitors from the market."

85 Whish and Bailey (n 76) 747.

86 'Reliance Jio Infocomm Annual Report 2016-2017' <https://www.ril.com/getattachment/0350f0b3-fc2c-42ad-9fff-979894a7ec1f/Annual-Report-for-the-year-2016-17.aspx> accessed 28 August 2020.

87 ibid.

concern, unless it was offered by a dominant player with the intention of excluding or eliminating competitors. In CCI's opinion, Jio simply incentivized consumers to subscribe to its services through offers and schemes, as would be necessary in the presence of existing big players with "sustained business presence and financial strength".[88] Therefore, CCI concluded that this was merely a short-term business strategy for market penetration and could not be a subject matter for investigation under the Act, and that no prima facie case for contravention existed.[89]

This argument of "meeting the competition", a defence to predatory pricing under Section 4, is very similar to what CCI in NSE case called the "defence related to development of nascent market".[90] Nascence denotes a phase at the time or immediately after the birth of a market, when enterprises are still discovering new dynamics quite frequently. However, later, when the market situations have played out, the market is no longer "nascent" even if the market is still not fully developed and players are still facing troubles. Therefore, strategies required to keep the new market alive are not necessary after the nascent stage. At the end of March, 2017, out of 400 million of wireless internet subscribers, 4G LTE had a subscriber base of 129.32 million, the second highest out of all technology trends in wireless internet access.[91] Therefore, even if 4G LTE market was not fully mature, it could not be seen as nascent either, since its launch in India was as early as in 2012.[92] Further, as shown above, at the end of December 2016 itself, Jio had captured a market share of 83%, clearly indicating that its pricing strategy was no longer needed as "penetrative" or "promotional".[93] Therefore, its '*Happy New Year Offer*' extending its uncharged data and voice call services till 31st March, 2017 cannot assume the defence of meeting the competition.

As a contrast to the existing legal framework consisting of high thresholds set by courts in adjudicating upon predatory pricing claims, modern economics views predatory pricing as a business strategy. There could be situations where entry barriers are created as a result of a new enterprise penetrating the market and gaining a significant share of market, potentially leading to a subsequent abuse of its dominant position.[94] There is a mention of the *Bolton test* in the NSE case, which looks at predatory pricing being adopted as an economically rational business strategy. It provides two variants of below-cost pricing measures – *first,* a defensive and competition-driven price reduction and

88 Airtel-Reliance Industries (n 3) [21].

89 ibid [22].

90 MCX Stock Exchange (n 62) [10.56].

91 Yearly Performance Indicators of Indian Telecom Sector 2016 (n 47).

92 'First 4G data service launched in India' (*British Broadcasting Company,* 10 April 2012) <https://www.bbc.com/news/world-asia-india-17662393> accessed 8 January 2022.

93 MCX Stock Exchange (n 62).

94 Patrick Bolton, Joseph F Brodley and Michael H Riordan, Predatory Pricing: Strategic Theory and Legal Policy (1999) <https://www.justice.gov/sites/default/files/atr/legacy/2006/10/30/218778.pdf> accessed 28 August 2020.

second, a market expanding price cutting. The former is usually carried out in response to a change in a competitor's pricing, whereas the latter is carried out with the objective of entering a new market. Jio's below-cost service pricing would therefore qualify as the latter.[95] A market expanding price cutting is especially problematic for an industry, since its consequences are either an improvement in competition or an exclusion/reduction of competition. Since its inception in 2016, Jio has become the leading telecom operator in India, and is set to capture nearly half the Indian telecom market by 2025.[96] There has already been a reduction in terms of competition as a result of Jio's entry, with the other operators carrying out acquisitions and the market moving towards oligopoly.

C. Relevance of 'Possibility of Recoupment'

One of the most significant aspects of predatory pricing, which has garnered a lot of attention lately is that of recoupment. Scholars have argued that an allegation of predatory pricing must be substantiated by proving that the predator would be able to increase its prices later and recoup the losses it had suffered due to low pricing of its products.[97] The recoupment stage (the second stage) begins when the firm in the dominant position seeks to recoup the losses made in the predatory stage. Recoupment occurs in various ways, in accordance with the predatory behaviour adopted by dominant firms.[98] If the market is such that after the alleged dominant firm increases prices, it loses its customers to its competitors, the predator might not be able to recoup its losses, making predatory pricing impracticable and unlikely. Therefore, a possibility of recoupment is a crucial aspect that must be considered by CCI in the future.

Now, an important question that arises is when would an alleged predatory not be able to recoup its losses? This can happen in several circumstances. For instance, when there are low barriers to entry in the market, making it possible for rivals to re-enter the market after the alleged predator increases its prices. In such a situation, if the alleged predator raises its prices too high, it might lose the increased customer base to the rival. However, even in such a scenario, there is still a possibility that the customers might be dis-incentivized to switch from the predator's product to the rival's product due to consumer inertia.

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95 MCX Stock Exchange (n 62).

96 'Jio may capture nearly half the Indian telecom market by FY25: Bernstein' (Business Standard, 17 June 2020) <https://www.business-standard.com/article/companies/reliance-jio-to-capture-48-indian-telecom-market-share-by-fy25-bernstein-120061700808_1.html> accessed 28 August 2020.

97 Bolton, Brodley and Riordan (n 94).

98 Christopher R Leslie, 'Predatory Pricing and Recoupment' (2013) 113 Columbia Law Review 1695, 1696.

The reluctance to switch could also be displayed because of the presence of interoperability cost. Suppose, a firm, after a prolonged period of zero pricing, decides to shoot up its price. However, the alleged predator would only be prevented from recouping prices when the customers of the platform actually leave the platform in response to an increase in price. This might not happen if the cost of switching to a new platform, the *interoperability* cost,[99] is simply higher than the price that their current platform is charging. For instance, in *Airtel-Jio*, even if the issue did not involve platform markets, the issue of interoperability cost could be pertinent. Reliance Jio was not charging any prices, while other service providers were. Therefore, switching to other service providers meant *actually paying* for the services. This payment requirement, which came with switching, acted as an interoperability cost for customers, deterring them from switching and leading to a loss of countervailing buying power.

The norms of interoperability can be determined in an ex-ante regulatory framework.[100] The interconnection norms brought in by TRAI are examples of it. Even under the Competition Act, it is possible for CCI to mandate interoperability by a dominant entity that is abusing its dominant position.[101] For example, in the *Microsoft* case,[102] the European Commission('EC') held that Microsoft had abused its dominant position in the PC operating system market by denying interoperability information to its users. Therefore, the EC asked Microsoft to reveal full and accurate interface information that would help rival corporations interoperate with the Window system.

IV. Conclusion

Through this paper, the authors have sought to analyse the *Airtel-Jio* decision and other subsequent developments from a critical lens in order to evaluate the merits of the decision and suggest alternative solutions that could have been followed by relying on jurisprudence developed by European Commission (a more experienced regulator). This has been done first, through the assertion that the CCI identified the relevant product market and the concept of dominance incorrectly. This is followed by an examination of predatory pricing framework in India, to suggest that the LRAIC ought to be considered instead of AVC, because of the various advantages the former has in comparison to the latter.

Over the last several years, there have been instances of inconsistent reasoning by the CCI in the determination of relevant market and dominant

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[99] 'Abuse of dominance in digital markets' (OECD, 2020) <www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf> accessed 9 January 2022.

[100] See the discussion in Consumer Online Foundation v. Tata Sky, Case No. 02/2009 (Competition Commission of India).

[101] Parsheera, Shah and Bose (n 8).

[102] Microsoft Corporation- COMP/C-3/37.792 (2009) (European Commission).

position. Another significant aspect, increasingly coming to surface, is CCI's laxity in adopting standards that are in alignment with evolving competition scenario in the country. Its fixation with AVC with respect to predatory pricing is one such instance. Numerous authorities have repeatedly emphasized on the appropriateness of LRAIC, while CCI, along with TRAI, conveniently ignores them. If CCI is supposedly a body with expertise in competition law, its ignorance certainly comes as a rude shock. *Airtel-Jio* was perhaps an opportunity for CCI to further the jurisprudence on predatory pricing, keeping in mind the new competition circumstances in the country. At this stage, we can only hope that no such opportunities are foregone in the future.