
FREE TODAY, MONOPOLISED TOMORROW: QUESTIONING CCI'S CALL ON JIO

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ABSTRACT

This article critically evaluates the order of the Competition Commission of India (CCI) passed in Case No. 98 of 2016 regarding alleged predatory pricing by Reliance Jio Infocom Limited ("Jio"). Jio launched as a disruptive force in India, in September 2016 with its free voice, data, and bundling of content "Welcome Offer". After gaining millions of subscribers, subsequently, a price war ensued that transformed the telecom sector in India. The CCI ruled out a claim of abuse of dominance, relying on static market-share thresholds and traditional product-market definitions under which all wireless services were aggregated under one analysis. Working from a multi-product, dynamic perspective of market power, the Commission did not take account of bundling, network-effects, and potential recoupment of later supra competitive pricing. By incorporating more empirical evidence, addressing emergent scholarly critiques and international guidance, and juxtaposing India's framework with (i) the Brooke Group test (U.S.), and, (ii) the AKZO standard (EU), this paper attempts to articulate a comprehensive, multifaceted analytical and policy framework to ensure competition in digital markets.

Introduction

When Jio entered India's telecommunications industry in September 2016 with the promotional offer named the "Welcome Offer" offering free voice, data and content services for an initial period, it instigated one of the most severe price wars in Indian history. The incumbent operators, including Bharti Airtel, Vodafone-Idea and others, began to see rapid subscriber churn, significant revenue losses and very fast consolidation leading to a complete change in the market. Meanwhile, two individual informants, C. Shanmugam and Manish Gandhi, brought Information No. 98 of 2016 before the Competition Commission of India (CCI) alleging Jio's conduct constituted predatory pricing and abuse of dominance under Section 4 of the Competition Act, 2002 (Act). Ultimately the CCI closed the case early on in the investigation holding that Jio did not have a dominant position in a relevant market, hence could have abused such a position.¹

This research article offers a critique of the CCI's order, in Case No. 98 of 2016, while arguing that the CCI did not consider the dynamic nature of market power and the real chance of recoupment, which were both embedded in Jio's strategy. The article examines the CCI's analysis in light of the legal framework of predatory pricing in India, in comparison to pivotal cases in the United States and the EU, and looks at the eventual impact on competition and consumer welfare. In the end, the article makes recommendations which will enhance India's competition jurisprudence in the digital era.

Research Problem

Did the CCI err in dismissing prima facie the claim of predatory pricing against Reliance Jio simply complying with static market-share thresholds and ignoring Jio's rapid subscriber acquisition, bundled offerings and the accompanying recoupment risks?

Research Objectives

1. To examine the CCI methodology in defining the relevant market, and in assessing dominance in Section 4 of the Act.

¹ Competition Commission of India, In re C. Shanmugam & Manish Gandhi v. Reliance Jio Infocomm Ltd., Case No. 98 of 2016, Order under Section 26(2) (June 15, 2017).

2. To criticize CCI's reliance on pan-India market-share figures without regard for short-term market entry and possible recoupment.
3. To contrast India's predatory pricing standard against the doctrinal tests found in Brooke Group (U.S.) and AKZO (EU).
4. To make recommendations for improvements to the analytical framework for abuse of dominance in fast moving digital, and platform markets.

Literature Review

Several commentators have reacted to the limited investigation by the CCI. An SSRN paper states that India's predatory pricing policy is at a critical juncture post-Jio², and that the CCI should amend its enforcement of Section 4. A Kluwer blog critique expresses concern for the absence of recoupment analysis and observes that Jio's rates remained above ATC for a short time following promotional pricing and subsequently raised rates to recoup losses.³ A National Law School Bangalore Review paper emphasizes the need to differentiate between the strategies of digital platforms from the classic predation context. An IRJMETs study (2024) contextualizes Jio's pricing as a form of predation associated with aggressive penetration, rather than benign competition.⁴

The Airtel v. Jio Case: Facts and CCI Order

1. *Factual Background*

Reliance Jio, a business arm of Reliance Industries Ltd, commenced 4G services when it launched in India and on September 5, 2016 the company offered free unlimited voice and data for all subscribers in its "Welcome Offer" until December 31, 2016 (for thousands of subscribers this offer was subsequently extended to March 31, 2017). In addition, it produced and sold basic 4G compatible handsets at subsidized prices and sold bundled HD streaming service content with partner platforms. In four months from

² Competition Commission of India, In re Reliance Jio Infocomm Ltd., Case No. 3 of 2017, Order under Section 26(2) (June 9, 2017).

³ Patel, M., Penetrative Pricing: Evolution under Indian Competition Law, Kluwer Competition Law Blog (2019), <https://competitionlawblog.kluwercompetitionlaw.com>.

⁴ Gupta, R., Analyzing the Impact of Pricing Strategies: The Jio Case, IRJMETs (2024), <https://irjmets.com>.

its launch in 2016, the company had signed up more than 72 million subscribers, capturing about 6.4% of the pan-India wireless market.

2. CCI's Assessment

- a. *Relevant Market*: The CCI found "provision of wireless telecommunication services to end users" to be the product market, and each of the 22 telecom circles in India to be the geographic market
- b. *Dominance*: CCI relied upon the figures presented by the TRAI at February 2017, the data indicated that Jio's share of the market was 6.4%⁵ well below any incumbent firm (Bharti Airtel 23.5%; Vodafone 18.1%; Idea 16.9%). CCI found there are multiple players having similar financial capabilities and technological sensitivities and it concluded that Jio was not dominant.
- c. *Abuse*: As no dominant position existed, the CCI determined that was prevented from further investigating predatory pricing. Moreover, it found no evidence to support an anti-competitive intention to exclude competitors, or of intending to recoup losses from prior operations by later reintroducing supercompetitive pricing. Consequently, the information was closed under Section 26(2).

3. Critical Observations

- a. *The CCI's four-month "snapshot"* of subscriber data ignores the speed at which Jio scaled up and the short-term market power implications of this. By March 2017, Jio's share in key circles had crossed 10% - suggestive of possible dominance zones.
- b. *Bundled Offerings and Ecosystem Leverage*: High switching costs and network effects created by Jio's subsidized handsets and free content bundling was not examined by the Commission with market power assessments.
- c. *Prospects of recoupment*: The CCI required "no evidence" on any potential future pricing ideas, but Jio launched paid plans in April 2017 with rates

⁵ TRAI, Press Release No. 60/17 on Subscriber Data (Feb. 17, 2017).

significantly above cost- and the ARPUs (Average Revenue Per Unit) were designed to recover any losses initially incurred.

Bundling and Ecosystem Effects

Jio attracted users to their ecosystem with subsidized devices priced at ₹3,000, which included free access to the JioTV and JioMusic, among other digital services. Since users would need to not only buy another device that was compatible, but they would also lose access to their free content, this attempted to maximize a competitive cost of switching. The company worked in conjunction with device manufacturers (OEMs) and global providers of content. As explained by the Harvard Business Review, this created a strong bundle of service offerings, where users were now locked into the Jio ecosystem.

Medianama also pointed out that the bundling strategies allowed for the creation of continued dependence, particularly with the rollout of the JioPhone and from both the hardware and content perspectives.⁶

Legal Framework and Judicial Pronouncements

1. Section 4 of the Competition Act, 2002

Section 4 prohibits abuse of dominant position by an enterprise. Aside from prohibiting any unilateral practice under sub-section 4(2) (a) that unfairly or discriminatorily imposes prices; clause 4(2)(c) prohibits giving predatory pricing, which is defined as pricing below cost in order to eliminate competitors. Clause 4(2)(e) also prohibits leveraging dominant position in one market to enter or protect another market.

2. Predatory Pricing under Indian law

Although the Act does not provide a detailed cost-based test, the CCI and appellate forums have borrowed economic reasoning and rulings made in other jurisdictions.⁷ The onus of proving dominance in a properly framed market rests with the informant and only then can the question of abuse, including predatory pricing, be examined. At earlier CCI conferences, CCI

⁶ Medianama, Reliance Jio Device Bundling Strategy (2021), <https://medianama.com>.

⁷ Competition Commission of India, In re Reliance Jio Infocomm Ltd., Case No. 3 of 2017, Order under Section 26(2) (June 9, 2017).

staff often referred to the report from the RBI Committee on mergers and acquisitions guidelines (2001) that suggested predation assessments would take place through comparisons of average variable cost (AVC) and average total cost (ATC). However, the Act also does not provide clear ex ante guidance on dynamic market power or the viability of recoupment.

3. CCI Guidelines on Predatory Pricing

In previous cases (e.g., Case No. 3 of 2017), the CCI did not distinguish 4G and 3G as separate product markets, treating all wireless telecom services as one major market. Allegations of predatory pricing involve clearly demonstrating

- (i) below-cost pricing by a dominant firm and
- (ii) an anti-competitive purpose or likely foreclosure of competition.

The CCI is hesitant to condemn price cuts by new entrants, absent a dominant position.

Empirical Data and Analysis

1. **Subscriber Growth:** India's subscriber base reached 1.19 billion by the end of December 2017, which Jio contributed 8 + million customers in December alone validating observably fast scale-up. Circle-Level Dominance: Jio achieved 10 percent market share in Maharashtra, Gujarat, and other circles within six months, and the CCI paid no mind at to the levels.
2. **ARPU Trajectory:** Jio's ARPU increased from ~₹135 in Q1 FY17 to ₹181.7 in Q1 FY25, which subjectively indicates a recoupment strategy, and analysts expect the ARPU to reach to ₹191 in 2024 for recoupment.⁸
3. **Revenue Consolidation:** Jio's wireless revenue grew by 15 percent year-over-year to reach ₹1.1 trillion in 2024, and it captured more wireless revenue than all its competitors, thereby validating the economy-of-scale benefits.

⁸ Economic Times, Reliance Jio's ARPU Remains Muted at Rs 181.7 in Q1 FY25 (Jul 2024), <https://m.economictimes.com>.

Comparative Perspectives on Predatory Pricing

1. United States: Brooke Group Test

In the landmark U.S. Supreme Court case *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, the Court established a two-part test for predatory pricing under Section 2 of the Sherman Act:⁹

- A. **Below-Cost Pricing:** The plaintiff must show that the alleged predator was selling products or services at prices below an appropriate measure of cost, which is usually the Average Variable Cost (AVC).

AVC refers to the average cost incurred related to variable inputs (i.e., labor, materials, or usage of the network) that vary as a function of output. If the selling price is lower than the AVC, the firm is losing money for each unit sold, which raises concerns of anti-competitive motivations.

- B. **Recoupment:** The plaintiff must also show that there is a "dangerous probability" that the firm would recoup the losses sustained during below-cost pricing by subsequently charging prices that are significantly higher than competitive prices (i.e., raising prices above competitive levels after driving competitors out).

The Court in *Brooke Group* stressed that such predatory pricing strategies would be difficult to maintain - especially in an oligopolistic context - as even if one firm attempts to raise prices later, rival firms can, and likely will, re-enter the market and cut prices again or limit any success recouping.

2. European Union: The AKZO Test

In the European Court of Justice case of *AKZO Chemie BV v. Commission*¹⁰, a cost-based standard was created under Article 102 of the Treaty on the Functioning of the European Union (TFEU), which is also concerned with prices falling below cost:

- A. If $\text{Price} < \text{AVC}$: the conduct is considered automatically abusive, because the firm is

⁹ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

¹⁰ *AKZO Chemie BV v. Comm'n*, (1991) C62/86, [1991] ECR I-3359.

not recovering its basic variable costs—indicating clear predatory intent.

- B. If $AVC \leq \text{Price} < ATC$: the conduct can also be abusive if there is additional evidence to conclude that it is the firm's intention to eliminate or discipline a rival.

ATC (Average Total Cost) includes both variable costs and fixed costs (like infrastructure, capital investment, etc.). Therefore, while selling below ATC and above AVC can still be predatory if it is indicative of behaviour to eliminate competitors.

- C. If $\text{Price} \geq ATC$: the pricing is generally not abusive as the firm is covering all costs incurred, and it cannot therefore be presumed that the firm has an intention to harm competition.

There is greater emphasis on intent and market structure in the EU than in the U.S. The EU also allows enforcement authorities to consider internal documents, market strategy, future pricing behaviour, etc. to ascertain predatory intent.

3. Lessons for India

The Competition Act 2002 of India defines predatory pricing under Section 4, but, unlike the U.S. or EU, does not explicitly accept the cost-based thresholds and recoupment analysis. The Competition Commission of India (CCI) typically does not examine whether predatory pricing is present until a static market share data indicates a firm is dominant.

This approach can be problematic in rapidly-changing digital or telecom markets in which:

- a. Market shares do not stand still,
- b. Loss leading strategies are adopted to win users, and
- c. Firms often recoup losses from loss-leading through ecological monetization (such as, content bundling, raising tariffs after promotional periods, or securing exclusive access).

If the CCI had employed a clearly defined AVC/ATC and recoupment and foreclosures tests, the "Welcome Offer" of Reliance Jio might have resulted in a full investigation. By dismissing the case only with reference to static market share (6.4% at the time), the Commission arguably failed to take into account the dynamic competitive harm already occurring.

Application to Jio: Jio's initial free prices were below AVC, while the subsequent tariff increases pushed prices above ATC within a matter of months—passing both steps for the international predatory pricing tests, particularly given the bundling and scale-based recovery of costs.

Impact on Consumer Welfare and Market Structure

1. Short-Term Consumer Benefits

With its aggressive zero-pricing strategy, Jio brought India the world's cheapest mobile data, resulting in dramatic digital adoption, widespread internet access and the mass availability of OTT services. Consumers benefited from virtually free voice calling and unlimited high-speed data, leading to unprecedented use of mobile broadband.

2. Long-Term Consumer Harms

On the flip side, the price-war eroded the financial sustainability of the incumbents. Idea-Vodafone merged to survive, Airtel acquired Telenor, while several smaller operators exited the market or off-loaded their spectrum. This consolidation reduced the choice for consumers, and by 2019, Jio had increased its charges by over 50 percent from the "Happy New Year Offer" prices.¹¹

3. Market Consolidation and Barriers to Entry

The degree of market consolidation dramatically increased post-Jio: the top three operators now captured over 90 percent of subscribers, compared to approximately 60 percent prior to Jio's entry into the market. New, would-be entrants face steep capital costs for infrastructure and the risk that Jio's deep pockets will undercut them. Unless meaningful ex ante protections are put in place, the telecommunications market will likely revert to monopolistic or duopolistic structures.

Critical Evaluation of the CCI's Jurisprudence

1. Excessive Reliance on Static Market Shares

¹¹ Economic Times, Jio Tariff Hike Analysis (Jul. 2019), <https://economictimes.indiatimes.com>.

The CCI mistakenly assumed that there was a causal relationship between market share and dominance, without accounting for how rapidly that share may have been growing. Dynamic analyses, as recommended by CUTS and the OECD¹², should be looking at growth trajectories and "query market power" in nascent digital markets.

2. Failure to Consider Recoupment Possibilities

The CCI's limitations in asking questions about Jio's ARPU's in their paid-plans or bundles as to whether a later recoupment is plausible, failed to offer sufficient international reporting standards to model future cash flows and anticipated price effects following the act of predatory pricing.

Conclusion and Recommendations

The CCI's closure of the predatory pricing investigation into Reliance Jio regarding Case No. 98 of 2016 relied on a legalistic, backward-looking framework that is ill-suited for dynamic, innovative, bundled and ecosystems/platform markets. Indian competition law must take the following actions:

1. A transparent cost-based test: An explicit disclosure of average variable costs (AVC) / average total costs (ATC) benchmarks in CCI's guidelines for ascertaining below-cost pricing.
2. Recoupment Analysis: Require economic models of future pricing paths and profit projections to determine if there is a dangerous probability of recoupment.
3. Dynamic assessments of market power: Assess growth rates in share and network effects, not just raw shares.
4. Ex-ante measures: Use section 33 to allow low-cost intermediaries to issue interim orders in dynamic digital markets to prevent permanent foreclosure.

By adopting these responses, India will reform its predatory pricing regulatory model to global best practices, while maintaining consumer welfare through vibrant competitive markets.

¹² CUTS CCIER, Analysis of Competition Cases in India, Edition 6 (2017), <https://ccier.org>.