

Conglomerate-Financed Entry, Predatory Pricing and Regulatory Interfaces in BRICS Telecommunications Markets: Lessons from the Indian Jio Decisions

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Abstract

This paper examines whether dominance-first predatory pricing rules adequately address conglomerate-financed entry into high-fixed-cost network industries across the BRICS jurisdictions. Taking the Indian Reliance Jio episode as the central case, it analyses how sustained below-cost strategies financed by diversified parent groups can trigger rapid, network-effect-driven reconcentration even when the entrant lacks contemporaneous dominance. Drawing on the frameworks of India (Competition Act, 2002 and the 2025 Cost of Production Regulations), South Africa, China, Brazil and Russia, it shows that static market-share snapshots systematically under-weight the competitive significance of externally financed entrants. The Competition Commission of India's 2017 closures of the Jio informations, the Supreme Court's 2019 TRAI-CCI demarcation, and the 2025 Kerala High Court refinement illustrate both the protective function and the limits of a sequential dominance gateway. Parallel challenges appear elsewhere in the BRICS group, including South Africa's average-avoidable-cost standard, China's treatment of platform cross-subsidisation, and Brazil's attention to losses financed by external capital. The paper argues that a residual gap concerning sustained cross-subsidisation from unrelated businesses is common to the bloc. It proposes four operational reforms: dynamic application of market-power factors; treatment of credible conglomerate cross-subsidisation as an intensifying factor; formal inter-agency protocols; and reasoned departures from average-variable-cost benchmarks. These measures preserve dominance-based architecture while equipping BRICS authorities to respond to capital-intensive network markets.

Introduction

A structural change occurred in the Indian telecommunications industry after Reliance Jio Infocomm Limited began operations on 5 September 2016. The company's initial free services and reduced tariffs produced a sharp decline in average revenue per user and a fierce price war, reconcentrating a previously fragmented industry into a three-firm structure (Athique & Kumar, 2022; Bhattacharjea, 2022).

In *Bharti Airtel Limited v. Reliance Industries Limited & Reliance Jio Infocomm Limited* (Case No. 03 of 2017), Bharti Airtel Limited accused the above activities of Jio as predatory pricing under Section 4(2)(a) (ii) of the Competition Act, 2002. By order dated 9 June 2017, the Competition Commission of India (CCI) closed the case under Section 26(2), stating that with the pan-India subscriber base of Jio being less than 7 per cent, there is no domination and hence no abuse (Bhattacharjea, 2022). Another information filed simultaneously in the same regard, *C. Shanmugam & Others v. Reliance Jio Infocomm Limited* (Case No. 98 of 2016), was closed under Section 26(2) on 15 June 2017 on the same grounds of lack of dominance (Gupta & H. S., 2022).

These outcomes highlight an underlying doctrinal dilemma that goes beyond the specific circumstances of the two closed informations. Entry through finance provided by conglomerates, which is based on cross-subsidies generated by the parent firm's businesses not connected to the market, and made possible by the power of network effects, can result in fast and lasting reconcentration in network

industries with high fixed costs despite the lack of dominance of the entrant at the time of the challenge under Section 4 (Jullien, Pavan & Rysman, 2021). In those cases, the dominance-first approach of Section 4 might turn into a structural blindness whereby the conduct potentially affecting market structure could remain unregulated because of the market share of the entrant falling short of the threshold usually linked to dominance (Cabrelli & Kruszewska, 2024). The subsequent concentration of the industry within three vertically integrated firms, coupled with a return to average revenues per user after the price war stage, demonstrates the typical pattern of immediate consumer benefits followed by reconcentration seen in network industries (Athique & Kumar, 2022).

This issue becomes more complicated due to the institutional framework governing the sector. The judgment of the Supreme Court in *Competition Commission of India v. Bharti Airtel Ltd.* ((2019) 2 SCC 521) has established the scope of CCI and the Telecom Regulatory Authority of India, whereas the judgment of the Kerala High Court in *JioStar India Private Limited v. Competition Commission of India* (2025) has made clearer how competition law interacts with sectoral regulation. Both judgments make it clear that the efficacy of competition law intervention will depend on the demarcation of jurisdictions. Neither the fixed conception of dominance nor the post-2019 jurisdictional jurisprudence, however, has fully grasped the competitive concerns arising out of the leveraged entry of conglomerates from outside the market.

The paper thus seeks to evaluate the adequacy of the dominance-first architecture in Section 4 of the Competition Act, 2002 in the particular setting of conglomerate-financed entry into high fixed cost network industries. The analysis proceeds in four stages. It begins with the statutory architecture of Section 4 and the successive Cost of Production Regulations. It then examines the competitive significance of conglomerate-financed entry and the limitations of conventional dominance analysis when network effects and external finance are present. The evolving TRAI–CCI jurisdictional relationship after *Competition Commission of India v. Bharti Airtel Ltd.* ((2019) 2 SCC 521) and the 2025 Kerala High Court refinement is next assessed. The paper concludes by evaluating whether existing doctrine remains adequate and by proposing concrete, guidance-based reforms.

Statutory and Regulatory Framework

The Competition Act, 2002, is the key legislative instrument that regulates anti-competition behaviour in India, including in the telecommunications industry. Section 4 states that it is unlawful for an enterprise or group of enterprises to abuse their dominant position. The clause is formulated in such a way that dominance is to be ascertained first before considering the issue of abuse. This is the key doctrinal question discussed in the current paper. Explanation (a) to Section 4 states that a "dominant position" means a position of strength accorded to an enterprise in the relevant market in India, which enables the enterprise to independently control the conduct in the relevant market and thereby affect its competitors, consumers or the relevant market. It is only after that that prohibited types of abuses are enumerated under the law (Sethi & Dhir, 2013). In particular, Section 4(2)(a)(ii) forbids charging of unfair or discriminatory prices for goods/services purchased or supplied. The parenthetical reference to

"predatory price" is explained further in Explanation (b), where the term "predatory price" means the sale of any goods or providing of services at such price, being lower than the cost, as may be determined under regulations, of production of the goods or providing of the services for the purpose of reducing competition or eliminating the competitors. The net result of this sequential arrangement is that any practice of below-cost pricing, no matter how long-term or well-financed, will be immune to Section 4 scrutiny unless dominance is established concurrently (Markovits, 2016).

The computation of "cost" as contemplated under Explanation (b) above has been undertaken in accordance with successive regulations. Under the Competition Commission of India (Determination of Cost of Production) Regulations, 2009, the primary criterion was that of average variable cost, subject to the possibility of using market value in appropriate situations (Sethi & Dhir, 2013). By a notification issued on 6 May 2025, the Commission brought into force the Competition Commission of India (Determination of Cost of Production) Regulations, 2025 (Notification dated 7 May 2025). These new Regulations completely replaced the earlier Regulations of 2009. Under the 2025 Regulations, "cost" would normally be deemed to be average variable cost used as a proxy for marginal cost. However, in appropriate cases, and in consideration of the particular industry, market and technology involved, "cost" could be any other concept of cost, such as average total cost, average avoidable cost and long-run average incremental cost (Competition Commission Of India, 2025). The preceding mention of "market value" has been deleted, which eliminates a vague external criterion that had come under intense attack for basing itself on perceived value and payment ability rather than production costs. In this way, the 2025 Regulations continue with average variable cost as the default standard while granting the Commission more freedom to choose other cost criteria that are appropriate for capital or network industries, but leave intact the preceding prerequisite that a dominant position be proven (Coates, 2015).

Substantive sections of Section 4 exist in tandem with jurisdictional and procedural guidelines that govern the interaction between the Competition Commission of India and sectoral regulators. Under Section 60 of the Competition Act, the Act is to operate notwithstanding anything inconsistent contained in any other law for the time being in force (Siddiqui & Singh, 2025). In contrast, Section 62 provides that the provisions of the Act are in addition to, and not in derogation of, any other law. Sections 21 and 21A set out reciprocal consultative arrangements wherein a statutory body may refer a competition matter, coming up in its proceedings, to the Commission and vice versa. Such arrangements were devised with the intention of creating coordination in the enforcement of competition and sectoral laws (Gual, Hellwig, Perrot, Polo, Rey, Schmidt, & Stenbacka, 2005).

In the case of the telecommunications sector, the relevant sectoral legislation is the Telecom Regulatory Authority of India Act, 1997. Section 11(1)(a)(iv) grants the Authority the power to recommend measures for facilitating competition and enhancing efficiency in the working of telecommunication services (Meena & Geng, 2022). Section 11(1)(b) grants the powers in relation to interconnection, technical compatibility and quality of service, whereas Section 11(2) enables the Authority to notify rates at which the telecommunication services should be offered. The tariff-related powers have led to a corpus of orders dealing with discriminatory and promotional tariffs. The concurrent application of both statutes

has resulted in an acknowledged problem of interface. Courts have attempted to reconcile the two regimes through the concept of harmonious construction, whereby it has been held that technical and sector-specific matters generally lie in the realm of the sectoral regulator, whereas the Commission enjoys independent jurisdiction to deal with market dominance (Gouri, 2023).

However, notwithstanding the formal structure of reciprocal consultations under Sections 21 and 21A, an empirical study of the Commission's annual reports indicates that there have been virtually no instances where the formal mechanism of recourse was used on account of sectoral regulators, including the Telecom Regulatory Authority of India, over a period of more than a decade (Abraham, 2020). For instance, the Annual Report of the Commission for 2023-24 mentions that no reference has been made under Section 21 in that year, while none was pending when it commenced; further, no reference has been made by the Commission itself under Section 21A. An analysis of the earlier Annual Reports shows the same trend (Singh, 2023). It must be noted that the Competition (Amendment) Act, 2023, kept the dominance gateway under Section 4, as well as the statutory definition of predatory pricing, intact. Hence, the sequential structure, which makes the below cost pricing inquiry contingent upon the prior determination of dominance, remains unchanged.

Doctrinal Evolution of Predatory Pricing in Indian Competition Law

In terms of the Competition Act, 2002, predatory pricing is an evolved version of the predatory practices found in the erstwhile Monopolies and Restrictive Trade Practices Act, 1969, where predatory practices did not have any cost-based definition, as the law was based on the protectionist approach. Predation was sometimes recognised in cases where there were low-price imports or where pricing was aggressive without any connection with cost or dominance. This approach has been criticised in literature as a practice closer to that of antidumping than that of competition law (Bhattacharjea, 2018, 2022).

Section 4 of the 2002 Act provided that any abuse had to be preceded by a finding of dominance. Thereafter, below-cost pricing (by reference to cost-of-production regulations) and having an anti-competitive objective may be examined (Bolton, Brodley & Riordan, 2000; Edlin, 2012). The Competition Commission of India (Determination of Cost of Production) Regulations, 2009 identified average variable cost as the general benchmark for marginal cost, while providing that the Commission had the flexibility to use other methods, such as long-run average incremental cost (Bhattacharjea, 2018, 2022).

The first major application of this model came about in *MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd.* (Case No. 13 of 2009, CCI order dated 23 June 2011). Although the Commission itself regarded NSE's strategy of zero charges in its currency derivatives business as "unfairly low," not predatory per se, it found dominance abuse due to cross-subsidisation by the profits from other profitable segments, which made the entry of a single-segment competitor, MCX-SX, difficult. On appeal, the Competition Appellate Tribunal (order dated 5 August 2014) expressly termed the practice predatory

and sustained both the directions and penalty. However, neither order provided an elaborate cost benchmarking analysis for the determination of zero price, thus leaving the methodology question unanswered (Bhattacharjea, 2018, 2022). This is an important case study in the context of this research since it acknowledges that cross-subsidisation can be a basis for dominance abuse, but only after having established dominance.

Further cases clarified the analytical approach. In *M/s Transparent Energy Systems Pvt. Ltd. vs TECPRO Systems Ltd.* (2013) and *HLS Asia Limited vs Schlumberger Asia Services Ltd.* (2013), the Commission again emphasised that cases of predatory pricing should be analysed with due consideration to costs, typically average variable cost, and that price reduction is an important aspect of competition (Bhattacharjea, 2022). This was in line with the sequential approach of Section 4: Without dominance, price reduction would never constitute a violation of the law.

Platform economy cases have also made the doctrine more sensitive towards network effects and scale development. Cases against Ola and Uber on account of below-cost pricing and heavy driver incentives were analysed considering two-sided markets explicitly (Evans, 2003; Gual et al., 2005; Gurkaynak et al., 2016). The Commission understood that any aggressive or unprofitable pricing can also be viewed as a legitimate strategy for achieving the critical mass of scale and cannot be concluded only because of fast growth or unprofitability (Evans, 2003; Jhaku & Malik, 2017). Such reasoning is found in the case of Google Android and Meta/WhatsApp, where the findings of leverage were not based on pricing practices but on the presence of market power. Academic discussion regarding zero-pricing has also evolved from an initial scepticism about such practice by financially sound companies towards an understanding of efficiencies and cutthroat competition between a few platforms (Atad, 2024; Bhattacharjea, 2018).

The last institutional refinement is the Competition Commission of India (Determination of Cost of Production) Regulations, 2025, which were issued on 6 May 2025 and gazetted on 7 May 2025. These Regulations amend the 2009 Regulation by retaining the average variable cost as the default proxy for marginal cost, extending the definition of long run average incremental cost and average total cost, and eliminating the market value definition of the previous Regulation (CCI Official Notification, 2025). The Commission thus has a greater discretion in choosing appropriate cost notions, but the dominance test before that has remained unchanged.

Critical Doctrinal Analysis of the Jio Predatory Pricing Decisions

The strategy followed by the Competition Commission of India with regard to the information that has been filed against Reliance Jio Infocomm Limited provides a specific example that clarifies the dominance gateway which shapes Section 4 of the Competition Act, 2002. This is seen in the case of *Bharti Airtel Limited v. Reliance Industries Limited & Reliance Jio Infocomm Limited* (Case No. 03 of 2017), decided on 9 June 2017, where Bharti Airtel Limited claims that the provision of free and discounted offers as part of Jio's Welcome Offer falls under predatory pricing in violation of Section 4(2)(a)(ii). The informant also argues that Reliance Industries Limited has used its economic strength in other markets

to enter the market, hence violating Section 4(2)(e). Another information filed by private individuals in the case of *C. Shanmugam & Others v. Reliance Jio Infocomm Limited* (Case No. 98 of 2016) contains almost similar allegations and was dealt with using the same rationale.

The commission started with the identification of the relevant market for wireless telecommunication service provision to the consumers, either at the pan-India level or in each one of the twenty-two circles under license from TRAI. Using the subscriber data provided by TRAI at the time, the commission estimated that Jio had a market share of 6.4% at the pan-India level and that none of the individual circles had a Jio market share of more than 7%. It was observed that the market was still made up of several well-established operators with financial muscle and good reputations. Jio did not qualify as a dominant player in such a market (Bhattacharjea, 2022).

With the conclusion drawn that dominance did not exist, the remainder of the inquiry became moot. As the Commission pointed out, the provision of free services may cause issues related to competition if and only if provided by a dominant company with the intention of preventing competition (Bhattacharjea, 2022). In the market where there are well-established companies, any short-term promotional or penetrative pricing of the newly appeared company will be regarded as legitimate rather than exclusionary. The information filed pursuant to Section 4(2)(e), claiming that Reliance Industries Limited has abused its position through leveraging across different markets, was similarly rejected in *Bharti Airtel Limited v. Reliance Jio Infocomm Limited* (Case No. 03 of 2017). It was held that simple capital investment, even if significant, could not be considered abuse per se, otherwise it might discourage companies from entering the market or expanding. Both cases were thus dismissed in accordance with Section 26(2) of the Act.

The decision is consistent both theoretically and textually with the sequential approach adopted in Section 4. The liability in respect of this section depends on finding the existence of dominance; only then do the cost comparisons, recoupment or exclusionary purpose become relevant. Thus, the Commission has fulfilled its statutory obligation to consider the dominance gateway as written.

However, the legal validity of the 2017 orders has failed to shield them from rigorous academic examination. The problem is the use of a snapshot test of contemporaneous market share. This form of test inherently de-emphasises the potential significance of the entering firm if it can sustain below-cost pricing because of resources outside the relevant market (Evans, 2003; Pera, 2008). The subsidiary company may have access to the large funds of the diversified parent company. This will allow it to adopt aggressive pricing policies for a sufficiently long time to ensure subscriber switching and network effect changes to market structure before achieving the normal thresholds of market dominance (Poulis, 2024).

Official TRAI data illustrate the structural consequences that followed. From a modest post-launch share in late 2016, the wireless subscriber base had by June 2026 reconcentrated into a durable three-firm structure, with Reliance Jio holding 39.27 per cent, Bharti Airtel 37.96 per cent, and Vodafone Idea 15.50 per cent (Telecom Regulatory Authority of India, 2026). Concurrently, wireless ARPU declined sharply in

the immediate post-entry years, then recovered from ₹149.25 in FY 2023-24 to ₹174.46 in FY 2024-25 (Telecom Regulatory Authority of India, 2025). These figures underscore the limitation of a purely contemporaneous market-share snapshot when assessing the competitive significance of sustained, conglomerate-financed entry in a high-fixed-cost network industry (Natter & Hruschka, 1998).

The handling of the Section 4(2)(e) charge is another example of the same challenge. In *Bharti Airtel Limited v. Reliance Jio Infocomm Limited* (Case No. 03 of 2017), the Commission dismissed the leveraging theory on formal grounds, holding that Reliance Industries Limited was neither dominant nor even active in any neighbouring telecommunications market. Financing, per se, could not have been considered an abuse of dominant position. Such interpretation is faithful to the wording of Section 4(2)(e), as it implies that there was already the position of strength in one market before moving into another market (Malik et al., 2019). However, there is a functional problem. When the financing is drawn from entirely unrelated activities and used to incur ongoing losses in the targeted market, the legal concept of “leverage of dominant position” cannot be invoked (Bolton, Brodley & Riordan, 2000; Edlin, 2012). Consequently, cross-subsidy that can create structural change becomes beyond reach, since the parent company does not have a dominant position in the nearby market (Monti, G., 2007).

It is imperative to stress that neither of the 2017 orders was statutorily mandated to anticipate future mergers, exits or reconcentration. Rather, their continuing analytical significance lies in the contradiction that they reveal between the statutory design focused on dominance and the underlying competition in the case of conglomerate entry into network industries, which feature high fixed costs and significant network effects (Athique & Kumar, 2022; Bhattacharjea, 2018). They reveal in particular the protective role of the dominance gate, namely, the prevention of the risk of competition law's inhibiting effect on entry and promotion through below-cost pricing, as well as the potential flaw of the gate if market power was built based on financing from outside.

Conglomerate Leverage as a Distinct Doctrinal Challenge

Section 4(2)(e) of the Competition Act, 2002 provides that no enterprise shall abuse its dominant position in a particular relevant market to enter into, or protect, other relevant market. The section targets traditional cross-market leveraging, in which an enterprise exploits its strong position in the first market as a stepping stone or shield in the second market. The application of the said section has been infrequent, and Jio's proceedings highlighted an important lacuna in its interpretation.

In *Bharti Airtel Limited v. Reliance Industries Limited & Reliance Jio Infocomm Limited* (Case No. 03 of 2017), the informant alleged that Reliance Industries Limited had drawn upon its economic strength in other markets to underwrite free and below-cost offers by its telecommunications subsidiary. The Commission rejected the claim. It held that the mere making of investments cannot be characterised as the leveraging of a dominant position, particularly where the parent company is neither dominant nor even active in any neighbouring telecommunications market (Bhattacharjea, 2022). To treat capital infusion itself as abusive, the Commission reasoned, would risk deterring entry and expansion (Reddy &

Reddy, 2025). The parallel information in *C. Shanmugam & Others v. Reliance Jio Infocomm Limited* (Case No. 98 of 2016) was closed on identical grounds.

This reading is textually coherent. Section 4(2)(e) presupposes the “use” of a pre-existing dominant position in one market. Where the parent neither holds dominance nor participates in a proximate market from which leverage could be exercised, the statutory language offers little purchase. The formal limitation is therefore clear: the provision addresses the classic case of leveraging dominance already held in a related market; it does not, on its face, reach the functional equivalent of market power created by conglomerate finance drawn from wholly unrelated businesses (Nguyen & Nguyen, 2025).

This functional reality is even more true when applied to the field of capital-intensive network industries. Markets like these are known to be characterised by high fixed costs, low marginal costs and a presence of network effects. Within this context, a diversified conglomerate can engage in sustained below-cost pricing via cross-subsidisation by businesses operating outside of the particular market and, indeed, outside of any neighbouring market (Yan, Yang & Jiao, 2010). Sustaining losses for an extended period of time is not a traditional form of market power in the target market. However, it can achieve results functionally similar to what Section 4(2)(e) aims to curb, namely, the quick attainment of scale by the entrant that regular single-market competitors cannot match, followed by structural reconcentration (Bolton, Brodley & Riordan, 2000; Edlin, 2012; Evans, 2003). This gap in doctrine is thus structural rather than factual. The statutory provision is designed for the traditional leveraging scenario quite well but is poorly suited to gaining competitive advantage through unrelated financing (Bolton, Brodley & Riordan, 2000).

It is helpful to describe this behaviour analytically as “conglomerate-leveraged entry.” The term is used here purely as a descriptive device to identify a pattern of entry in which a subsidiary sustains below-cost pricing for an economically significant period through cross-subsidisation from a diversified parent whose businesses lie outside the target market and outside any neighbouring market from which classic leverage under Section 4(2)(e) could be exercised. It is not proposed as a new legal category.

An alternative path may be in the list of factors, not necessarily exhaustive, that the Commission might have regard to under section 19(4) in determining whether there exists a “position of strength”. Well-documented proof of ongoing cross-subsidisation from other entities may, in theory, be deemed relevant as a factor that may show the ability of the entity to conduct itself independently of competitive pressure, or material to the assessment of anti-competitive object (Soomro & Yuhui, 2023). This course does not necessitate any change in legislation; it involves a purposive interpretation of the factors in the light of the economic features of network industries. On the other hand, this interpretative development has to be properly circumscribed. It must be remembered that a combination of assets may just as easily contribute to efficient entry which will benefit consumers in the short run through lower prices, increased innovation and improved access. An overbroad interpretation of external funding has the potential to have a chilling effect on the competitive discipline that competition law seeks to preserve.

The issue is how to take ongoing cross-subsidisation into account without making conglomerate structure per se an indicium of liability.

The TRAI–CCI Jurisdictional Interface: Doctrinal Mapping

Pre-Bharti Airtel Uncertainty

For decades since the inception of both these agencies, there has been ambiguity in relation to their respective jurisdictional boundaries. The telecommunications industry is one of the most regulated sectors where issues relating to licensing, interconnection, and tariffs pertain to the Telecom Regulatory Authority of India Act, 1997. However, the Competition Act, 2002 vests exclusive jurisdiction of the Competition Commission of India over anti-competitive agreements and abuse of dominant position. Instances of disputes over interconnections, or discrimination amongst operators, have often led to simultaneous appeals to both these bodies, leading to overlapping jurisdictions. This has been especially evident in the cases related to denial of interconnections to Reliance Jio Infocomm Limited. The Commission formed a prima facie view and directed investigation under Section 26(1) in In Re: Case Nos. 81 of 2016, 83 of 2016 and 95 of 2016 (order dated 21 April 2017). The Bombay High Court set that order aside on 21 September 2017, holding that technical and contractual questions arising under the TRAI Act and the applicable licence conditions must first be resolved by the sectoral regulator (*Bharti Airtel Ltd. & Ors. v. Competition Commission of India & Ors.*, Bombay High Court, judgment dated 21 September 2017).

Supreme Court in Competition Commission of India v. Bharti Airtel Ltd. (2019)

The Supreme Court settled the issue for the time being in the case of *Competition Commission of India v. Bharti Airtel Ltd.*, (2019) 2 SCC 521, decided on 5 December 2018. Employing the doctrine of harmonious construction, the Court ruled that both the acts operate in different but complementary spheres. In case the subject matter of a dispute involves interpretation of terms of license, adequacy of facilities of interconnection, or other obligations imposed by the provisions of TRAI Act, then jurisdictional facts need to be first determined either by the sectoral regulator or by the Telecom Disputes Settlement and Appellate Tribunal (TDSAT). Only thereafter can the Commission decide whether the conduct amounts to an anti-competitive agreement or abuse of dominance (Singh, 2023). The decision does not take away any of the powers granted to the Commission under the act. It provides only for an approach to be adopted in case of disputes where technical or licensing aspects are antecedent to competitive aspects (*Competition Commission of India v. Bharti Airtel Ltd.*, (2019) 2 SCC 521).

Post-2019 Developments

Later judicial pronouncements have only clarified and furthered this sequential process without replacing it. This has finally been set out by the Division Bench decision of the High Court of Kerala dated

3 December 2025 in *JioStar India Private Limited v. Competition Commission of India* (2025:KER:93252). In the above case, the Court ruled that the Competition Act and the TRAI Act are special Acts applicable to their individual fields of competence. When the substance of the complaint concerns abuse of dominance or any anti-competitive practice in the market, then the Commission continues to have its own independent jurisdiction notwithstanding the fact that the sector itself is regulated by the TRAI. The sequential approach required by the decision in *Bharti Airtel* was described as a fact-based one and relevant only where there were certain technical or licensing issues which had first to be decided by the sectoral regulator (Absi et al., 2018).

The post-2019 jurisprudence thus retains the unique functions of both institutions while minimising the possibility of sectoral regulation becoming a complete defence against competition law analysis (Singh, 2023). In relation to the competitive practices under discussion in this paper, persistent pricing below costs through the use of conglomerate finances that can give rise to fast-developing network effects, the refined interface becomes especially important. Dynamic cross-subsidisation may raise both questions of technical nature regarding tariff regulation or interconnectivity, and questions of competition concerning exclusion or structural reconcentration (Li & Li, 2018). An inflexible sequence approach would defer the consideration of the competition aspect after market dynamics have already changed; an excessively broad interpretation of the Commission's jurisdiction could lead to contradictory technical determinations. The complementary approach offered by the Kerala High Court attempts to overcome both extremes by basing the sequence on the real nature of the problem rather than the mere sectoral character of the practice.

Despite the doctrinal clarification, a practical implementation gap persists. Empirical examination of the Commission's annual reports reveals that formal references under Sections 21 and 21A of the Competition Act have been almost entirely absent for more than a decade (Singh, 2023). The near-total non-utilisation of the statutory consultation mechanisms means that coordination between the Commission and the Telecom Regulatory Authority of India continues to depend on ad-hoc interaction rather than structured protocols. In markets characterised by high fixed costs, low marginal costs and strong network effects, the speed with which competitive harm can materialise places a premium on timely information exchange and coordinated sequencing of inquiries. Without more systematic inter-agency arrangements, the refined jurisdictional map risks remaining under-utilised precisely in those cases, conglomerate-financed entry and aggressive pricing in network industries, where prompt and coherent regulatory response is most needed (Natter & Hruschka, 1998).

Comparative Insights and Emerging Approaches

Analysis of the law governing predatory pricing in other major jurisdictions reveals instructive differences that illuminate the particular challenges confronting Indian competition law when applied to capital-intensive network industries (Bhattacharjea, 2018; Hemphill & Weiser, 2018). The comparative exercise is especially useful because the economics of telecommunications and digital platforms, high fixed costs, low marginal costs, strong network effects, and the possibility of external or conglomerate

finance, cut across national boundaries (Athique & Kumar, 2022; Bhattacharjea, 2018). What varies is the doctrinal architecture through which those economics are filtered.

In the European Union the governing test remains that articulated by the Court of Justice in *AKZO Chemie BV v Commission* (Case C-62/86). Prices charged by a dominant undertaking that fall below average variable cost are presumed abusive; the presumption is virtually irrebuttable because no rational firm would incur losses that fail to cover even its variable costs except for an exclusionary purpose (Bhattacharjea, 2018; Holzwarth, 2026). The prices falling in between the average variable cost and the average total cost can also be seen as abusive when it is established by the authority that the prices are part of the scheme aimed at removing the competitor from the market. Importantly, in Europe, there is no need for the demonstration of any real possibility of recouping (Hemphill & Weiser, 2018). All along, it has been viewed as being important to protect the competitive process as the ultimate objective rather than the recoupment after the damage through supra-competitive prices. It is clearly articulated in the case of *France Télécom SA v Commission* (Case C-202/07 P, the Wanadoo litigation) and is now also reflected in the Draft Guidelines on Exclusionary Abuses of Dominance under Article 102 TFEU. Thus, in the European system, relatively more weight is put on the costs and on the objective ability of the pricing scheme to exclude equally efficient competitors (Holzwarth, 2026; European Commission, 2024).

U.S. law, on the other hand, has a much higher standard of proof for predatory pricing. According to the landmark ruling in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), in order for a Section 2 action for predatory pricing under the Sherman Act to succeed, the plaintiff must be able to prove two prongs (Hemphill & Weiser, 2018; Kaplow, 2018). First, the price should be lower than the cost, which is usually represented by the average variable cost. The second prong is that the defendant must be in a position to recover its investments in predatory pricing after disciplining or eliminating competitors (Brooke Group, 1993; Kaplow, 2018). This dual requirement of below-cost pricing and recovery of investment makes successful predation cases relatively uncommon in American courts. The reason for this is that historically there has been a concern that overly interventionist antipredatory rules may chill competition and harm consumers. As a result, American law is relatively forgiving of such an aggressive approach to pricing unless both elements, loss of immediate profits and possibility of gaining monopoly profits in the long run, can be convincingly proven by the plaintiff (Bhattacharjea, 2018; Hemphill & Weiser, 2018).

In addition to other jurisdictions in the developing world, the practices amongst the BRICS jurisdictions also differ in ways that are highly pertinent to the questions analysed in this paper. One of the clearest examples of a statutory definition comes from South Africa. According to section 8(1)(d)(iv) of the Competition Act 89 of 1998, as amended by the Competition Amendment Act 18 of 2018, the act makes it unlawful for a dominant company to sell goods or services at “predatory prices”. What the statute means by predatory prices is any price level lower than the average avoidable cost or average variable cost (Competition Amendment Act 18 of 2018). In this case, the explicit inclusion of average avoidable cost – a concept in economics that includes costs which would have been saved if production had not been increased – makes the South African law in sync with current European thinking (Bhattacharjea,

2018; Hemphill & Weiser, 2018). The absence of any requirement of recoupment and the emphasis only on the cost-price relationship and anti-competitiveness of the pricing method are notable here. The legislative clarification was motivated in part by the protracted *Media 24* litigation, which had exposed uncertainties surrounding the appropriate cost benchmark. South Africa's experience therefore illustrates a deliberate move toward clearer, cost-based rules while preserving the dominance gateway.

According to China's Anti-Monopoly Law, the dominant company is prohibited from selling goods at prices lower than its costs without proper reasons. Regulatory enforcement has generally focused on whether the price falls below the average variable cost, although increasingly considering the need for the multi-sided nature of the cost structure and cross-subsidization when dealing with platform markets (Bhattacharjea, 2018; Athique & Kumar, 2022). Over the last few years, regulators have become more focused on two closely related issues. First, the use by big platform companies of algorithms to make merchants sell below costs. Second, long-term losses funded by money obtained from outside the relevant market under the guise of user acquisition and ecosystem building. Chinese authorities have become increasingly inclined to look into these methods as possible vehicles for exclusion, especially in cases where network effects lead to market tipping and make reconcentration hard to achieve (Athique & Kumar, 2022; Hemphill & Weiser, 2018). China's experience thus shows an attempt to adjust the classic cost-based prohibition to the realities of platform markets and conglomerate financing, while keeping dominance as a prerequisite (Bhattacharjea, 2018; Kaplow, 2018).

The Brazilian practice of the Administrative Council for Economic Defense (CADE) represents an intermediate approach compared to the European cost presumption test and the US strict recoupment criterion. Normally, CADE requires proof of selling below some reasonable measure of cost, an ability to sustain losses for an adequate duration, and a reasonable expectation of subsequent recovery of such losses or excluding competitors (Bhattacharjea, 2018; Kaplow, 2018). In analysing digital platforms, especially food delivery markets and other multi-sided markets, Brazilian regulators have acknowledged the difficulty of applying predation tests in situations of zero pricing, aggressive subsidization through external/venture capital, and cross-subsidies between business segments (Athique & Kumar, 2022). The traditional test for predation, which is geared towards single-sided markets, fails to fully capture the competition risk involved when a well-funded competitor has a capability of operating at a loss while creating rapid structural changes within the market via network effects. CADE's practice is also cognisant of the possibility that third-party financing might sustain the below cost pricing of a company much longer than its regular competitors, with the threat of reconcentration still lingering on. (Athique & Kumar, 2022; Bhattacharjea, 2018; Hemphill & Weiser, 2018).

These BRICS examples reveal a shared concern: how to distinguish efficient, aggressive entry from exclusionary strategies that draw on resources outside the target market and that may produce durable reconcentration after an initial price war (Athique & Kumar, 2022; Bhattacharjea, 2018). South Africa has adopted more sophisticated statutory cost criteria; China has started adjusting cost approach to platforms; and Brazil has focused on sustainability of losses and use of external financing. Despite the fact that all of these approaches have not departed from the notion of dominance or market power, they

have recognised that it is not enough to look at the snapshot of the market share only if financial ability of the entrant is not limited by the market economics (Hemphill & Weiser, 2018; Kaplow, 2018; Bhattacharjea, 2018).

The Indian approach occupies an intermediate doctrinal space. Section 4 of the Competition Act, 2002 requires proof of dominance, below-cost pricing as determined by the applicable cost regulations, and an anti-competitive purpose or object (Bhattacharjea, 2018; Bhattacharjea, 2022). There is no statutory element of recoupment. In practice the Competition Commission of India has tended to focus on the integrity of the competitive process rather than on the subsequent recovery of losses through supra-competitive prices, an orientation closer to the European model than to the American one (Bhattacharjea, 2018; Bhattacharjea, 2022). The 2025 Cost of Production Regulations refine the available cost benchmarks (retaining average variable cost as the default while permitting average total cost, average avoidable cost or long-run average incremental cost for reasons recorded in writing) and thereby bring Indian doctrine into closer conversation with both South African and European practice (Competition Commission of India, 2025; Bhattacharjea, 2022). At the same time, the continued insistence on a contemporaneous finding of dominance leaves open the very gap that the Jio decisions exposed: the difficulty of addressing sustained below-cost strategies financed by conglomerate resources when the entrant's market share at the moment of pricing remains modest.

Scholars have observed that neither the traditional European cost-presumption model nor the American recoupment requirement fully captures the complexities of conglomerate-financed entry into capital-intensive network industries characterised by low marginal costs, strong network effects and external capital (Athique & Kumar, 2022; Bhattacharjea, 2018; Hemphill & Weiser, 2018). Newer analytical approaches therefore emphasise dynamic effects, the sustainability of losses over extended periods, and the structural consequences of rapid reconcentration after intense price competition. These concerns map directly onto the Indian experience examined in this paper. The comparative survey suggests that incremental doctrinal refinement, particularly in the dynamic application of the factors listed in Section 19(4) and in the treatment of credible evidence of cross-subsidisation, offers a more promising path than wholesale transplantation of either the European or the American template (Bhattacharjea, 2018; Bhattacharjea, 2022; Athique & Kumar, 2022).

Recommendations and Conclusion

These doctrinal problems, as pointed out above, demand a thoughtful and gradual process of correction and not the entire restructuring of the legislation. There are four changes that could be made in the operations of the legislation to allow the enforcement scheme to effectively handle the problem created by the use of static dominance theory and inadequate handling of persistent conglomerate cross-subsidization in network industries.

First, there is need for the Competition Commission of India to publish a brief guidance on the dynamic interpretation of the factors provided for in Section 19(4) of the Competition Act, 2002. This would

particularly involve the interpretation of how such factors as financial power, capacity to incur loss for a long time, network effects and entry barriers would come into consideration in determining whether an enterprise has a “position of strength” (Evans, 2003; Weyl, 2010). This would still adhere strictly to the provisions of the legislation but allow the Commission to consider the conglomerate capacity to engage in such behavior without having to amend the dominance provision at all (Athique & Kumar, 2022).

Second, credible proof of cross-subsidisation through unrelated businesses should be taken into account as an intensifying factor for the purposes of assessing the anti-competitive object and effect of the practice under Section 4(2)(a)(ii) and, as appropriate, Section 4(2)(e). The recommendation does not add a new type of abuse, nor does it widen the leverage restriction rule beyond its text-based limits. Instead, it simply takes into consideration the fact that the ability to cause losses which the average single-market competitor cannot bear is significant to the existing statutory determination of the object, effect, and power (Bolton, Brodley & Riordan, 2000). Such a determination must be done with care not to discourage efficient entry by conglomerates into the market that produces immediate consumer benefits.

Third, the complementary jurisdiction regime developed by the Supreme Court in *Competition Commission of India v. Bharti Airtel Ltd.*, (2019) 2 SCC 521, and clarified by the Kerala High Court in *JioStar India Private Limited v. Competition Commission of India* (2025:KER:93252, 3 December 2025), must be implemented in the form of a memorandum of understanding between the Competition Commission of India and the Telecom Regulatory Authority of India. Such a memorandum will facilitate timely information sharing and, as required by the practical issues involved, a parallel or sequential investigation. Such an institution-based solution will avoid any delays and regulatory arbitrage without changing the existing allocation of jurisdiction as recognised by the courts (Singh, 2023).

Fourth, even though the Competition Commission of India (Determination of Cost of Production) Regulations, 2025 rightly provide for some flexibility in choosing the cost benchmark, the Commission needs to give its reasons for moving away from average variable cost to long run average incremental cost, average total cost or any other metric. Such transparent approach would ensure predictability in the multi-product and network scenarios without compromising on the essential cost basis of the predatory pricing test (Competition Commission Of India, 2025).

Taken together, these measures preserve the dominance-first architecture of Section 4 while supplying the interpretive and institutional tools necessary to respond to the distinctive economics of conglomerate-backed entry into capital-intensive network markets. They constitute soft-law and coordination-based adjustments rather than statutory redesign, and they leave the protective function of the dominance gateway intact.

The dominance-first architecture of Section 4 of the Competition Act, 2002 has supplied a clear analytical framework and has protected legitimate entry and promotional pricing in markets already characterised by powerful incumbents. At the same time, that architecture leaves a structural gap when confronted with sustained, conglomerate-financed below-cost strategies capable of triggering rapid

network effects and subsequent reconcentration. The Indian experience with allegations of predatory pricing against Reliance Jio Infocomm Limited crystallises this tension.

Static market-share snapshots systematically under-weight the competitive significance of entrants financed by diversified conglomerates. In the 2017 orders closing *Bharti Airtel Limited v. Reliance Industries Limited & Reliance Jio Infocomm Limited* (Case No. 03 of 2017) and the parallel information in *C. Shanmugam & Others v. Reliance Jio Infocomm Limited* (Case No. 98 of 2016), the Commission correctly applied the sequential structure of Section 4. With Jio's pan-India subscriber share below 7 per cent, no finding of dominance was possible, and the informations were closed under Section 26(2). The decisions were textually faithful. Yet the subsequent trajectory of the market reveals the analytical cost of that fidelity. From a modest post-launch share in late 2016, the wireless subscriber base had, by June 2026, reconcentrated into a durable three-firm structure, with Reliance Jio holding 39.27 per cent, Bharti Airtel 37.96 per cent and Vodafone Idea 15.50 per cent. Average revenue per user, after a sharp post-entry decline, recovered from ₹149.25 in FY 2023-24 to ₹174.46 in FY 2024-25. These figures illustrate the classic network-industry pattern of intense price competition followed by structural reconcentration—precisely the dynamic that a contemporaneous market-share test is ill-equipped to capture.

The statutory framework underscores the same residual gap. Explanation (b) to Section 4 makes the below-cost enquiry contingent on dominance. The 2025 Cost of Production Regulations refine the second-stage cost analysis while leaving the first-stage requirement intact. Section 4(2)(e) is likewise confined to classic cross-market leverage of an existing dominant position; it does not reach the creation of market power through cross-subsidies drawn from wholly unrelated businesses. The Section 19(4) factors could, in principle, treat continuing external finance as relevant to a “position of strength,” but that interpretive path remains under-specified as to evidence, duration and the risk of over-deterrence. Neither the European cost-presumption model nor the American recoupment requirement fully captures this reality.

The TRAI–CCI interface compounds the difficulty. The Supreme Court's decision in *Competition Commission of India v. Bharti Airtel Ltd.* ((2019) 2 SCC 521) established a sequential approach grounded in harmonious construction. The 2025 Kerala High Court refinement in *JioStar India Private Limited v. Competition Commission of India* clarified that the sequence is fact-based rather than automatic: where the substance of a complaint concerns abuse of dominance, the Commission retains independent jurisdiction. That complementary map is doctrinally sound. Its practical implementation is not. Formal references under Sections 21 and 21A have been almost entirely absent for more than a decade. In markets where competitive harm can materialise rapidly through network effects, ad-hoc coordination risks leaving the refined jurisdictional map under-used when prompt response is most needed.

The four soft-law and institutional measures set out above preserve the protective function of the dominance gateway while placing cost analysis and market-power assessment in a longer temporal and structural frame. They do not convert conglomerate structure itself into an indicium of liability, nor do they require statutory redesign. The Jio episode, and the scholarly and judicial reflection it has provoked,

supply a concrete foundation for that measured evolution in India and, with local adaptation, in other BRICS jurisdictions confronting the same economics of capital-intensive network markets. The residual gap concerning sustained cross-subsidisation from unrelated businesses can thereby be narrowed without chilling efficient entry that delivers immediate consumer benefits.

Declarations

Authors Contributions

The authors have researched, completed and reviewed the final manuscript and consent to its publication.

Ethics approval and consent to participate

This paper does not involve studies with human participants or animals that would require formal ethical approval. Not applicable, no human participants were involved, and no informed consent was required.

Data availability

This is a doctrinal study. No original datasets were generated by the authors. All materials used are publicly available official sources:

- Competition Commission of India orders (Case No. 03 of 2017 and related matters)
- Supreme Court and High Court judgments
- Competition Act, 2002 and the Competition Commission of India (Determination of Cost of Production) Regulations, 2025
- Official TRAI reports containing the subscriber-share and ARPU figures cited in the paper (December 2016 Performance Indicators; Yearly Performance Indicators 2024–2025; Telecom Subscription Data as on June 2026).

Consent for publication

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