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Lecturer, Sangam University, Bhilwara (Rajasthan).  
Email Id: [vrindagaggar01@gmail.com](mailto:vrindagaggar01@gmail.com).***



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## **I. JIO COMPANY'S ONSLAUGHT ON THE INDIAN TELECOM MARKET:**

*"On September 5, 2016, Reliance J. company Infocomm Limited (RJIL) (referred to as 'J. company') launched their free data and voice plan, 'J. company welcome offer,' which was extended till December. It then offered the 'Happy New Year Offer,' which opened the existing plan until March 31, 2017. Even in 2018 and 2019, it charged low costs for high-speed internet and voice, which sparked India's digital revolution. Huge investments were made for the first time in India, and a new entrant entered the telecommunications business, which was previously held firmly by a few incumbents. In less than a year, they had effectively entered the market. However, their zero-price model was deemed exploitative and anti-competitive. They were on thin ice, with a single definition of dominance separating them from being fined for anti-competitive activity. This was the start of a new age for Indian competition law, in which a novel pricing approach was implemented, providing customers with utopian incentives. We should focus on a specific phase, 'penetration', and its relationship and position with the Indian Competition Law. It remains a grey area, but it can transform India's competition law environment".*

## **II. CONTROVERSIAL PRO-PENETRATION STAND OF TRAI:**

The verdict by the *Telecom Regulatory Authority of India (TRAI)* on J. company's alleged exploitative pricing provides an intriguing viewpoint. J. company made its impression on the telecommunications sector when it began offering free broadband and phone services in 2016. As a result, the consumer base shifted dramatically. Even when they started charging for their services, it was a fraction of what their competitors (*Airtel, Vodafone, and Idea*) were charging. In 2018, TRAI changed the predatory pricing guideline, causing market upheaval, particularly for J. company's rivals. It allowed J. Company to continue offering low prices while prohibiting its competitors from lowering their prices to compete. It reasoned that rivals' current positions would lead to misuse, but J. company, as a new entrant, was incapable of abusing (predatory).

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It also dropped traffic volume as a metric for determining market strength, giving J. company complete immunity because it saw a massive rise in traffic volume. However, these adjustments were overturned by a sectoral appeal tribunal when rivals challenged them based on J. company's purpose and capabilities. The sectoral appellate panel stated that TRAI's modifications provided 'artificial protection' to new entrants and, as a countermeasure, permitted rivals to offer low rates to compete with J. company's inexpensive pricing. While the TRAI directly allowed penetrative pricing by granting relaxations to J. company due to its developing position, the appellate tribunal rejected the merit of market penetration through low pricing, thereby rejecting the theory of penetrative pricing by ignoring the entrant's position and denying it the benefit of a newcomer's promotional pricing opportunity.

### **III. PENETRATIVE PRICING:**

The Search for Clarity and the Beginning of Its Undoubtedly Existence. Penetrative pricing, unlike predatory pricing, is not widely practiced in competition law. *The Competition Act, 2002 (hence the 'Act')*, which governs competition in India, is quiet on this issue, with no specific reference to it throughout the Act. To clarify the veil, the following aspects of penetrative pricing will be discussed:

### **IV. DEFINITION:**

Penetrative Pricing is a frequent marketing and pricing technique. Rarely has a clear and straightforward description been offered in cases or by regulatory bodies that incorporates the bulk of the characteristics of penetrative pricing under competition law. A hypothetical definition is provided here. "Penetrative pricing is the practice of a non-dominant participant organization dropping the prices of goods or services to establish, promote, and highlight its identity and existence in a market where multiple incumbent players exist. The goal is to quickly attract consumers' attention at the risk of initial losses that may or may not be recovered once their identity is established through this short-term incentive-based strategy," according to the definition of the term. Primarily, the term penetrative price was employed in two cases: first, in *National Stock Exchange of India Ltd. & DotEx International Ltd. vs. MCX Stock*

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*Exchange (referred to as the "NSE Case"); and second, in Fast Track Call Cab Pvt. Ltd & Meeru Travel Solutions Pvt. Ltd. vs. ANI Technologies Pvt. Case (referred to as the "cab case").* The former, however, was rejected on the grounds of anti-competitiveness, abuse of dominance, and predation intention. In the latter case, however, they did not address the legitimacy of the pricing strategy, i.e, the concept of penetrative pricing, but rather accepted its logical and circumstantial foundation. It is important to note that they did not support the strategy by citing penetrative pricing's non-dominance or pro-competitiveness.

***In Bharti Airtel Ltd. vs. Reliance J. Company Industries Ltd. (henceforth referred to as the "J. company case"),*** the Competition Commission of India (*further mentioned as an organization*) successfully applied and accepted it for the first time. Although these were included in the obiter dicta section rather than the ratio decidendi one, they are not yet ready to formally accept it as a pro-competitive and significant strategic development in the Indian competition law sector. It was also the first time they acknowledged its strategic value and provided specific criteria. This renders it ambiguous since the commission's conclusion remains unclear because it needed to establish official standards, leaving it up to future interpretation."

## **V. NATURE:**

Expanding consumer choice and diversifying the market are the fundamental components of penetration, which is why it is pro-competitive. *"A new entrant armed with a new idea, superior technology, or a superior product or technological solution that challenges the status quo in a market and shifts a large consumer base in its favour would not always be as held dominant,"* the AN ORGANIZATION implied in the cab case, expressing the fundamental idea behind penetrative pricing. This proves the pro-competitive character of penetrative pricing, which is sometimes misrepresented as predatory pricing with a mala fide purpose to be anti-competitive. *"The Jio company (further mentioned as J. Company) instance stands out for its original zero-price plan. Although it was employed deceitfully in the NSE case, the dominating NSE was not seen as being within the penetrative pricing category but as monopolistic. However, in J. company's case, the commission successfully*

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*approved it because J. company was an entrant. However, several relevant considerations about the duration of this approach, its purpose, its stance on the price element, and its potential to cause a brief disturbance of the status quo are still up for debate. In J. company's instance, zero cost shifted the focus entirely to the quality, which users could freely test and compare. Although zero pricing discourages rivalry among businesses, it encourages quality competition. Entrants can provide higher quality at zero cost and incur temporary losses; if they are superior, they will earn market share and recoup their losses. This refutes the argument that zero pricing under competition law is an anti-competitive dead end."*

## **VI. CRITERIA:**

As noted in the J. company case, the AN ORGANIZATION alluded to a few requirements. These comprise the offering company's non-dominant character, incentive-focused design, lack of a strategy to lessen competition, and short duration.

### **The Commission gave its opinion as follows:**

Offering services at no cost cannot, by itself, give rise to competition concerns unless it is provided by a dominant enterprise and proven to be tainted with an anti-competitive goal of excluding competitors or competition; this does not appear to be the case in this particular instance, as the relevant market is defined by the presence of established players with a stable business presence and strong financial position. It wouldn't be anti-competitive for a newcomer to direct clients toward its services with alluring offers and schemes in a competitive market where major competitors are already present. An entrant's short-term business plan to break into the market and establish its identity cannot be deemed anti-competitive, and as such, it cannot be the focus of an Act inquiry. In essential terms, it is distinct from the taxi case. In these instances, their affordability and ease of use were the primary factors that drew attention, but J. Company experienced the opposite outcome. When consumers tried it, they discovered its quality was unmatched nationwide, even though its zero-cost attracted attention and placed its quality on a lower pedestal. These two elements fuelled J. Company's telecommunications campaign.



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## **VII. TAKING A CLOSE LOOK AT THE FAME ACCUSATION:**

*“To determine the relationship, impact, and influence of predation on penetration, it is essential to comprehend predation. The term "predatory price" is defined as the "sale of goods or provision of services, at a price which is below cost, as may be determined by regulations, of production of goods or provision of services, to reduce competition or eliminate competitors" in u/s 4(2)(a)(ii) of the Act. As a result, competitors in the market cannot match the dominant player's pricing and will either have to exit the industry or suffer ultimately fatal losses. In Re: “Johnson and Johnson Ltd., AN ORGANIZATION, concluded that the essence of predatory pricing is pricing below one's cost to eliminate a rival.”*

Predatory pricing is regarded as an extreme type of domination. According to the principles of most countries' competition regulations, it is seen as an anti-competitive offense. It was formerly governed and outlawed under *Article 82 of the Treaty Establishing the European Community (TEU)*[1]. *Predatory pricing is forbidden in the United States by Section 2 of the Clayton Act* [2]. *“Numerous assessments are available to forecast if a company's pricing strategy is predatory. Here is a quick examination of the link between predation and penetration—two Pillars of Predation: Intention and Recoupment.” The past shapes the present, serving as the future's basis. We must examine its history and forecast future actions to comprehend any competitive playfully. Predation tests are built around two pillars: intention and recoupment.”*

In the case of *M/s. Transparent Energy Systems Pvt. Ltd. vs. TECPRO Systems Ltd.*, the Commission established three requirements for determining predation identification:

The dominating firm's products and services are priced lower than it costs to produce or acquire them. The dominating firm's price decrease was intended to drive competitors out of the market. When rivals are driven out of the market, a great deal of preparation is involved in trying to make up for the losses by raising prices once more. *“The NSE case followed a similar reasoning. The final two criteria were written forth as a two-prong exam. The viewpoint in Europe, however, is very different. "Proving that it is possible to recover losses is not a*

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*necessary precondition for a finding of predatory pricing," the Court of Justice of the European Union (CJEU) argued in the Wanadoo case. This created a presumption of predation on prices below Average Variable Cost (AVC) without providing credible evidence. Because the aim is disregarded, the move's intended goal must be fixed, rendering the predator prediction brittle. Future projections are vulnerable to inaccuracies and misjudgments if the purpose of an act needs to be clarified and considered. A similar observation was made by the Court of First Instance in the Tetra Pak II case and the France Telecommunications Case."*

However, in the *Compagnie Maritime Belge* case, Attorney General Fenelly argued that recoupment should be included in the criteria for predatory pricing. In the AKZO case, the *European Court of Justice (ECJ)* connected purpose with recoupment and implicitly recognized the criterion of recoupment:

*"Given that every sale results in a loss, a dominant enterprise has little motive in setting such prices other than to drive out rivals to have the ability to raise their prices by abusing their monopolistic position. The Court of Justice analyses four factors when determining predation: dominance, pricing, purpose, and recoupment. However, it is open to accepting such acts, except for objective reasons.*

## **VIII. REGARDING THE J. COMPANY EXAMPLE, THE FOUR ELEMENTS ARE AS FOLLOWS:**

Dominance: When the penetration pricing method was used, the target firm was not dominant; rather, its competitors were able to challenge its control of the dominating market. Price- It is unclear where J. company's zero pricing approach will stand in the price test. The objective was to infiltrate the market, which may be mistaken for predation, but due to its young state, the presumption of penetration appears obvious. Recoupment--a component that distinguishes all predation--was not detected in J. company's instance. Even after entering the market, it charged low rates, which completely undermined the claim of recoupment.

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As a result, it is clear that J. company's approach does not fall under the category of predation in and of itself; rather, it is an essential tactic that encourages competition. "Examination of the Allegations Made by the Rivals in the Past about the Competition Act of 2002. Interestingly, if the competitors who claimed that J. company was engaging in anti-competitive behaviour and causing a significant adverse effect on competition (AAEC) consider their long-standing monopolistic attitude and consistently high rates with little advancement in any form, they would also be in violation of sections 4(b)(ii)[6] and 19(3)(f)[7] of the Act, which both forbid restrictions on the promotion or development of scientific, economic, and technical provisions. Scientific advances and investments mostly drove J. company's digital revolution.

***The reasons behind J. company's success are as follows:***

When Infotel Broadband obtained 4G spectrum across all Indian sectors in 2010, Mukesh Ambani purchased a 96% share. Later, they rebranded it J. company and began creating a Fiber optic network nationwide." Opposing capital investment in the market would imply obstructing[8] the flow of capital, which would inevitably impede technological growth. Consumers benefit from increased data capacity provided by fiber optic networks and towers. India's digital landscape is being transformed with the installation of 90,000 environmentally friendly 4G towers and 2,50,000 km of Fiber optic connections. Because data providers do not have the bandwidth or ability to handle massive volumes of data, zero pricing, and limitless free services were made possible. Nevertheless, this regressive threshold is being breached as a result of J. company's massive Fiber optic revolution. Competitors have never bothered to invest in optical fibers. Since J. company can safely eliminate the same fee and lower costs as a result, they do not have to pay other firms to use their optic fibers, which increases rates. Competitors who reject this technology growth have responded massively delusionally to the burst of technical backwardness and lack of investment." Customers who have, up till now, paid for antiquated, inefficient technology would suffer grave consequences if J. company's service were to be prohibited. As a result, the challenges provided by rivals suffer from anti-competitiveness disguised as protectionist measures in the Act.

**IX. LONG LIVE THE CLIENTS?:**

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“The competitiveness of pricing penetration will be the final test. There were particular goals in mind when competition laws were created globally. The primary interest in these acts is the maximum well-being of consumers. If all other penetration characteristics were discarded and just the most substantial evidence remained, the influence on consumers would be the litmus test. The competition between low prices and good quality maximizes benefits for consumers. The regulations aim to depict a consumer-first stance. The Competition Act's preamble [9] refers to the defense of consumer interests.

***In AN ORGANIZATION vs. SAIL the Supreme Court of India stated that:***

Using competition as a tool to help create a market responsive to customer preferences, the primary goal of competition legislation is to enhance economic efficiency. The legislation states that J. company's penetration pricing approach is productive, allocative, and dynamically efficient. The General Court ruled in the instances of Österreichische Post Sparkasse AG and GlaxoSmithKline that the primary objective of competition legislation is the well-being of consumers. Consumer welfare takes precedence over maintaining the equilibrium of competitors, according to Article 102 of the *Treaty on the Functioning of the European Union (TFEU)*. The law's objective justification requirements incorporate several pro-consumer provisions, such as the allowance of alleged anti-competitive or dominant behaviour that outweighs the anti-competitiveness and provides the consumers with significant benefits and accelerated efficiency. These provisions counter the arguments made by the incumbent and its rivals, who are more interested in maintaining their regressive status quo than in promoting the consumer's interests. The General Court President asserted that *"the main goal of Article 102 is to prevent the distortion of competition, and, especially, to safeguard the interests of consumers rather than just protect the position of specific competitors."*

**X. CALL FOR GUIDELINES: IS IT TIME FOR THE SLOTHFUL  
AN ORGANIZATION TO WAKE UP?:**

We may infer that penetration is still strongly supported by its pro-consumer behavior, which peaks at zero or decreased pricing. On the other hand, regulation of this novel pricing approach in the form of recommendations or Act modifications that precisely define the word and



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establish the criteria and constraints is desperately needed in the Indian Competition law regime. Through severe recoupment, an extreme approach like this might also hurt consumers by fostering future monopolistic behaviour hidden under a short-lived pro-consumer and consumer-first policy. According to J. company's example, no such activity has yet been noticed. It keeps charging meager prices and leads India's digital revolution. It also sheds light on the benefits and expectations of penetrative pricing under the Indian competition law system. It should be highlighted that, unlike its European or American counterparts, Indian competition law is still in its infancy and is susceptible to conjecture, as well as more behavioural observations regarding the adoption of this unusual pricing approach.

## **XI. COMPETITION ACT OF 2002:**

Preamble *"An Act to provide, considering the economic development of the nation, for the establishment of a Commission to prevent practices that hurt competition, to foster and maintain competition in markets, to safeguard consumer interests and ensure other market participants' freedom of trade in India, and for matters related to it or incidental to it."*

**"CCI vs. Steel Authority of India (SAIL):** "Competitive laws have different goals in each country, and even within a country, those goals tend to fluctuate and develop over time. Nonetheless, mentioning a few of the common goals of competition law will be helpful. The primary goal of competition law is to improve economic efficiency by utilizing competition as a technique of aiding in establishing markets responsive to customer preferences. Three benefits come from perfect competition: dynamic efficiency that encourages creative thinking, productive efficiency that guarantees efficient use of resources, and allocative efficiency that ensures efficient use of those resources. These elements have mainly been acknowledged globally as guiding principles for the efficient application of competition law."

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