

CONSUMERISM VIS-À-VIS COMPETITION IN INDIA- THE OTHER FACE OF CONSUMER
ACTIVISM IN THE MARKET WITH AN ANALYSIS ON JIO' ISSUE

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ABSTRACT

With the Consumer Protection Act,1986 and Competition Act,2002 in hand, consumerism and competition advocacy is at its faster developing pace, mutually accommodating each other by protecting the rights of the consumers and preserving the competition. The major actors in this regime are the consumers and the businesses and the relationship between them is so delicate that needs to be handled with utmost diligence and care, to sustain in the market especially in a capitalistic regime.

This paper would essentially focus on evaluating the impacts of consumerism on competition in the market and vice versa, by interlinking them with the capitalist ideology. In order to aid the process, this paper would include a case study on the recent Reliance Jio offers to demonstrate the influence of the consumer-focused policy on the prevailing competition and the telecom industry as a whole.

Keywords: *abuse of dominant position, capitalism, expansion of consumption, consumer movement, consumerism/consumer activism, consumer-focused policy, consumer welfare, predatory pricing.*

1. INTRODUCTORY CHAPTER

1.1 Introduction

‘Consumerism is a social force within the environment designed to aid and protect the consumers by exerting legal, moral and economic pressure on business’

- Cravers and Hills

Consumerism is in itself, one of the several forms of ‘consumer movements’ that is concerned with the increasing utilization of resources with the increasing demands and wants of the society facilitated by more informed decisions. The rise of consumerism in 80’s had in fact led to the enactment of a separate legislation called Consumer Protection Act, 1986 (CPA) in this regard. The

legislation has a strong connection with the repealed Monopolies and Restrictive Trade Practices(MRTP) Act, 1969 and the present Competition Act, 2002 (CA) wherein both the consumer interests and competition in the market are interlinked and need to be protected- evident from the objectives of both the legislations. This paper intends to bring out the working relationship between consumerism and the competition regime under the existing framework and the probable impacts produced on each other with a pragmatic approach.

1.2 Research questions and methodology:

- What are the positive and negative impacts of consumerism on the competition regime and vice versa?
- Whether consumer-focused competition practices affect the free market policy?
- Do promotional offers at free of cost, amount to predatory pricing especially in case of Jio?
- Can the explosion of consumerism better serve the constitutional agenda of mixed economy and social justice?

The research methodology adopted is *doctrinal* in nature. The nature of research is partly evaluative and partly analytical so as to achieve the objectives efficiently. The primary source includes the Consumer Protection Act, 1986 and Competition Act, 2002 and the secondary sources include books, articles and web sources.

2. INTERFACE BETWEEN CONSUMERISM AND COMPETITION LAW

2.1 Consumerism- an overview of conceptual evolution:

The term "consumerism" had been first used in the year 1915 and referred to "***advocacy of the rights and interests of consumers***" defined in Oxford English Dictionary but is used in an altogether different sense which reflects social as well as economic order that encourages the buying of goods and services in ever-greater amounts (1960's usage).¹ In this paper we would consider the modern terminology inclusive of both the synonyms and as such "consumerism" refers to the ***consumerists movement, consumer protection or consumer activism***, which seeks to protect and inform consumers by requiring such practices as honest packaging and advertising, product

¹ See *Consumer Rights*, <http://www.consumerrights.org.in/consumerism.htm>, (last visited Oct.28, 2017, (N.T.M)).

guarantees, and improved safety standards,² with regard to the conscious expansion in the consumption. The scope of consumerism, is still getting wider day by day and the word has different connotations in various disciplines say, social, politics, economics, marketing etc.

2.1.1 Historical evolution of 'Consumerism' and 'Consumer Protection laws':

'Consumerism' or 'Consumer Activism' centers around the interests and the protection of rights of the consumer and enshrines the principle '**Consumer is the King of the market**'. Hence, it is equally important to define who a consumer is. Adam Smith observed that,

*"Consumer is the sole end and purpose of all production and the interest of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer."*³

However, the term has been defined under Consumer Protection Act, 1986.⁴ Going by the Act, the term signifies only the individual consumers and excludes commercial purchasers or users. Across the Globe, history of consumer rights dates back to 1824 but gained importance only after the Second World War.⁵ US has been the forerunner in this regard and every year, 15th March is observed as "**World Consumer Rights Day**" commemorating a historic declaration (1962) by former US President John F. Kennedy of four basic consumer rights in the proposed Consumer Bill of Rights namely,

- *"The right to safety*

² Sweta Rao, *Consumer Protection under Competition Law*, 2002, 3(6) IJSR, (June 2014) <https://www.ijsr.net/archive/v3i6/MTcwNjE0MDE=.pdf>, (last visited Oct.28, 2017, (N.T.M)).

³ Refer, *Consumerism in India Issues and Problems*, p. 2.14, http://shodhganga.inflibnet.ac.in/bitstream/10603/81430/8/08_chapter%202.pdf, (last visited Oct.28, 2017, (N.T.M)).

⁴ Refer s.2(1) (d) of Consumer Protection Act, 1986,

"(d) "consumer" means any person who—

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who 'hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purposes;

Explanation.— For the purposes of this clause, "commercial purpose" does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment;"

⁵ Ashu-Vyas Maharshi & Aniruddha Vithal Babbar, *Study Of Evolution Of Consumerism In India With Reference To The Consumer Rights And Responsibilities From Socio-Legal And Historical Perspective*, 4(1), SAJMS, 156,157, http://sajms.com/wp-content/uploads/2017/01/CONSUMERS_RIGHT.pdf, (last visited Oct.28, 2017, (N.T.M)).

- *The right to be informed*
- *The right to choose*
- *The right to be heard,*⁶

Which later included ‘right to consumer education’ as suggested by President Ford. In India, we started celebrating Dec.24 as ‘**National Consumer Rights Day**’ recently. The US President’s declaration is followed by the UN guidelines on Consumer protection in 1985,⁷ which has led to the birth of *consumer protection regime* among the countries and gave way for the enactment of Consumer Protection Act, 1986 in India.

In India, Consumer protection and consumerism dates back to 3200 B.C. and one of the age-old literatures, Kautilya’s Arthashastra has excerpts which advocate consumer protection.⁸ People’s welfare was the prime motto of the ancient and medieval rulers which promoted ethical considerations in the business and the competition by virtue of the principles of Dharma. In the modern era, it had acquired a distinctive legal set of rights only after the UN’s policy framework and as one of its many consequences, the doctrine of ‘Caveat emptor’ (Let the buyer beware) had significantly lost its value over time, wherein the maxim ‘**Caveat Vendor**’ (Let the seller beware), prevails.

‘**Consumer advocacy**’ is not a part of the old MRTP Act (Monopolies Restrictive Trade Practices Act, 1969 but later acquired legitimacy through Consumer Protection Act, 1986 and Competition Act, 2002. Consumerism was better encouraged through *three-tier fora* namely consumer Protection Councils and Consumer Dispute Redressal Commissions at the district, state and center levels. There are other legislations like the Indian penal Code, 1980, Indian Contract Act, 1872, Sale of Goods Act, 1930, Agricultural Produce (Grading and Marketing) Act, 1937, Industries (Development and Regulation) Act, 1951, Prevention of Food Adulteration Act, 1954, Essential Commodities Act, 1955, Essential Service Maintenance Act, 1968, Standard to Weights and Measures Act, 1976, Bureau of Indian Standard Act, 1986, Environmental Protection Act, 1986 etc.,

⁶ Refer *Consumerism And Its Historical Aspects With Future Perspective*, chapter IV, 63 http://shodhganga.inflibnet.ac.in/bitstream/10603/4464/13/13_chapter%204.pdf, (last visited Oct.28, 2017, (N.T.M)).

⁷ *Ibid.*

⁸ *Supra* 5.

which indirectly promotes consumerism and protection of consumers, that are enacted even before CPA.⁹

The etymology of the statutory protection can also be very well inferred from the Directive Principle of State Policy especially under Arts. 38¹⁰ and Arts. 39.¹¹ They mandate the state to ensure social and economic order and prevent the concentration of wealth in pursuance of social and economic justice. This aims to promote the spirits of socialism in the context of mixed economy. It does not end with the state's responsibility in protecting the consumers but also rests in the Consumer's realization of their rights and responsibilities in the reign of awakening consumer movements. However, Consumer rights have been considered as a part of fundamental rights specifically under Art.14 and Art.21 too.

2.1.2 Consumer movements in India:

Amongst all the consumer rights, 'right to awareness or education' encompasses the soul of consumerism in it, which makes it important to study about the consumer movements. Consumerism essentially has yet another connotation as '**consumer activism**' that includes a variety of activities like consumer movements and advocacy. Consumer movements might be in the form of official or non-official protests and also promote consumer advocacy in addition to the consumer awareness. The part of the population that is conscious and aware about the consumer protection laws and consumer rights is very low in percentage though there are several governmental and NGO's are organizing the consumer movements and educating the consumers.¹²

⁹ Kiran Chaudhry, Tanu Chandhok and Parveen Dewan, *Consumer Protection And Consumerism In India*, 1(1) International Journal of Multidisciplinary Research, 16,17 (May 2011), http://www.zenithresearch.org.in/images/stories/pdf/2011/May/vol-1_issue-1_art-7.pdf, (last visited Oct.28, 2017, (N.T.M)).

¹⁰ See Constitution of India -Article 38,

"38. State to secure a social order for the promotion of welfare of the people

(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life

(2) The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations".

¹¹ See Constitution of India -Article 39 (c)

"39. Certain principles of policy to be followed by the State: The State shall, in particular, direct its policy towards securing
(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;".

¹² Role and Importance of Consumer Movements, chapter 3, 116, http://shodhganga.inflibnet.ac.in/bitstream/10603/54415/10/10_chapter3.pdf, (last visited Oct.28, 2017, (N.T.M)).

Looking at the history of movements, Gandhiji's organized salt march was one prominent consumer movements against salt tax in India. Later after independence, the first association to be set up was the Indian Association of Consumers and in 1963,¹³ the National Consumer Association followed by several organizations including Consumer education and Research Centre (CERC) were set up to create awareness on consumer rights. They offer free legal advice, training programs and publish consumer journals especially file public interest litigations (PILs) in addition to organizing movements. They are valid complainants under the existing CPA- S.2 (1) (c) and suits filed by them are entertainable before any consumer forums and the Courts. The latest consumer movement in India is 'Green Consumerism'¹⁴ to observe environmental protection. Such Consumer movements have had a great role in introducing consumer laws, increasing consumer awareness and promoting consumerism in INDIA.

2.2 Consumerism, Capitalism and Competition:

The interlink between Consumerism and Competition in the market has been greatly established through the legislations- CPA, 1986 and CA,2002. On one hand, one of the Objectives of the Competition Act is to promote Consumer interests and on the other, Consumer Protection Act prohibits unfair trade practices in the market which duly affects competition. However, it is important to draw an ideological bridge between them to understand the practical problems and recent trends in consumerism.

2.2.1 Capitalism v. Consumerism- Cause or Effect?

Consumer advocacy and consumer movements are more like socialists agendas but they have their strong foundation on capitalism. The excerpt hereunder,

".....not everyone is happy about the new Consumerism. Right activists worry that the poor are being abandoned and Nationalists wonder if India's native industry is being swallowed by global behemoths."¹⁵

¹³ *Ibid* at p.155-158. Also refer Rajeswari and Thangavelu, *Present Status Of Consumer Movement In India*, 12(2) IJER (2015), <http://www.serialsjournals.com/serialjournalmanager/pdf/1435297332.pdf>, (last visited Oct.28, 2017, (N.T.M)). This write up has described briefly about the consumer movements and pointed out the rights and responsibilities of the consumers in the era of consumerism.

¹⁴ Pranjal Brezborah, *Green Consumerism in India*, The eastern Today, Jan 12, 2016, <http://www.eastern-today.com/entries/blog/green-consumerism-in-india>,(last visited Oct.28, 2017, (N.T.M)).

¹⁵ Refer *Consumerism and Consumer Protection in India*, <http://202.138.105.9/Kilpar/upload/e6.pdf>,(last visited Oct.28, 2017, (N.T.M)).

shows how consumerism is a concern for different class of people in the recent years, more so demonstrating the effect of capitalist regime infiltrating into the different layers of the market economy. The little obviousness in the explosion of consumerism is that it originates from capitalists agenda of profit maximization and that it is more of an indirect tool to expand production and profit margin rather than educating the consumers. One of the famous anthropologists Richard Robbins, who has studied the consumption patterns, has marked

“.....Our consumption of goods obviously is a function of our culture. Only by producing and selling things and services does capitalism in its present form work, and the more that is produced and the more that is purchased the more we have progress and prosperity..... Our consumption patterns are so much a part of our lives that to change them would require a massive cultural overhaul, not to mention severe economic dislocation.”¹⁶

Though consumption depends on our culture as quoted by him, the capitalism does not stop with just production and selling of goods instead it has greatly impacted in influencing the long-followed culture irrespective of the status of the countries (developed or developing) or their Constitutional agenda (Capitalist, Socialist or mixed economy). Not to comment on it as good or bad, the statement is true, where the American concept of Consumption had spread out itself widely across the globe, bringing drastic changes in our culture thereby affecting consumption patterns and one of such consequential cultural overhaul being the changed preferences of the consumer towards Western product, that has considerable and comparative negative impacts on the environment.¹⁷ This would probably force us to question on the background of Conscious consumption which is evidently one of the agendas of Consumerism.

It is very much essential to understand the impact of capitalism on consumption so as to elucidate the cultural transformation of any market towards preferring particular products (consumption patterns), and subsequently towards preferring every kind of products in the market, thus expanding the consumption. To quote Indian context, when the British occupied and ruled India, we started adopting their culture and they had a good market for their clothes here. Later,

¹⁶ See Richard Robbins, *Global Problem and the Culture of Capitalism*, (Alln and Bacon, 1999), pp. 209-210 referred in Anup Shah, *Effects of Consumerism*, Global Issues, (Aug.10, 2005), <http://www.globalissues.org/article/238/effects-of-consumerism>, (last visited Oct.28, 2017, (N.T.M)).

¹⁷ Alden Wicker, *Conscious consumerism is a lie. Here's a better way to help save the world*, Quartz, (Mar.1, 2017), <https://qz.com/966336/the-four-likeliest-outcomes-of-todays-french-election-and-what-they-mean/>, (last visited Oct.28, 2017, (N.T.M)). The writer had took a stance that conscious consumerism is itself wrong and it had drastically affected even the poor countries. He had illustrated the marketing impacts and consumption of several products on environment in the modern world and had suggested method to take eco-friendly decisions on consumption.

Gandhiji's Khadi products gained significance and dominated the domestic market. But then, after independence till date, we are wearing both the indigenous and foreign clothes where the latter has a comparatively good market, owing to the change in the consumption patterns influenced by globalization and westernization.

However, taking the recent example of cool drinks trading in Tamil Nadu, India, the Traders Association have decided not to sell foreign cool drinks like Pepsi, Coke in the shops across Tamil Nadu, as an opposition against drawing water from Rivers in Tamil Nadu, which was an incidental effect of the awareness spread during Jallikattu protest.¹⁸ This has led to the sudden hike in the consumption and sale of native drinks like Kalimark (Bovonto etc.) company¹⁹, who is also guilty of drawing water from the rivers and the giant beverage companies faced huge loss. However, Pepsi had changed its name to 'Gethu' in Tamil²⁰, in order to have a profitable market in Tamil Nadu as a native 'desi' drink, which has been reported in the local news media. This would be a perfect example of *Consumerism and Conscious decision making* by the Consumers which has tremendously impacted the consumption patterns and the product market. But the element of capitalism is found in each stage, in the form of competition, wherein both domestic and foreign companies are trying to promote their product aiming at profit earning and maximization and drive the rival out of the market, by employing different strategies resembling a '*cat and mouse*' chase. Both the drinks are however being sold in retail shops in Tamil Nadu (both in original and changed names in case of coke and pepsi), and at the end of the day, high level of competition is achieved and the consumption had expanded under the guise of consumerism.

It all lies in motivating the people to buy more and more products through marketing and advertising.²¹ On the other hand, each class of people compare themselves with their 'reference group', and wants to buy more products thus, leading to the expansion of consumption.

¹⁸ Dharani Thangavelu, *Riding on Jallikattu protests, Tamil Nadu traders look to ban Pepsi*, Coca-Cola, Live mint, Jan 25, 2017, 1.11 IST <http://www.livemint.com/Politics/4yTp3306JCVDDec2CXhPdTO/Riding-on-Jallikattu-protests-Tamil-Nadu-traders-look-to-ba.html>, (last visited Oct.28, 2017, (N.T.M)).

¹⁹ Express News service, *Tamil Nadu says fizzes off to Coca Cola and Pepsi after Jallikattu protests*, *The new Indian Express*, March 1, 2017, <http://www.newindianexpress.com/states/tamil-nadu/2017/mar/01/tamil-nadu-says-fizz-off-to-coca-cola-and-pepsi-after-jallikattu-protests-1575964.html>, (last visited Oct.28, 2017, (N.T.M)).

²⁰ Samayam, *பெயரைமாற்றி ஊரைஏமாற்றப்பார்க்கும் பெப்சி*, Octil 16, 2017, <http://tamil.samayam.com/latest-news/state-news/gethu-pepsi-name-changed-in-tamilnadu/articleshow/58206593.cms>, (last visited Oct.28, 2017, (N.T.M)).

²¹ Refer *Consumerism*, chapter 7, (Aug, 2009), <https://www.ssc.wisc.edu/~wright/ContemporaryAmericanSociety/Chapter%207%20--%20consumerism%20--%20Norton%20August.pdf>, (last visited Oct.28, 2017, (N.T.M)).

“A poor man walking on the road refers to middle class man riding a bike and aims to own a bike; the middle class man instead looks at the upper middle class and wants to buy a car; the man owning a car refers to a millionaire and wants to buy a better luxurious car and some other costlier transport.”

We are brought up in such a way, that we are ready to purchase more products besides fulfilling our needs, just to fulfill our changing and evolving desires from time to time regardless of the actual utilization of the product. And thus, the sellers spend their time in convincing us or motivating us to buy their products in that aspect, which promotes both consumption and competition.

It is absolutely blunt to characterize the capitalism either as the cause or effect of the consumerism alone, rather the capitalism should be viewed both as the cause and effect of the Consumerism. And that’s why the developed countries are in fact very much interested in promoting Consumerism.

2.2.2 Bridging Consumerism and Competition via Capitalism:

India, though seems to preserve socialism, enthalls the regime of mixed economy that too, with dominant characteristics of capitalism excluding the state-owned sectors. We do not have a purely free market regime as there are regulatory restrictions on the monopolism and competition in the market. Consumer protection is an automatic projection of competition regulatory framework in India²² as mentioned earlier. Competition Act, 2002 prohibits anti-competitive practices having negative impacts on consumers.

Competition Act’s preamble speaks about the consumer interests and they aim at promoting competition and consumer advocacy in the long run. Further, all the provisions relating to s.3 – Anti-competitive agreements (Horizontal and vertical cartels) and s.19- inquiry into anti-competitive agreements, s.4 – Abuse of dominant position, s.5 and 6- Regulations of combinations etc, ultimately intends to serve the consumers and protect them, in the present era of globalization and fierce competition.

²² Sustainable Competition Law (2015, July 11) CUTS International. Retrieved from https://www.google.co.in/?gfe_rd=cr&ei=Zk-3Vc-_G7Pv8weYqLAAQ&gws_rd=ssl#safe=off&q=competition+law+and+consumer+protection+in+india, referred in Rahul Mishra, *Competition Law and Consumer Welfare: Issues and Challenges*, 2(5) IJHSS, March 2016, https://www.ijhss.com/files/Rahul-Misra_di6663z1.pdf, (last visited Oct.28, 2017, (N.T.M)).

The importance of consumerism in a free market regime and intense competition has been quoted in one of the judgments too. In *Ashoka Smokeless Coal v. Union of India*,²³ the Supreme Court while dealing with the issue of balancing constitutional obligations of the state and the competition in the free market, opined that,

*“If the policy of the open market is to be achieved the benefit of the consumer must be kept uppermost in mind by the State.”*²⁴

Capitalism and free market policy both depends on demand and supply in the market and actively encourages private ownership with no or limited government intervention, yet at times, capitalists economy might prevent free competition when there is a monopoly in the market.²⁵ Sometimes, the purest form of capitalism is regarded as free market and the primary feature uniting capitalism and free market is the competition at first instance. The competition amongst the companies, persons and enterprises, aims towards maximization of profits via high production and consumption. Their target however is the consumers, and demand and supply for any product in a market depends on consumer preferences.

Capitalism vis-à-vis competition has a direct impact on the consumers since they are the end-users of the manufactured products or services. However, Consumerism in the light of consumer rights, advocacy, movements etc, can have both positive and negative effects on the competition. In the present scenario of a ban on foreign drinks, explained above, the consumerism seemed to bring monopoly initially but accommodated other products too. Educating the consumers can very well be used as a tool to promote market for a particular product driving out or affecting the rival competitors, which reflects an ideal capitalist society.

In such cases, conflict between ethical and business considerations would also arise. Ultimately, in countries like India, such strategy would be acceptable if it benefitted the consumers

²³ (2007) 2 SCC 640.

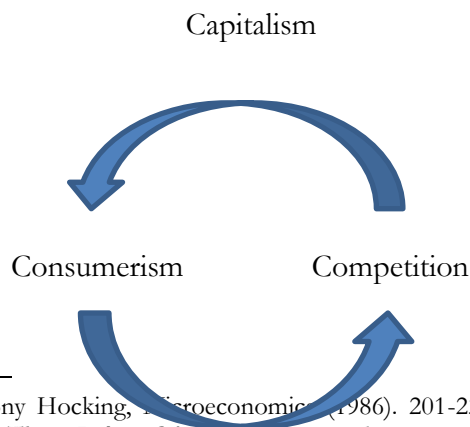
²⁴ Refer the judgment in Indian Kanoon, <https://indiankanoon.org/doc/1067949/>, (last visited Oct.28, 2017, (N.T.M)). The relevant excerpt is,

“In a market governed by free economy where competition is the buzzword, producers may fix their own price. It is, however, difficult to give effect to the constitutional obligations of a State and the principles leading to a free economy at the same time. A level playing field is the key factor for invoking the new economy. Such a level playing field can be achieved when there are a number of suppliers and when there are competitors in the market enabling the consumer to exercise choices for the purpose of procurement of goods. If the policy of the open market is to be achieved the benefit of the consumer must be kept uppermost in mind by the State.”

²⁵ Steven Nickolas, What is the difference between a capitalist system and a free market system?, Investopedia, (Oct. 22, 2015, 13:11 IST), <http://www.investopedia.com/ask/answers/042215/what-difference-between-capitalist-system-and-free-market-system.asp>, (last visited Oct.28, 2017, (N.T.M)).

and not against the public policy. For instance, advertisements of Kalyan jewelers in south India, in the recent years educated the consumers about the BIS Hallmark certification and evaluation of wastage value for the gold ornaments. This had actually benefitted the consumers and also increased their profits comparatively affecting the rivals. However, this is just one of the many impacts.

Capitalism and competition themselves work around the consumers so as to give them n' number of choices, attract them and lure them to buy their products. A healthy competition could give quality and standard products to the consumers at low price and with high quantity, and maximization of benefits to the consumers is a possibility where competition is found to benefit the consumers.²⁶ Unregulated competition might have negative impacts on consumers too, when anti-competitive practices lead to inflation in prices, unworthy goods etc.²⁷ However, capitalists agenda of competition had successfully expanded the consumption ratio while the consumerism in turn, has the ability to create a market for a new product or could drive out any existing product. A shift from 'old consumerism' towards '**new consumerism**' and '**neo consumerism**' had probably lead to more competition, privatization etc.²⁸ Creating awareness about the goodness of the herbs could suddenly increase the market for herbal cosmetics and pull down artificial cosmetics' market. Such is the power of consumerism, and capitalism can be felt in each and every step of it, in the private sectors and competition regime. Further, capitalism is not an ideology that characterizes the economy as a whole, for it can be present within and influences each layer of the market – competitors and consumers. The relationship between them can be better portrayed through a simple diagram given below.



²⁶ See, eg, Roger Waud and Anthony Hocking, *Microeconomics* (1986). 201-239 referred In Chris Field, *Creating A Prosperous And Fair Australia: The Role Of Consumer Advocacy*, 32 *Alternative L.J.* 39 (2007), <file:///C:/Users/User/Downloads/32AlternativeLJ37.pdf>, (last visited Oct.28, 2017, (N.T.M)).

²⁷ John C. Bodner, *Antitrust and Consumer Protection in Tandem: What Should We Expect of Section 5*, 15 *Pat. Trademark & Copy. J. Res. & Ed.* 85 1971-1972, <file:///C:/Users/User/Downloads/15PatTrademarkCopyJResEd8.pdf>, (last visited Oct.28, 2017, (N.T.M)).

²⁸ *Supra* 26.

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Thus, a vicious circle is always present between the consumerism and competition, where each can be both cause and effect of the other, in a capitalists or dominant capitalists market and influences in and out of such markets. Whereas it is not possible in a socialists' economy, though consumerism could still exist.

3. CASE STUDY: RELIANCE JIO

3.1 Reliance Jio Offers- Nightmare to the Telecom Industry:

The most recent and popular talk of the town is on the '*Reliance Jio*' offers, that changed the fate of the entire telecom industry in a single night. The company took over the entire industry's revenue and the rivals are facing a rapid fall in their shares and market for their products. There are a bunch of cases filed against and by Jio-Infocomm in CCI, which reflects the fierce competition in the industry.

3.1.1 Factual Background of the Issue:

On 1 September 2016, Reliance Jio -Infocomm (RJio), which is part of Reliance Industries Limited (RIL), India's biggest private company headed by the country's richest man Mukesh Ambani, commercially launched services to transfer voice and data through the internet using fourth-generation (4G) telecommunications technology.²⁹Said to be the biggest "start-up" in the world with an investment of ₹1,50,000 crore—RIL is backing RJio with an investment of equity capital of more than ₹45,000 crore—the new -entrant comes with substantial financial cloud.³⁰ While other telecoms like Bharti Airtel, Vodafone, Idea, BSNL etc., were operating at 2G, 3G and sometimes at 4G platforms with circuit switched (CS) or packet switched (PS) networks for voice services, Jio operated at 4G platform using Voice over Long term platform (VoLTE) technology offering data-centred services including both voice calls and unlimited internet.

²⁹ Jai Bhatia and Advait Rao Palepu, *Reliance Jio: Predatory Pricing or Predatory Behaviour?*, 51(39), EPW, 26 Oct, 2016, <http://www.epw.in/journal/2016/39/web-exclusives/reliance-jio-predatory-pricing-or-predatory-behaviour.html#sthash.OqOHtp2S.dpuf> (last visited Oct.28, 2017, (N.T.M)).

³⁰ *Ibid.*

Reliance Jio had given several ‘promotional offers’ through *JIO’s Welcome offer*’ with unlimited voice calls and unlimited internet (which is later on capped to 1 GB per day) at free of cost, from Sep.1, 2016, for limited days. Later then, Jio came with up another offer- ‘*Happy New year*’, which extended the promotional services for few more days.

With the tremendous growth of the consumption rate in the telecom, Jio was accused of offering free promotional offers by its rivals, which has taken down the entire industry. When the issue was taken to TRAI- Telecom Regulatory Authority of India, the issue was decided in favour of Jio, which approved of its promotional offers for 200 days, irrespective of the regularly approved time limit of 90 days, as per the letter issued by Department of Telecommunications (DoT) by June 2002.³¹ It has been criticized that the decision is against the spirits of TRAI Act and healthy competition prevailing in the telecom industry, thereby affecting the rival industries.

TRAI was also given the burden of deciding the issue on PoI (Points of Interconnect) based on Jio’s claims against Bharti Airtel, Idea cellular, Vodafone companies. The telecom regulator found that the incumbent telecom operators to be in “non-compliance of the terms and conditions of license” and that the denial of interconnection was an anti-competitive move that appeared to be with an “ulterior motive of stifling competition”.³² Fortunately or unfortunately, the case was decided in favour of jio and the three telcos were imposed a penalty of Rs. 50 Crore each on their respective circles, as their continuous activities in relation to PoI congestion was against the public interest “*circumventing the Standards of Quality of Service of Basic Telephone Service (Wireline) and Cellular Mobile Telephone Service Regulations, 2009.*”³³

This has never been the end of the telcos battle and reportedly, cases have been filed of this sort before Competition Commission of India (CCI) also.

3.1.2 Jio offers- Battles in the Anti-Trust Regime:

Jio was also accused of ‘predatory pricing’ and ‘abuse of dominant position’ in the Indian market, both in TRAI and CCI. CCI had confirmed the registration of totally four cases as informed

³¹ Manoj Gairola, *TRAI Is Wrong When It Comes to Reliance Jio’s Promotional Free Data Offers*, The Wire, Octil 01, 2017, <https://thewire.in/120615/tra-i-wrong-comes-reliance-jios-promotional-free-data-offers/>, (last visited Oct.28, 2017, (N.T.M)).

³² Anuj Srivas, *Why Did TRAI Rule In Reliance Jio’s Favour on the Points of Interconnect Issue?*, The Wire, Oct.22, 2016, <https://thewire.in/75057/tra-i-rules-reliance-jios-favour-interconnect-point-issue/>, (last visited Oct.28, 2017, (N.T.M)).

³³ *Ibid.*

by Ministry of corporate Affairs, of which Jio's accusation on the rivals Airtel, Vodafone and Idea of forming cartel in PoI issue, is one among them.³⁴The said cases have been filed under ss.3 and 4 of the Competition Act, 2002.

3.1.2.1 Predatory Pricing and Abuse of Dominant Position- Jio's Liability:

'Predatory pricing' is pricing one's goods below the production cost, so that the other players in the market, who aren't dominant, cannot compete with the price of the dominant player and will have to leave the market.³⁵ It is well accommodated and defined³⁶ in the CA, 2002 under the provision for 'abuse of dominant position' and affirmed in Judicial decisions,³⁷ which shows that it is essential to prove the dominant position of the alleged person, company or enterprise in order to bring a successful claim on 'predatory pricing'.

We have come a long way from MRTP Act, and dominant position is no more illegal per se. In the present Act, S. 4(2),³⁸ predatory pricing has been considered as one of the factors of 'abuse of dominant position', thereby producing appreciable adverse effects on competition (AAEC). To decide on whether Jio has abused its dominant position, it is pertinent to look at what is a dominant position.

"(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

³⁴ Anuj Srivas, *Absolved Thrice, Reliance Jio Now Faces Final Regulatory Challenge*, The Wire, Feb.02, 2017, <https://thewire.in/106628/absolved-thrice-reliance-jio-now-faces-final-regulatory-challenge/>, (last visited Oct.28, 2017, (N.T.M)).

³⁵ Himanshu Sharma & Martnand Nemana, *Predatory Pricing: A Synopsis On The Indian Telecom Sector*, Mondaq, (Mar.15,2017), <http://www.mondaq.com/india/x/576894/Antitrust+Competition/Predatory+Pricing+A+Synopsis+on+the+Indian+Telecom+Sector>, (last visited Oct.28, 2017, (N.T.M)).

³⁶ Refer Explanation (b) of s.4 in CA,2002,

"4-Abuse of Dominant Position

Explanation (b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors"

³⁷ In Re: Johnson And Johnson Ltd., (1988) 64 Comp Cas 394, where it is opined that

"the essence of predatory pricing is pricing below one's cost with a view to eliminating a rival."

³⁸ See s.4 (2) in CA,2002,

"(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise,—

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or services; or

(ii) price in purchase or sale (including predatory price) of goods or service; or Explanation.—For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory conditions or prices which may be adopted to meet the competition;"

- (i) operate independently of competitive forces prevailing in the relevant market; or
- (ii) affect its competitors or consumers or the relevant market in its favour;³⁹

Going by the definition, Jio as a separate entity do not enjoy any such dominant position in the relevant market previously. Moreover, there are several criteria to determine the dominant position in the market such as the market shares etc. Though it has charged no or low cost below the average variable cost in the market, the product being a new entrant into the market could not be said to be enjoying the dominant position in the relevant market. Further, it needs to be reconsidered *whether dominant position in relevant market is absolutely mandatory?*, while considering the company's or the related entity's dominant position in the relevant product or geographic market (products taken altogether in one geographical area) would also be sufficient. In such a scenario, Porter's pre-requisite conditions as stated below shall be noted in order to get a clarity on this.

- i. *The bargaining power of customers (buyers)*
- ii. *The threat of the entry of new competitors*
- iii. *The bargaining power of suppliers*
- iv. *The threat of substitute products or services*
- v. *The intensity of competitive rivalry*⁴⁰

Such a question can also be based upon s. 4(2) (e) of CA, 2002⁴¹. Reliance company is one of the biggest giant companies in India, that operates in various sectors. Jio could not have offered the services at free of cost to large scale population, had Reliance not been in such a powerful position in the market. With this fact in hand, ***Can one accuse Reliance holding company or Jio Informatics for using its dominant position in the otherwise relevant market to drive out the competitors in the telecom sector?***

In the Apex Court pending case of *Uber v. CCI*,⁴² where Uber has been accused of charging predatory pricing based on the information given by Ola cabs (Rival), CCI held that none of the two cabs enjoy dominant position in the market, hence it does not amount to predatory pricing. Yet it was criticized later and is reversed by Competition Appellate Tribunal (COMPAT) and now it has

³⁹ S.4 Explanation (a) of CA,2002.

⁴⁰ *Supra* 35. Michael Porter of Harvard Law School has documented this analysis on abuse of dominant position.

⁴¹ See S.4(2) (e) of CA, 2002.

"(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market."

⁴² CCI Case No.21 of 2016.

just undergone the first hearing of the arguments in the Supreme Court.⁴³ And further, it is of the common view that the dominant position cannot be decided outside of the fragmented relevant market.⁴⁴

On this point, Experts⁴⁵ and TRAI officials⁴⁶ do have a view that the Jio offers do not amount to ‘predatory pricing’ for the reason that Jio is not a dominant player in the market. And moreover, following that observation, promotional offers of such a nature in case of a new entrant, cannot be quantified as predatory pricing.

3.2 Aspects of Consumerism and Competition law with regard to Jio Issue:

As put forth by Mukesh Ambani in a recent conference, “India has become no 1 country in mobile data usage. Jio users consumed more than 100 crore GB of data per month on the Jio network and that’s more than 3.3 crore GB a day, nearly as much mobile data as the entire United States of America and nearly 50% more mobile data than all of China, also Jio consumers, according to him, make more than 200 crore minutes of voice and video calls”.⁴⁷

Consumer benefits in one way or other serves as a concern for any regulatory measures undertaken by CCI. Now that the Jio’s offers might be destructive to the competition prevailing in the telecom industry but had immensely benefitted the consumers in the long run, of which no one could have ever thought over. Consumer benefits have also been an important consideration as held in the case of *DotEx International Ltd. and Omnesys Technologies Pvt. Ltd.*,⁴⁸ and in similar other cases,

“Predatory pricing was defined by CCI as a conduct which the dominant firms undertake to incur losses and forgo profits for a short period of time with the objective of foreclosing the competitors..... Predatory pricing is illegal

⁴³ Vasudha Misra, *Day 1 of Uber v. CCI in the Supreme Court*, Bar and Bench, (Mar.2, 2017), <https://barandbench.com/day-1-uber-v-cci-supreme-court/>, (last visited Oct.28, 2017, (N.T.M)).

⁴⁴ Atyotma Gupta, *Legal Position Of Predatory Pricing: An Analysis In India*, Competition Law Observer, (Aug 11, 2016), <https://competitionlawobserver.wordpress.com/2016/08/11/legal-position-of-predatory-pricing-an-analysis-in-india/>, (last visited Oct.28, 2017, (N.T.M)).

⁴⁵ Mobis Philipose, *Do Reliance Jio’s free offers amount to predatory pricing?*, Live Mint, 8:25 AM IST, <http://www.livemint.com/Money/s5ntYNvq43ltcwpxEVY9iO/Do-Reliance-Jios-free-offers-amount-to-predatory-pricing.html>, (last visited Oct.28, 2017, (N.T.M)).

⁴⁶ Upasana Jain, *Reliance Jio: Trai official says predatory pricing doesn’t apply*, Live Mint, Oct.22, 2016, 3:27 IST, <http://www.livemint.com/Companies/uhVdHDDwGV5v7XiDE7GIPL/Reliance-Jio-Trai-official-says-predatory-pricing-doesnt-a.html>, (last visited Oct.28, 2017, (N.T.M)).

⁴⁷ Muntazir Abbas, *Thanks to Reliance Jio! India becomes top mobile data user*, The Economic Times, Feb 21, 2017, 16:01 IST, <https://telecom.economictimes.indiatimes.com/news/thanks-to-reliance-jio-india-becomes-top-mobile-data-user/57269548>, (last visited Oct.28, 2017, (N.T.M)).

⁴⁸ 2011 CompLR 129 (CCI).

under the Act due to the adverse effects of reduction of competition in the market.....It is done in the best interests of the new entrants in a specific industry and the consumers.”⁴⁹

As such, it is important to explore the benefits accrued to the consumers through Jio offers. Consumerism in Jio has been reflected through the increased rate of consumption, and consumers' preference to Jio has made even the rivals to lower the tariffs to sustain in the market. In the consumer's perspective, it is in fact a welcome move, since Jio being a new entrant (as contrasted from the prevailing reliance network) offering services at 4G network, had given such promotional offers at free of cost with a pre-fixed rate to the future services, and that the fixed rate is also less than the average price charged by the competitors. As of now, it is not a deceiving offer, since it comes with a valid closing offer period and the company has given required information about the prices to be charged at a later point of time.

But a sense of apprehension exists, where Jio could utilize its 'acquired position' and could raise the costs arbitrarily in the future as per the recoupment theory. Owing to the promotional offers guaranteed, it has taken a total customer base to 100 million in just 170 days and reportedly adds 7 customers at every second⁵⁰, which has already made Jio, comparatively a dominant player in the market. Dominant player, in the other sense, would mean that the pricing in the telecom market depends on what Jio fixes too (to a considerable extent). Also, the offers at free of cost persisted for more than next one year, despite the company's announcement on the closing date to be April.15, 2015. So, any extended offers herein, after locating the time from which Jio had acquired dominance in the relevant market, could be declared anti-competitive. Simultaneously, there are chances that the Reliance had already used its position in the market so as to lure the authorities in favour of Jio. Yet, dominance argument can be defeated by the fact that some of the consumers use double sim mobiles, with different networks and accordingly dominance could not be inferred. More so, there are other issues to be dealt by the CCI in parallel,

1. ***Whether promotional offers could qualify to be predatory pricing?***
2. ***Whether 'abuse of dominant position' is assessed with respect to the relevant product market or geographic market- (as a single market) and can the associated entities' dominance also be considered?***

⁴⁹ *Supra* 44.

⁵⁰ *Supra* 47.

In addition to this, consumerism in terms of awareness, have now made us to realize that the telecom industry could actually offer such services at lower tariffs. As our market is totally consumer driven, almost all the competitors had come up with similar consumer-focused plans to regain their position in the market. In fact, the telecom companies have effected several mergers among them wherein Airtel is showing some interest in one of the biggest mergers of Vodafone and Idea⁵¹ and Tata is about to merge with the already planned merging entity of RCom- Aircel- Mts.⁵² Whilst the former is expected to be ranked as the second most happening telecom combination across the world, in the latter case, RCom and Aircel had recently called off the approved merger resulting in RCom's debt elevation.⁵³ Now all that offers given by Jio has come to an end and they are providing more affordable packages for unlimited data and calls, which is also followed by several other companies like BSNL, Airtel etc. These changes are however worthy in terms of consumer welfare, offering them quality services at low cost. Especially it has made the internet services very much accessible to the consumers of the Indian market. After all, capitalistic competition regime is able to give such beneficial services to the consumers and the competitors themselves.

In terms of predatory pricing, there are several approaches to decide on it, which includes the Price-Cost Test, the Recoupment Test, Predatory Intent Test.⁵⁴ All such tests somehow, could go subjective on a case to case basis, when consumer focused benefits ought to be taken as an utmost concern. In *Haridas Exports v. All India Floating Glass Mfrs. Association and Ors*,⁵⁵ it was held that reduction in prices should not always be restricted when it has not affected the competition in the market and is done to **preserve the interests of the consumer**, which has to be noted too.

⁵¹ ET Telecom, *Vodafone-Idea Cellular merger is a 'perfect match': Sunil Mittal, Bharti Chairman*, Economic Times, Jan 20, 2017, 09:46 IST, <http://telecom.economictimes.indiatimes.com/news/vodafone-idea-cellular-merger-is-a-perfect-match-sunil-mittal-bharti-chairman/56679473>, (last visited Oct.28, 2017, (N.T.M)). See also Swaraj Singh Dhanjal, *Merger of Vodafone India and Idea Cellular gets CCI approval*, Live Mint, Jul 25 2017, 08 51 AM IST, <http://www.livemint.com/Companies/IW7RgcrlZzB64Kvj62Kzyj/Vodafone-Indias-23-billion-merger-with-Idea-approved-by-CC.html>, (last visited Oct.28, 2017, (N.T.M)).

⁵² Sunny Sen, *After Vodafone-Idea merger, RCOM in talks with Tata Teleservices to take on Jio*, Hindustan Times, Feb.20,2017, 17:48 IST, <http://www.hindustantimes.com/business-news/after-vodafone-idea-merger-rcom-in-talks-with-tata-teleservices-to-take-on-jio/story-TVkDnUZK8Ddof7AW1NAJK.html>, (last visited Oct.28, 2017, (N.T.M)).

⁵³ Muntazir Abbas, *RCom's Aircel merger collapse credit negative: Moody's*, ET Telecom, October 05, 2017, 11:53 IST, <https://telecom.economictimes.indiatimes.com/news/rcoms-aircel-merger-collapse-credit-negative-moodys/60951268>, (last visited Oct.28, 2017, (N.T.M)).

⁵⁴ Ravisekhar Nair & Abdullah Hussain, *Predatory Pricing under the Indian Competition Act, 2002*, http://www.luthra.com/admin/article_images/Predatory-Pricing-under-CA.pdf, (last visited Oct.28, 2017, (N.T.M)).

⁵⁵ AIR 2002 SC 2728.

However, with this observation, the CCI could allow for several offers despite affecting the competition based on the benefits accrued to the consumer, when such ‘aggressive competition’ which previously existed, is not completely ruined and the lower tariff rates are actually reasonable as to the cost of offering such services. TRAI has already taken steps to revise the rules of tariff assessment and promotional offers with regard to predatory pricing and has recently invited for public opinions.⁵⁶ Then in such circumstances, we will have to resolve the jurisdictional issues between TRAI and CCI in cases of predatory pricing and promotional offers.

4. CONCLUDING CHAPTER

4.1 Conclusion and Recommendations:

Competition and Consumerism are intrinsically woven ideologies which if appropriated properly, could promote the progress of the economy in a right direction. Successfully establishing the cause and effect relationship between the two, it is to be noted that decisions have to be taken with due consideration to the consumer interests, so as to have the expected sustainable progress by achieving constitutional obligations of social, economic and political justice even in a comparatively free market domain. In case of Jio, there are indeed several questions which have to be answered and it is suggested by the researcher to take down the following points.

- Promotional offers are different from predatory pricing but somehow come within the ambit of both TRAI and CCI. TRAI could be given the authority to deal with, when it comes to deciding on the violation of rules and regulations but CCI shall be given the authority when deciding such cases involve analyzing the rules of competition and conservation of consumer interests’. However, it is better for CCI to work together with the sectoral regulatory bodies so as to ensure fairness and justice in deciding the anti-competitiveness.
- Abuse of dominant position could be inferred with regard to relevant geographic market taken as a whole and the related/associated entities’ position in the relevant product market or geographic market might also be considered for assessment, in some of the exceptional cases. Exception to such exception could be consumer benefits. This is so because, some of the big giant companies using their position in that geographical region, though not in relevant market, could suddenly overtake the market foreclosing the competition. Not in all

⁵⁶ PTI, *TRAI seeks views on promotional offers, predatory pricing*, The Economic Times, Feb.18,2017, 16:12 IST http://economictimes.indiatimes.com/articleshow/57221469.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst, (last visited Oct.28, 2017, (N.T.M)).

cases like Jio, could it afford benefits to consumers and sometimes might deceive the consumers too. Legislative amendments are not necessary, and the discretion of Director General could prevail.

- Such promotional offers given by them if goes beyond the limit should be analyzed with the help of 'Rule of reason' considering *consumer interests' primarily and probability of competition revival* to be the subjective qualifications. In most of the cases, the market is flexible as that the competition could however be revived with the same or much better spirit. In such cases, new entrants could be allowed to give such offers for the betterment of the consumers.

Competition Commission did realize its responsibility to protect and promote the consumer interests and thereby is issuing several guidelines on the assessment of several laws thereof,⁵⁷ yet the actual assessment in each case should also take that into consideration. With the above mentioned recommendations, Reliance Jio could be held guilty of abuse of dominant position, for having an entry into the otherwise relevant market but with the considerations of consumer interests' and possibility of revival of competition, Jio could be resolved of its liability completely. There is also a need to increase the awareness among the consumers and the *Consumer Protection Councils need to be strengthened*, to focus on educating the consumers. Consumerism in any form could help us to incur maximum benefits and enhance healthy competition, if appropriated properly, which is very evident from the analysis made herein. Hence, a more planned awareness intending to educate the consumers, irrespective of the sector of production or services, could lead us to a more stabilized economy.

⁵⁷ See *The Competition Commission of India (Competition Assessment of Economic Legislations and Policies) Guidelines, 2016*, http://www.cci.gov.in/sites/default/files/whats_newdocument/Competition%20Assessment%20Guidelines%2C%202016.pdf, (last visited Oct.28, 2017, (N.T.M)) and also refer, *The Competition Commission of India (Competition Assessment of Legislations and Bills) Guidelines, 2015*, http://www.cci.gov.in/sites/default/files/whats_newdocument/Competition%20Assessment%20Guidelines%202015.pdf, (last visited Oct.28, 2017, (N.T.M)).