

A STUDY OF PREDATORY PRICING: IN LIGHT OF ABUSE ON DOMINANT POSITION

by

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“If you're not worried that you're pricing it too cheap, you're not pricing it cheap enough.”

- Roy H Williams

Everyone has seen many products or services on which there is a huge discount which is offered by a large number of players. It is unbelievable to see how these products and services are offered at throwaway prices.

Predatory pricing is a strategy whereby a powerful organization with deep pockets, prices its goods or services at rock-bottom levels so that no rivals can compete with them.

The researcher in this paper will analyse the impact of predatory pricing upon the consumer as well as upon the business organization. Further, the researcher will also see the legal position under the Indian Competition Law. Also, the researcher will cover the OLA & JIO case.

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INTRODUCTION

Predatory pricing poses a dilemma that has perplexed and intrigued the antitrust community for many years. On the one hand, history and economic theory teach that predatory pricing can be an instrument of abuse, but on the other side, price reductions are the hallmark of competition and the tangible benefit that consumers perhaps most desire from the economic system.² Everybody has come across a product or service where a large number of player offers at throwaway prices, but they jack up price later. That's predatory pricing.

Predatory pricing is a strategy whereby a powerful organization with deep pockets, prices its goods or services at rock-bottom levels so that no rivals can compete with them. And when everyone else runs up with huge losses and forced out of the business, the Goliath makes hay by withdrawing the freebies and fleecing consumer.

The Competition Act, 2002 outlaws predatory pricing, treating it as an abuse of dominant position, prohibited under Section 4. Predatory pricing under the Act 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, to reduce competition or eliminate the competitors. 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. The CCI in *In Re: Johnson And Johnson Ltd.*³ said that

“The essence of predatory pricing is pricing below one's cost to eliminate a rival.”

CONCEPT

Predatory pricing is a temporary arrangement in which the price of the commodity is held back lower the production cost to hamper the competition and draw more profits in the long term. It is a scheme followed to increase market power. In this type of market setup, the price to meet and beat the competition is different because the aim is to hinder the competition. This strategy

² PREDATORY PRICING: STRATEGIC THEORY AND LEGAL POLICY - Patrick Bolton, Joseph F. Brodley and Michael H. Riordan

³ *In Re: Johnson And Johnson Ltd.*, (1988) 64 Comp Cas 394

aims at either eliminating a market contender or restrict the entry of a new participant.⁴ Predatory pricing primarily aims at capturing and influencing the market terms. It happens when a dominant player in the market sells its product at a price below the standard price to chase away the competitors and derive higher benefits from the reduced competition. Although in the long run the predator might recover but he will have to make a sacrifice of his profits at the beginning as the chances of recoupment are not certain. This scheme demands a high risk and is practicable for the dominant market participants only. It is because of this reason that this arrangement is often viewed as a kind of “abuse of dominance”.⁵

The predator has the power to ascertain the cost without taking into account its fixed price, thereby wrongfully allocating the efficiency. There are also instances where the dominant market participants exercise their dominant position and create hurdles for young participants or otherwise make an attempt to chase them away from the market. This practice of forcing out other participants from the market is termed as predatory pricing.⁶

FACTORS ESTABLISHING PREDATORY PRICING

- **Dominance**

The predator has to sustain losses for the time as he is selling the commodity at a value less than the standard cost, therefore to last in such situation is only possible for that market player who has huge capital reserves, therefore predatory pricing can be only practiced by the player who dominates the market. This position of dominance can be examined in connection with the geographic market and the relevant product and by analysing the demand of the product and its substitutability. The market power of the dominant player can be determined by the position he has in other markets.

- **Roadblocks to entry as well as re-entry**

To execute a thriving predatory pricing exercise, some sort of roadblock to be put at the stage of entry in the market is needed otherwise the potential competitors will instantly try to come

⁴ Sriraj, It's all Dominance that's crucial in Predatory Pricing, LEGAL SERVICE INDIA, <http://www.legalserviceindia.com/article/I267-Predatory-Pricing.html>.

⁵ ibid

⁶ Kumar Harshvardhan, An Analysis of the Law Relating to Predatory Pricing in India, MANUPATRA, <http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=3e7817b5-23f9-4313-9ac0-fd94a329de45&txtsearch=Subject:%20Competition%20/%20Antitrust>

back in the market once the dominant player will increase the prices of the products to recoup the losses and then drag the prices to the competitive level. The roadblock at entry subsists as the new player will have to incur few costs like the fixed cost investments which the dominant player currently holding the market will no longer bear.

- **Excess Capacity**

The dominant player in the market must be capable of attracting all the demand that is created by the artificial cutting down of prices, the predator must also be able to attract the customers of the competitors. If the predator fails to do this then the demand will outgo the output of the predator and resultantly the competitors will get a chance to re-enter and survive in the market.

- **Non-price Predation**

It includes product differentiation, product innovation; the object is to increase the costs of the competitors. If the cost of the rivals grows, the dominant player takes advantage of the situation and gains profit even if the competitor stays in the market.⁷



IMPACT ON CONSUMERS

A high-level committee was formed named ***Raghavan Committee*** to draft a report keeping in mind the issues concerning the abuse of dominance. Predatory pricing was one such issue and the question of its impact on consumers was dealt with.⁸ The Committee made certain findings that were similar to those held by the Apex Court of India in the case of ***“Haridas Exports v. All India Floating Glass Mfrs. Association and Ors”***.⁹ In this case, the court decided that if the product is sold at a price that is lower than its average cost, then that should not be always restricted. The finding was linked with a condition that the diminution in price should not hamper the competition persisting in the market. This aims at guaranteeing the interest of the

⁷ Tapasya Roy, Predatory Pricing as an Abuse of Dominant Position, ACADEMIA, available at https://www.academia.edu/6974733/PREDATORY_PRICING_AS_AN_ABUSE_OF_DOMINANT_POSITION

⁸ ‘Raghavan High Level Committee, Report on Competition Law and Policy, 2000’.

⁹ AIR 2002 SC 2728

consumers. In the report submitted by the committee, it was expressed that only when the diminution in the price is done to hamper the competition and rule out the other competitors then, in that case, it should be restricted. However, it should not restrict those firms that have a higher market share because of their higher efficiency and low prices. Therefore, care should be taken while differentiating between a deliberate attempt to injure the competition and diminution due to the higher level efficiency of the dominant market player. It is in the former situation that the interest of the consumer is hampered and they are adversely affected. When the predator, reduces the price of the product to hamper the competition and rule out competitors than as soon as the dominant enterprise finds it sufficiently secure, it will again elevate the prices to make up for the losses that it incurred throughout the period of reduction and to gain higher profits.¹⁰

ROLE OF COMPETITORS IN PREDATORY PRICING

When a single entity in the market rises almost instantaneously, it is mostly because of the abuse of dominant position and predatory pricing which follows. These two principles are seen to intertwine to form a bridge between legal and economic boundaries and overlap over the existing players in the market. Such activities are found to be illegal, however, it is just one of the many most frequently used ways in which that enterprise or group may abuse its position of dominance.

Predatory Pricing is mostly dependent upon the use/ misuse of dominant position. As per Section 4(2) of the Competition Act, 2002 dominant position has been described as:

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

- (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*

For an entity to attain a dominant position, it is important that the entity has control and has the influence to affect the relevant sector of the market to the tune of 50 percent or more, provided that the other rival players hold a much less share in the active market. Though the economic strength of the entity does play a vital role, however, conditions like the presence of other

¹⁰ Atyotma Gupta, Legal Position of Predatory Pricing: An Analysis in India, COMPETITIONLAWOBSERVER, published on August 11, 2016, available at <https://competitionlawobserver.wordpress.com/2016/08/11/legal-positionof-predatory-pricing-an-analysis-in-india/>.

players in the relevant section of the industry/ market plays an important role in ascertaining whether the entity is capable of exercising a dominant position.

LEGAL REMEDIES AGAINST PREDATORY PRICING

To ensure a healthy competition in the market amongst the players the Competition Act, 2002, has been introduced in replacement of the Monopolies and Restrictive Trade Practices Act, 1969, seeks to ensure the welfare of the consumers. Upon realizing the risk and challenges posed by predatory pricing, which mostly a clear abuse of the 'dominant position' in the market, which per-se is illegal; the dealings of predatory pricing in India, as expressed under the Competition Act, 2002, have been borrowed from the English Competition Act, 1998 and the Clayton Anti-Trust Act, 1914. The provision reads as below:

Section 4(2) (a) of the Competition Act, 2002 states that:

There shall be an abuse of dominant position under Sub-section (1), if an enterprise or a group,-

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

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

(ii) price in purchase or sale (including predatory price) of goods or service.

Explanation.— For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service 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 condition or price which may be adopted to meet the competition

As per explanation (b) at the end of Section 4 predatory pricing refers to a practice of driving rivals out of business by selling at a price below the cost of production.¹¹ Which read as follows:

“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.”

¹¹ Hovenkamp, H., Federal Antitrust Policy-The Law of Competition and its Practice 339 (3rd ed., 2005)

Denial of market access briefly referred to in this section, if read conjunctively, is expressly prohibited under Section 4 (2) (c) of the Competition Act, 2002.

The Section 4 of the Competition Act, 2002 corresponds to Clause 4 of the Notes in clauses of the Competition Bill, 2001 which reads as follows:

This clause prohibits abuse of dominant position by any enterprise. Such abuse of dominant position, inter alia, includes imposition, either directly or indirectly, or unfair or discriminatory purchase or selling prices or conditions, including predatory prices of goods or services, indulging in practices resulting in denial of market access, making the conclusion of contracts subject to acceptance by other parties or supplementary obligations and using dominant position in one market to enter into or protect other market.¹²

However, in 2007, Section 4 of the Competition Act, 2002 was amended by the Competition (Amendment) Act, 2007. The objects and reasons of such amendment were given in the Notes on clauses of the Competition (Amendment) Bill, 2007 which says that:

This clause seeks to amend Section 4 of the Competition Act, 2002 relating to abuse of dominant position. The existing provisions of Section 4 apply only to an enterprise and not to the group of enterprises. Clause (c) Sub-section (2) of Section 4 states that there shall be an abuse of dominant position if an enterprise indulges in practice or practices resulting in denial of market access.

CASE STUDIES

1. OLA CASE

A petition was filed against ANI Technologies Pvt. Ltd. by Fast Track Call Cab disputing the violation of several provisions of the Competition Act. The respondents run the OLA Cab service.

The CCI viewing the petition stated that it commands the Director-General under Section 26(1) to investigate the case and conclude it in 60 days from the date when the order is received. Throughout the investigation, the Director-General shall also inquire about the behavior of the

¹² H.K. Saharay, Textbook on Competition Law, (1st ed., 20

functionaries of ANI Technologies to fix the liability on them if they are observed contravening the provisions of the Act.

Taking note of the provisions of the Act relating to predatory pricing, the Commission remarked that the company is alleged to pay out more on inducements (other than the variable cost it incurs) and discounts to customers and their drivers in comparison to the revenue they are generating.

It was discovered that ANI Technologies spent about Rs. 574 per trip though they made Rs. 344 which led them to a loss of about Rs. 230 on each trip. The appropriateness of these estimates is a matter of inquiry; clearly, the Commission believes that they suggest predatory pricing targeted to throw the rivals out of the market. Fast Track, radio taxi service provider in Kerala, Tamil Nadu, Maharashtra, Andhra Pradesh, West Bengal, and Karnataka inferred that the opponents have received financial help from several agencies and averred that they are indulging into abusive activities like predatory pricing after being funded from several to set up its monopoly and throw out the rivals.¹³ Quoting the market share that is available on the Government of NCT of Delhi's website, it was observed by the watchdog that the share of the alleged company is very low and with such low market share, it is not possible to be in a dominant position.¹⁴ Finally, since there was no position of dominance, therefore the question of abuse does not come into the picture.¹⁵

2. JIO CASE

The Indian Telecom in the past 3 years has witnessed a turmoil, which was caused by a new entrant in the telecom market by the name of "Jio", a product of the conglomerate of Reliance Group of Industries. The services under the offer which was first launched as an "employee-only" offer (i.e. Unlimited Calling for life and Unlimited Data Benefit) were made open to the general public which resulted in the torrent and surge of the masses to avail the proposed

¹³ CCI directs DG to probe alleged restrictive practices of Ola Cabs, BUSINESS STANDARD, published on May 6, 2015, available at http://www.business-standard.com/article/companies/cci-directs-dg-to-probe-alleged-restrictivepractices-of-ola-cabs-115050601015_1.html.

¹⁴ CCI rejects 'predatory pricing' allegations against Ola, THE INDIAN EXPRESS, published on September 2, 2016, available at <http://indianexpress.com/article/india/india-news-india/cci-rejects-predatory-pricing-allegationsagainst-ola-3010352/>

¹⁵ CCI declines interim action vs Ola (Cyril AM) predatory pricing (despite stinging dissent), LEGALLYINDIA, published on September 4, 2015, available at <http://www.legallyindia.com/bar/cci-declines-interim-action-vsola-cyril-am-predatory-pricing-despite-stinging-dissent-read-order-20150904-6548>.

benefits. From what was already prognosticated not only did the move trigger profusion of clientele but also instilled the rivals with a sense of fierce competition. This further resulted in a multifold reduction in the prices of the services of all other leading service providers which then painted this insurgence of competition as an act of intentional sabotage. Though the allegations can't be discarded as foul cry, the consumer-centric market has welcomed the new entrant and the competition with open hands which further makes it difficult for others to form a basis of competition. Despite repeated denials by the Reliance Group of Industries about the "Predatory Pricing" & being a dominant player in the market, the conglomerate has surely affected the Indian telecom sector and the major players, left right and center.

LEGAL PRECEDENTS

The most valuable observation relating to predatory pricing and abuse of dominance was made by Lord Denning, M.R. in Registrar of Restrictive Trading Agreements v. W.H Smith & Son Ltd.,¹⁶ while construing the English Law in Restrictive Trade Practices Act, 1965 that there was a time when traders used to join hands, and combine, to keep the trade all for themselves, so that prices can be decided according to them, because of the monopoly. This also leads to the shutting down of all new entrants who might cut prices or even produce and sell better quality goods. Therefore, the Parliament had to step in, both for the benefit of the new entrants and the consumers and had to hold these trade practices void unless they were done in the interest of public interests. Therefore, the law made any such agreement void and also asked the traders to get all their trade practices registered. However, Lord Denning observes that the traders who combined did not tell the law about it, and it was done in dark; without the law or the consumers knowing about it. Neither putting such agreement in writing, nor words were required, "a wink or a nod was enough" for them to combine and turn the whole market into a monopoly and control everything in it. Therefore, the Parliament came up with another law to get rid of these practices, and so, it included not only agreements but also arrangements to keep the predatory pricing in control.

¹⁶ Registrar of Restrictive Trading Agreements v. W.H Smith & Son Ltd., (1969) 3 All ER 1065

CONCLUSION

Competition Law is having over with the obligation of shielding the consumers and also the competitors from the adverse impact of predatory pricing.¹⁷ The Indian law on competition and the regulators under the Act appear to have assumed the age-old saying of “living in the present” way too earnestly. A sense of necessity for a sapient law obtruding predatory pricing is felt to move into a truly fair and free market. The drafting committee has however done a satisfactory task by disallowing predatory pricing yet it went wrong in providing a much required comprehensive definition of predatory pricing.



¹⁷ Ashish Ahluwalia, Abuse of Dominance: Predatory Pricing, COMPETITION COMMISSION OF INDIA, available at

at

<http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=ED81A511464E75FE198F1BD2701F1342?doi=10.1.1.646.9414&rep=rep1&type=pdf>