A STUDY ON PREDATORY PRICING AS AN ABUSE OF DOMINANT POSITION- WITH SPECIAL REFERENCE TO ONLINE SHOPPING

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ABSTRACT

Competition law consists of laws that protect the competition process to improve consumer protection. Competition law has evolved at a tremendous pace in recent years in reaction to enormous changes in political thinking and economic activity worldwide. Competition law is concerned with applying legal rules and regulations to fix market imperfections and maintain, encourage and often restore fair market conditions. In other words, protecting competition is law. In a fair, healthy economic climate, competition has always been a consumer-centered business model that harnesses players potential. The most important is removing power concentration structure. It is equally important that companies have a level playing field to develop them as a respectable and trustworthy organisation as it is necessary for the consumer to get the value of money on the goods they want. Predatory pricing is a dynamic type of dominant exploitation that can lead to market monopoly. Under the Competition Act 2002, a company's supremacy must be proved before predatory pricing can be proven and without the presence of dominant position, predatory pricing is out of the question, thereby being a roadblock in many situations. Therefore the current provision under Section 4 of the Act must be amended and specified penetrative pricing phrase. In our daily lives, we come across numerous market practices embraced by companies that some critics might say amounts to predatory pricing. Online shopping festivals such as The Great Indian Sale" and "Big Billion Day" sell goods at massive discounts and have always been a centre of controversy where serious allegations of antitrust and FDI policy violations are made against top E-Commerce companies. Therefore, from a legal perspective, it is very hard to substantiate Predatory Pricing claims against e-commerce giants. As can be seen from the preliminary review of the evidence, the nature of the procedure does not create any major adverse impact on the applicable market competition. Through this paper we will be seeing into Predatory Pricing as an abuse of dominance, with special reference to online shopping.

INTRODUCTION

In our daily lives, we come across numerous market practices embraced by companies that some critics might say amounts to predatory pricing. Online shopping festivals such as The Great Indian Sale" and "Big Billion Day" sell goods at massive discounts and have always been a centre of controversy where serious allegations of antitrust and FDI policy violations are made against top E-Commerce companies. It is estimated that a 40-

page newspaper's production expense is in the price range of Rs 18-25, and most costs are cross-subsidized by advertising revenue. While this might look like a classic case of unfair pricing on its own, one may need to judge this activity on considerations such as: do newspaper companies intend to gain exploitable market power; will lead to pushing out rivals or improve consumer protection without adversely affecting market competition. CAIT has consistently alleged Flipkart and Amazon to pursue deceptive and unfair trade practices where their deep pockets cause them to incur losses and sell goods at unfair or predatory rates as a measure to wipe out market competition. Although customers know nothing wrong with big short-term discounts, the long-term effect of unfair pricing can be devastating as e-commerce companies can manipulate rates after wiping out competition and winning the market. While the Competition Commission of India ("CCI") is to determine the validity of claims of antitrust violations, we should look at what constitutes predatory pricing and whether a preliminary review of the facts makes it possible for these e-commerce giants to actually engage in unfair trading practices by deep discounts and predatory pricing as a measure to wipe out competition.

WHAT IS PREDATORY PRICING?

Predatory pricing is the practice of a dominant firm selling its goods at low rates to push rivals out of the market, discourage new entry, and monopolise the market effectively. Predation is a competitive activity whereby an undertaking intentionally causes losses to remove a rival to be able to charge unfair rates in the future. Predatory prices as specified in the Act mean 'the selling of products or the provision of services at a price below the cost as calculated by legislation, the production of goods or the provision of services in order to minimise competition or exclude competitors. As it stands, it is for the commission to issue regulations defining what costs would be considered for this reason. According to the definition, any business that sells its goods or provides its services to customers on the market below its cost in order to minimise or eliminate competition on the market will be said to engage in the practice of predatory pricing During the review, the commission would analyse the subject market and the company's role in that market i.e. whether it holds a dominant position or not. After that the commission will investigate the cost factor, whether the prices of the goods or the services offered by the firm are below their cost, and once below cost pricing has been identified, proof must be shown in order to limit or remove competition.

Predatory pricing is a tactic whereby a Goliath in a rock-bottom-level market with deep pockets prices its products or services, so no competitors can compete with it. Once everyone else suffers enormous losses and is put out of service, the Goliath makes hay by eliminating freebies and fleeing customers. In India, the 2002 Competition Act sets the ground rules for predatory pricing. 'Predatory pricing' statistics on a market player's misuse of dominant position. It specifically prevents any enterprise or association from 'abusing its dominant market position,' either by enforcing unfair conditions or an unfair and discriminatory price, including predatory price, resulting in denial of market access. Predatory price is clearly defined as selling or products or services at a price below production cost to minimise or remove competition. Predatory Pricing is illegal under the Act because of its adverse effect on the market competition. Predatory Pricing practice creates barriers for potential entrants willing to enter the market and often impacts customers in the long run as prices increase due to lack of competition. Predatory Pricing was however, consistently called an ineffective means of winning the market while being illegal. Nevertheless, there have been cases where the strategy has helped dominant players make good profit by leveraging higher prices after market capture.

Predatory pricing is also considered possible only when businesses operate multi-market because if the company operates only in one market, it is more rational for the company to absorb or satisfy the new entrant (by acquisition or takeover) than to incur significant losses by undercutting. Losses the predator has suffered today, and could be high, but tomorrow's gains above the competitive level will be if and when the predation technique works. However, if a business is multimarket, it may be able to cover losses on one market from gains on another. Moreover, a business that develops a reputation for violent reaction to competition in one market can discourage entrants into another, so predation in one market can protect many others.

WHAT DOES NOT CONSTITUTE PREDATORY PRICING?

Don't confuse predatory pricing with normal competitive price wars. For example, a company that lowers costs below its competitors could offer lower-price products. Achieving cost leadership, players like Walmart, Southwest Airlines, and D-Mart can consistently sell at low prices. Such prices, if matched by competitors, could cause them to lose and leave the market—but cannot be considered predatory. Similarly, smaller or new players offering temporary, deep discounts would not be considered predatory as they may not drive bigger firms out of the market. It is often said that predation can only be a rational strategy for a very dominant company, in the sense that it has very high market share. But 'easy market power isn't enough. Predatory sales must account for a significant fraction of retail sales. If not, loss-making rates draw market-wide losses, making the plan unworkably costly. Moreover, removing one of several rivals leads to inadequate gains. Both incumbents would benefit from that turn of events and from each of them's previous investment in loss-making rates. In short, there's great debate about predatory pricing. Mainstream wisdom can be summarised as saying it can happen, but only under certain circumstances.

DOES DEEP DISCOUNTS ON ONLINE SALES CONSTITUTE PREDATORY PRICING?

Leading online retailers are not dominant players in the overall retail sector, but they have the financial muscle to sustain losses that others might not. In a number of cases, e-tailers reportedly offered prices below variable costs, but this is now becoming more difficult with the rules governing the marketplaces. E-commerce has not led to the departure of traditional retailers. Finally, there are no major barriers to entry in the retail sector, with the proliferation and frequent entry of niche or regional players. E-commerce giants were directed to reveal the names of the top five sellers on their respective websites, an elaborate list of seller's goods prices suggested as site's favourite sellers, and the kind of help offered to sellers. They were also asked to fill in individual questionnaires to reveal and disclose their capital structure, elaborate note of business process and model, and inventory management system. The crux of the claims made by e-commerce giants in response to the allegations was that they had little or no influence on the pricing mechanism as the sellers had live dashboards that enabled them to see prices being offered by fellow sellers for specific products, and the sellers themselves decided on the discount they were willing to give and modify the prices offered for the products accordingly. They further stated that, despite the low profit margin on each sale, sellers unlock the possibility of good profits in the short term as the collective or combined profit during the sale season is substantially high compared to normal days due to high sales. Another defence the giants took up was that the losses they incurred are not due to predatory discounting, but to investments in building business and technology.

In M/s. order Transparent Pvt Energy Systems. Ltd. v. TECPRO Systems Ltd., CCI argued that three requirements must be met to determine whether a dominant firm's activity constitutes predatory pricing-

- The price offered for the goods or service should be lower than the average product output or service acquisition cost.
- Such manipulation of the product's price was achieved with the goal of wiping out business rivals.
- There is a substantial strategy for restoring or recovering the losses suffered by lowering prices by jacking prices high again after removing rivals from the market.

It's not the first time online retailers have made such claims. In the past, CCI reviewed similar cases and dismissed them due to numerous flaws in the substance of alleged practice to have any major adverse impact on the relevant market competition. Since Predatory Pricing is a type of abuse of dominant position pursuant to Section 4 of the Act, it is a prerequisite to determine that the alleged party is a dominant market player determined by market share in the relevant market. And CCI has held that online marketplaces cannot be considered dominant players based on their present market share. Even if they were to be considered a dominant market player, Predatory Pricing's basics are hard to satisfy as discounts on online market places during such sales do not generally constitute Predatory Pricing. The grieved party must determine that online retailers funded such discounts, not the vendors/sellers themselves. They must also establish that the final price offered was lower than the average variable cost of such goods. Arguendo, two components are created. The party is also expected to determine that a strategy exists for restoring or recovering the losses sustained by jacking the prices high again after removing the competitors from the market.

ROLE OF MARKET CONDITIONS

The clear indication is that low-cost pricing has clearly benefited customers for decades, has not resulted in pushing efficient competitors out of the market and in reality, the newspaper industry has faced and continues to face substantial competition from players active in decimating news/articles/information via online platforms. This plays a key role in deciding whether price predation is a viable strategy for a business to employ. Evidence has already begun to imply that many e-commerce firms either shut down/reduce operations or drastically reduce their capital burn in an effort to remain afloat. This probably indicates that markets will correct themselves in the medium to long term. India's government should consider setting up a high-level committee to fully address concerns in this sector particularly those of small and medium-sized enterprises.

CONCLUSION

Therefore, from a legal perspective, it is very hard to substantiate Predatory Pricing claims against e-commerce giants. As can be seen from the preliminary review of the evidence, the nature of the procedure does not create any major adverse impact on the applicable market competition. And even with more in-depth research, finding e-commerce retailers as dominant industry players with their present market share as e-commerce is not considered a distinctly significant market. However, CCI launched an investigation against Flipkart and Amazon due to claims of vertical agreements like preferential listing, exclusive tie-ups, private labels and preferential sellers. Such claims based on current activities on these sites are likely to be prosecuted as a breach of Section 3(4) and Section 4(2) of the Act. Competition law is burdened with the task of protecting customers as well as rival rivals from the ill effects of unfair pricing, while at the same time ensuring that certain firms dominating a given market are not dissuaded from competitively lowering prices due to the strict law applicable in these cases. This contributes to the need for an all-encompassing test to identify instances of price predation. It is now amply clear that key metrics used in such assessments are vulnerable to error, often due to proof issues. For example, in some situations, it is important to quantify costs incurred by a business (operating in many markets) in just one market, this task is difficult due to the inability to classify the costs incurred in which market.

SUGGESTIONS

Antitrust courts should use economic facts to detect predatory pricing. Economic data will now demonstrate the logic of predatory pricing as the likelihood of recovery, an important element in assessing the rationality of a firm's predatory strategy. Anti-trust regulators will need to ensure the market structure facilitates predatory pricing prospects. This includes nuanced market analysis where anticompetitive effects have occurred or are likely. This involves determining the predatory firm's supremacy, entry barriers, and competitors' market strength. However, anti-trust regulators should make a distinction between intention to exclude competitors on the basis of results as is the case under normal competition and removing competitors through anti-competitive practises such as predatory pricing. The courts should also accept overt and indirect evidence to support predation. Direct evidence includes business records such as a clear strategy indicating the use of predatory pricing to exclude a competitor, discourage entry or evidence of specific threats. Indirect evidence includes the size, length and continuation of low prices, recovery possibilities, etc.

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