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PREDATORY PRICING ISSUES AND CHALLENGES IN BUSINESS SECTOR: A COMPETITION LAW ANALYSIS

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INTRODUCTION TO PREDATORY PRICING

BACKGROUND

'Predatory pricing is taken to be a manifestation or sign of market dominance. But too often it is a precursor.'

According to the principles of economics, the demand for a commodity in a well-functioning market is determined by the price that consumers are willing to pay. This price reflects their perception of the commodity's value. In such a market, the supply of the commodity is determined by the amount of money spent on producing it. All market participants utilize the same manufacturing technique, and even if there are little variations, none of them possess enough strength to impact economies of scale or bring about a substantial alteration in the established fixed price. The Competition Act of 2002 considers situations where the supply of a commodity is mostly limited to a single market participant who, due to their dominant position, has become very powerful. This is because they have achieved low production costs, significant economies of scale, and advanced research and development capabilities that surpass many others.

Predatory pricing may initially benefit consumers, but in the long term, they will bear the negative consequences. Nevertheless, authorities exercise caution over such techniques, as there is a high likelihood that the dominant player will eliminate competitors. Once the competition is undermined, prices will inevitably rise, leaving consumers with no choice but to accept the higher prices. This study aims to analyze the Indian competition legislation pertaining to predatory pricing and examine it in the context of abuse of dominance. This paper will analyze current charges of unfair competition against OLA and provide recommendations on how to address them.

THE CONCEPT

Although predatory pricing is not a new notion, it was commonly utilized by incumbents to eliminate new competitors. Predatory pricing is a short-term strategy where the price of a product is deliberately set below the manufacturing cost in order to hinder competition and generate greater profits in the future. It is a strategy employed to enhance market dominance. In this particular market configuration, the price required to surpass and outperform competitors varies due to the objective of impeding competition. This strategy seeks to either eliminate a competitor in the market or impede the entry of a new player. Predatory pricing is a strategy that focuses on gaining control over the market and exerting influence on its conditions. It occurs when a market leader sells its product below the usual price in order to

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eliminate competitors and get more advantages from lower competition. While the predator may eventually regain its losses, it will first have to make a sacrifice of its gains, as the likelihood of recouping them is uncertain. This plan requires a significant level of risk and is feasible only for the most influential market participants. This arrangement is sometimes perceived as a form of 'abuse of dominance' due to this particular reason.
The predator possesses the ability to determine the cost without considering its set price, thereby incorrectly allocating the efficiency. There are other cases where the dominant market actors use their dominant position and create obstacles for the new competitors or attempt to drive them out of the market. The act of driving competitors out of the market through aggressive price strategies is referred to as predatory pricing.

IMPACT ON CONSUMERS

An expert committee called the Raghavan Committee was established to prepare a report addressing concerns related to the abuse of dominance. One of the issues that was addressed was predatory pricing and its potential impact on consumers. The Committee reached conclusions that mirrored those of the Apex Court of India in the case of 'Haridas Exports v. All India Floating Glass Mfrs. Association and Ors.'
In the case mentioned above, the court ruled that selling a product at a price lower than its average cost abroad may not always be prohibited. The discovery was associated with a requirement that any decrease in price should not hinder the ongoing competition in the market. This ensures the protection of consumer interests.
The committee's report emphasized the need to restrict price reductions that are intended to hinder competition and eliminate other competitors. However, it should not limit the potential of firms with a larger market share due to their superior efficiency and competitive pricing. It is important to exercise caution when distinguishing between intentional efforts to harm competitors and the natural decline caused by the superior efficiency of the dominant market player.
In such circumstances, the consumer's interests are hindered and they suffer negative consequences. After the predator lowers the price of the product to hinder competition and eliminate rivals, the dominant enterprise will eventually raise prices once it feels confident enough. This is done to recover the losses incurred during the price reduction period and to maximize profits.

LEGAL POSITION UNDER INDIAN COMPETITION LAW

INTRODUCTION

The anti-trust laws in majority of the jurisdictions deals with ‘predatory pricing’ at par with an anti-competitive practice and also impose punishment against it. The India Competition Act of 2002 specifies predatory pricing as *‘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.’* The way that this definition has been defined is similar in majority of the territories and reflects the one given in the Act of 2002, i.e., *‘sale of goods or provision of services at a price below the average variable cost, with a view to reduce competition or eliminate competitors.’*

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Predatory pricing is interpreted under competition law as a deliberate scheme which is practiced by a dominant market player in order to chase away competitors from the market by positioning their prices very low or trading the commodity at a value lower than the cost of producing it and hamper the competition and rule out the competitors.[1]

Basically, the definition that has been portrayed under the competition law specifies three conditions to be satisfied before any punishment can be provided for:

- Firstly, the enterprise that is engaging in such an anti-competitive practice should have a dominant position;
- Secondly, the value at which the product is traded or the services rendered should be lower than the standard cost of that commodity;
- Lastly, the alleged enterprise should have indulged in this practice in order to injure the competition or to rule out the competitors.

FACTORS ESTABLISHING PREDATORY PRICING

a. Dominance:

As we have seen in the last chapter that the predator has to sustain losses for the time 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 has dominance in 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.

b. 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 back in the market once the dominant player will increase the prices of the products in order 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. The new entrant runs the risk of dumping or under-pricing by the dominant player with dropped costs. The dominant player himself functions as barrier to entry and this authorizes him to raise the prices adversely affecting the consumers. On the other hand, roadblock to re-entry comes into place when a player that went out of the market seeks to come back then it has to incur certain substantial expenses to restart its business. If the barriers at re-entry are not there then the player who had to leave the market at the time when the prices were low will enter again at the time when the prices will be increased to monopoly level.

c. Excess Capacity:

The dominant player in the market must be capable of attracting all the demand that is created by the

[1]Glossary of statistical terms, OECD, available at http://stats.oecd.org/glossary/detail.asp?ID=3280, (last visited on January 27, 2024 at 6:20 PM).

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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.

d. Non-price Predation:

It includes product differentiation, product innovation; basically 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.[2]

REPRESENTATION BY CCI AND COMPETITION APPELLATE TRIBUNAL

Competition Act of 2002 empowers the Competition Commission of India (CCI) and Competition Appellate Tribunal (COMPAT) to restrict the practices that are anti-competitive. The primary issue that is to be dealt by the CCI is that if a commodity is sold at a price below the average cost is illegitimate intrinsically under the Indian competition law regime. Another significant question that is to be looked into is that if the zero pricing of any commodity is unjust then should it be disallowed.

The COMPAT recently in the case of '*MCX Stock Exchange Ltd. v. National Stock Exchange &Ors.*'[3]held that fee waivers provided by the National Stock Exchange in the currency derivatives segment is unjust. It held that the stock exchange was misusing its dominance and MCX needs to be protected against it.

Further, in '*Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,*'[4]the Apex Court of America held that the price which is lower than the standard cost can be termed as predatory if in case the dominant player indulging in this practice has an opportunity to recover the losses made by it in the reduction period to rule out the competitors.

The test of recoupment is followed by CCI and COMPAT along with the intention that is required in order to adjudicate to matters of predatory pricing. In another instance of '*H.L.S. Asia Limited, New Delhi v. Schlumberger Asia Services Ltd. Gurgaon and Oil & Natural Gas Corp. Limited, New Delhi,*'[5]CCI observed that before claiming relief under predatory pricing, it is required to determine the average variable cost. It was further observed that the cost so determined should necessarily be more than the price of the commodity.

Further, in '*M/s. Transparent Energy Systems Pvt. Ltd. v. TECPRO Systems Ltd.*'[6], it was held by the commission that in order to adjudicate upon the dominant position of any firm to indulge in predatory pricing, three conditions needs to be satisfied:

- The selling price of the goods or the services rendered by the dominant player is lower than their cost of production.
- This reduction in the price of the commodities was practiced by the dominant player in order to rule the rivals out of the market.

[2]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, (last visited January 28, 2024 at 9:29 AM).
[3]Case No. 13 of 2009 (COMPAT, 5/12/2014).
[4]509 US 209 (1993).
[5]Case No. 80/2012, 2013.
[6]Case No. 09 of 2013, (2013).

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- There is a future arrangement so as to recover the losses incurred throughout the period of reduction once the rivals are driven out from the market.

Such observations have been made by CCI time and again in various cases; one such case recently is that of Cab service provider OLA, which would be dealt in the next chapter.

PREDATORY PRICING PRACTICES IN INDIA

The Indian law on regulating the competition only disallows "predatory pricing" by those firms that are dominant players in the relevant market. This means that if the firm is not dominant then practically predatory pricing is not applicable. To find out whether a company is a dominant player necessitates a combination of various factors like economic analysis, consumer preferences, business realities, law and many more.[7]

DETERMINATION OF COST

Dealing the commodities at a price lower than the cost is the preliminary element which is to be taken into thought while identifying predatory conductof an enterprise. It is however highly difficult to distinguish between predatory pricing and price which is pro-competitive. In order to determine predatory pricing, several types of cost have been laid down by Competition Commission of India (Determination of Cost of Production) Regulations 2009:

"Average Variable Cost means total variable cost divided by total output during the referred period."[8]

"Total Cost means the actual cost of production including items, such as cost of material consumed, direct wages and salaries, direct expenses, work overheads, quality control cost, research and development cost, packaging cost, finance and administrative overheads attributable to the product during the referred period."[9]

"Total Variable Cost means the total cost minus the fixed cost and share of fixed overheads, if any, during the referred period."[10]

"Total Avoidable Cost means the cost that could have been avoided if the enterprise had not produced the quantity of extra output during the referred period."[11]

"Average Avoidable Cost is the total avoidable cost divided by the total output considered for estimating 'total avoidable cost'."[12]

"Long Run Average Incremental Cost is the increment to long run average cost on account of an additional unit of product, where long run cost includes both capital and operating costs."[13]

"Market Value[14] means the consideration which the customer pays or agrees to pay for a product which is sold or provided or can be sold or provided, as the case may be."[15]

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[7]Paku Khan and ManasChaudhuri, *''Predatory pricing' and the law',* THE HINDU BUSINESS LINE, published on October 28, 2014, available at http://www.thehindubusinessline.com/opinion/predatory-pricing-and-the-law/article6541819.ece.
[8]Regulation 2(b).
[9]Regulation 2(c)(i).
[10]Regulation 2(c)(ii).
[11]Regulation 2(c)(iii).
[12]Regulation 2(c)(iv).
[13]Regulation 2(c)(v).
[14]Regulation 2(c)(vi).
[15]AditiShroff, *Predatory Pricing,* LEXSCRIPTA, Vol-XXV-2013-2nd | July 2013, available at http://www.kotak.com/bank/legal-newsletter/july_2013/Selected.pdf, (last visited on January 31, 2024 at 7:04 PM).

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CASE STUDY- OLA CASE[16]

A petition against ANI Technologies Pvt. Ltd. was registered 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 into 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 the behaviour of the functionaries of ANI Technologies so as 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 is of the opinion that they suggest predatory pricing targeted to throw out 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 in order to set up its monopoly and throw out the rivals.[17]

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.[18]

Finally, since there was no position of dominance, therefore the question of abuse does not come into picture.[19]

SUGGESTIONS AND CONCLUSIONS

SUGGESTIONS

- Competition courts should apply economic proves to identify predatory pricing. Also these evidences also show the reasonableness of predatory pricing like would there be any chances of recovery which is an important factor in identifying the reasonableness of predatory scheme of the firm.
- Competition authorities are required to ensure whether the market structure endures predatory pricing. In order to determine this, a composite analysis of the market is required where the effects of these anti-competition activities have happened or are likely to happen. It comprises

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[16]M/s. Fast Track Call Cab Private Ltd. v. ANI Technologies Pvt. Ltd.Case No. 6 of 2015, Order dated September 03, 2015.

[17]*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-restrictive-practices-of-ola-cabs-115050601015_1.html.

[18] *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-allegations-against-ola-3010352/.

[19]*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-vs-ola-cyril-am-predatory-pricing-despite-stinging-dissent-read-order-20150904-6548.

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the dominant position of the enterprise, the roadblocks to entering the market and the ability of the rivals.

Hence, the lawmakers should be clear in their viewpoint and make provisions in law concerning predatory pricing more comprehensive. It will function as a stimulant for the fresh entrants and the small market player and will also assist in encouraging competition and maximum welfare.

CONCLUSION

Competition Law is having over with the obligation of shielding the consumers and also the competitors from the adverse impact of predatory pricing.[20] The decision given by CCI in the above cases has proclaimed firm competition between the market participants. The question that now concerns us is that for how much time will this competition sustain in such a premise?

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 in order to move into a truly fair and free market.[21]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.

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[20]AshishAhluwalia, *Abuse of Dominance: Predatory Pricing,* COMPETITION COMMISSION OF INDIA, available at http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=ED81A511464E75FE198F1BD2701F1342?doi=10.1.1.646.9414&rep=rep1&type=pdf, (last visited on January 31, 2024 at 8:28 PM).

[21]Prabhat Singh, *The price of unfair competition,* THREAD, published on September 6, 2016, available at http://www.thehindu.com/thread/economy/article9075873.ece.