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PREDATORY PRICING IN INDIA

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CHAPTER 1

INTRODUCTION TO PREDATORY PRICING

1.1 Background
1.2 The Concept
1.3 Impact on Consumers

1.1 BACKGROUND

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

As per the nature of the law of economics, the demand for any commodity, expressed by the cost that the consumers are inclined to give and they believe that it is right, in a perfectly healthy market, is equivalent to the supply of the commodity which is expressed by the sum of money expended on manufacturing that commodity actually. Every market participant has the same mechanism for production and in case they somewhat vary; none of them are adequately strong to influence the economies of scaleand make a significant change in the pre-existing fixed price.

However, the Competition Act of 2002 takes account of those instances where the supply of any commodity is by and large, restricted to an individual market participant, who by exploiting his dominant position has developed so strong by reason of his low cost of production, because of his huge economies of scale and improved research and development facilities which is superior to many.[1]

Predatory Pricing might seem to profit the consumers in the short term, but in the long run they are the ones to suffer. However, the regulators are careful of such strategies as the chances are that the dominant player will rule out the competition. Once the competition is ruined, the prices will start moving upwards and the consumers will be left with no other alternative then to go with the high prices.[2] The aim of this project is therefore to analyse the Indian competition law relating to predatory pricing and see it in the light of abuse of dominance. Further this project will also discuss the recent instances of allegations of unfair competition made against OLA and will give certain suggestions in this regard.

1.2 THE CONCEPT

Whilst it is wrong to say that predatory pricing is a novel concept, it used to be ordinarily practiced by the officeholders to exclude new competition. Predatory pricing is a temporary arrangement in which the price of the commodity is held back lower the production cost so as 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 aims at either eliminating a market contender or restrict the entry of a new participant.[3]

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 so as 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

[1] Kumar Harshvardhan, *An Analysis of the Law Relating to Predatory Pricing in India,* MANUPATRA, available at http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=3e7817b5-23f9-4313-9ac0-fd94a329de45&txtsearch=Subject:%20Competition%20/%20Antitrust, (last visited January 27, 2017 at 6:21 AM).

[2] AnanthPadmanabhan, *Regulations on Predatory Pricing Must Benefit End Users but not Check Innovation,* CARNEGIE INDIA, published on January 16, 2017, available at http://carnegieindia.org/2017/01/16/regulations-on-predatory-pricing-must-benefit-end-users-but-not-check-innovation-pub-67706.

[3] Sriraj, *It's all Dominance that's crucial in Predatory Pricing,* LEGAL SERVICE INDIA, available at http://www.legalserviceindia.com/article/l267-Predatory-Pricing.html, (last visited on January 27, 2017 at 7:31 AM).

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'.[4]

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 the young participants or otherwise make an attempt to chase them away from the market. This practise of forcing out other participants from the market is termed as *predatory pricing*.[5]

1.3IMPACT 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 of such issue and the question of its impact on consumers was dealt with.[6] The Committee made certain findings that were similar to that held by the Apex Court of India in the case of '*Haridas Exports v. All India Floating Glass Mfrs. Association and Ors.'*[7]

In the case mentioned above, the court decided that if the product is sold at a price which is lower than its average cost abroad 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 consumers.

In the report submitted by the committee, it was expressed that only when the diminution in the price is done in order 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 higher market share by reason of their higher efficiency and low prices. Therefore, care should be taken while differentiating between 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, as has been explained in the previous part of the chapter, reduces the price of the product in order to hamper the competition and rule out competitors then as soon as the dominant enterprise finds it sufficiently secure, it will again

[4] *Ibid*.
[5] *Supra* note 1.
[6] 'Raghavan High Level Committee, Report on Competition Law and Policy, 2000'.
[7] AIR 2002 SC 2728.

elevate the prices so as to make up for the losses that it incurredthroughout the period of reduction and to gain higher profits.[8]

In the next chapter, we will see the legal regime of predatory pricing under the Competition Act and the factors determining predatory pricing.

CHAPTER 2

LEGAL POSITION UNDER INDIAN COMPETITION LAW

2.1 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.'*

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. Once the dominant

[8] 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-position-of-predatory-pricing-an-analysis-in-india/.

player is successful in driving out the existing competitors off the market and restrict the entry of new entrants, it can increase its cost and gain more profits.[9]

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 renderedshould 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.

2.2 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 thrivingpredatory pricing exercise, some sort ofroadblock 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

[9]Glossary of statistical terms, OECD, available at http://stats.oecd.org/glossary/detail.asp?ID=3280, (last visited on January 27, 2017 at 6:20 PM).

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 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.[10]

2.3 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.

[10] 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, 2017 at 9:29 AM).

The COMPAT recently in the case of '*MCX Stock Exchange Ltd. v. National Stock Exchange &Ors.*'[11]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.,*'[12]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,*'[13]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.*'[14], 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.
- 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.

CHAPTER 3

PREDATORY PRICING PRACTICES IN INDIA

[11]Case No. 13 of 2009 (COMPAT, 5/12/2014).
[12]509 US 209 (1993).
[13]Case No. 80/2012, 2013.
[14]Case No. 09 of 2013, (2013).

3.1 Determination of Cost

3.2 Case Study- OLA case

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.[15]

In the recent past, there were few allegations of predatory pricing against OLA by the other market competitors. The details will be dealt further in this chapter.

3.1DETERMINATION 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."[16]

"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."[17]

"Total Variable Cost means the total cost minus the fixed cost and share of fixed overheads, if any, during the referred period."[18]

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[15] 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.

[16] Regulation 2(b).

[17] Regulation 2(c)(i).

[18] Regulation 2(c)(ii).

"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."[19]

"Average Avoidable Cost is the total avoidable cost divided by the total output considered for estimating 'total avoidable cost'."[20]

"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."[21]

"Market Value[22] 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."[23]

3.2CASE STUDY- OLA CASE[24]

A petition against ANI Technologies Pvt. Ltd. was registered by Fast Track Call Cabdisputing 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

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[19]Regulation 2(c)(iii).
[20]Regulation 2(c)(iv).
[21]Regulation 2(c)(v).
[22]Regulation 2(c)(vi).
[23]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, 2017 at 7:04 PM).
[24]M/s. Fast Track Call Cab Private Ltd. v. ANI Technologies Pvt. Ltd.Case No. 6 of 2015, Order dated September 03, 2015.

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.[25]

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.[26]

Finally, since there was no position of dominance, therefore the question of abuse does not come into picture.[27]

CHAPTER 4

SUGGESTIONS AND CONCLUSIONS

4.1 Conclusion

4.2 Suggestions

4.1 CONCLUSION

Competition Law is having over with the obligation of shielding the consumers and also the competitors from the adverse impact of predatory pricing.[28] The decision given by CCI in the above cases has proclaimed firm competition between the market participants. The question

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[25] *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.

[26] *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/.

[27] *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.

[28] 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, 2017 at 8:28 PM).

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. The literature is flooded with prospects of smaller participants engaging in anti-competitive activities in order to unfairly attract the markets. A sense of necessity for a sapient law obtruding predatory pricing is felt in order to move into a truly fair and free market.[29]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. It hasn't been defined anywhere in the law that the price below this would amount to predatory pricing.

4.2 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 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.

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