

## PREDATORY PRICING IN INDIA

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### **Introduction**

The term predatory pricing has perplexed and intrigued the anti-trust community for many years as it on the one hand can be an instrument of abuse, but on the other hand, price reductions benefits the consumers. Predatory pricing is a risky and unreliable pricing strategy where a product or service is set at a very low price, intending to drive competitors out of the market, or create barriers to entry for potential new competitors. Theoretically, by resorting to predatory pricing, the predatory merchant aims to eliminate the competitors or potential competitors out of the business as the latter cannot sustain equal or lower prices without losing money and thereby reducing the number of competitors or even creating a de facto monopoly. At present most of the jurisdiction consider predatory pricing as anti-competitive and illegal under the anti-trust laws. But proving predatory pricing is difficult and in many cases competitors would be driven out of market before the case is heard.

Predatory pricing and abuse of dominant position are two terms in competition law which are bound together by a complex web of legal rules and sometimes overlapped because an enterprise or a group may, illegally, abuse its dominant position and use predatory pricing as just one of the many ways in which that enterprise or group may abuse its dominant position to force other players out of the race. This is reason why most of the anti-trust legislations in the world lists predatory pricing as abuse of dominant position. The area with respect to predatory pricing is still a grey area. Predatory pricing can be generally defined as a practice of driving rivals out of business by selling at a price which is lesser than the cost of production.<sup>2</sup> This can be seen as a step to attract consumers. Predatory pricing is categorized as an abuse of dominance under S. 4 of the Competition Act 2002. The commercial strategy behind predatory pricing is that the dominant firm reduces the price of its product to a level which forces the rivals too to reduce their price and finally evicts the rivals from the competition. When the rivals are evicted from the competition scenario, the dominant firm can then increase its price.<sup>3</sup> Even though there is possibility that the consumers would be

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<sup>2</sup> HOVENKAMP, H., FEDERAL ANTITRUST POLICY-THE LAW OF COMPETITION AND ITS PRACTICE 339 (3rd ed., 2005).

<sup>3</sup> FAULL, J., & NIKPAY, A., THE EC LAW OF COMPETITION 373 (2nd ed. 2007).

negatively affected by this, there are certain difficulties in penalizing predatory pricing as it is not always possible to differentiate between unfair and fair predatory pricing.<sup>4</sup>

It was held in the very famous case of *In Re: Johnson & Johnson Ltd*<sup>5</sup>, it was held that predatory pricing is aimed at eliminating rivals from the market. In *DotEx International Ltd. and Omnesys Technologies Pvt. Ltd*<sup>6</sup> predatory pricing was defined by CCI as a conduct in 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 adversely affects competition. In India, the law relating to predatory pricing had been attributed to vagueness and lack of precision till the Competition Act, 2002 was adopted as a replacement of the Monopolies and Restrictive Trade Practices Act, 1969, to ensure the welfare of the consumers by maintaining healthy competition in any relevant market. According to section 4 the Act, predatory pricing 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.<sup>7</sup>

### **Predatory Pricing- Concept**

Predatory Pricing is a commercial strategy by which a dominant firm first lowers its price to a level which will ultimately force its rivals out of the market. When the latter have been successfully expelled, the company can raise the prices again and reap the rewards.<sup>8</sup> It is an exclusionary practice which means a practice which deters the potential rivals from entering the monopolist market or existing rivals from increasing their output in response to the monopolist's price increase.<sup>9</sup> It is a short term strategy through sharp discounting which will result in reduced profits and the competitors who are not financially stable will suffer greater loss of revenue and ultimately will be forced out of the market. The predator can then raise the prices above competitive levels and generate profits which will offset the losses it incurred during predatory pricing period. The firm engaging in predatory pricing should have enough financial strength and capacity to endure the losses incurred during the initial phase and to absorb rival's market. There should be entry barriers in the market else the competitors driven out will be replaced by new firms.

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<sup>4</sup> MONTI, G., EC COMPETITION LAW 178 (Cambridge University Press, 2007).

<sup>5</sup> (1988) 64 Comp Cas 394.

<sup>6</sup> 2011 CompLR 129 (CCI).

<sup>7</sup> Explanation (b) of section 4 (2) of The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India)

<sup>8</sup> FAULL, J., & NIKPAY, A., THE EC LAW OF COMPETITION, 373 (2nd ed, 2007).

<sup>9</sup> United States vs. United Shoe Machinery Corp. 110 F.Supp. 295 (D. Mass. 1953).

In United States, predatory pricing is dealt under the Sherman Act, 1890 and Federal Trade Commission Act, 1914 and Clayton Act, 1915. These legislations are generally worded and does not attempt to give the definition of or requirements for, “predatory pricing” in its text. According to Section 2 of the Sherman Act it is illegal for a person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations. Under Federal Trade Commission Act, Section 5(a) prohibits unfair or deceptive acts or practices in or affecting commerce. Thus violation of Section 2 of the Sherman Act also violates Section 5 of the FTC Act, which prohibits unfair methods of competition. The Clayton Act prohibits predatory pricing and price discrimination. Section 2 of the Clayton Act prohibits both predatory pricing and discrimination. As per the provisions of the Act, it is unlawful for any dominant market player to discriminate in price between different purchasers of commodities of like grade and quality, and also says that pricing below the cost is not permissible. In addition to the above legislations, the US Supreme Court has pronounced many judgements in which the legal position of predatory pricing is clearly explained. The US Supreme Court has set high standards for claims related to predatory pricing and requires the plaintiffs to show that the pricing practices adopted by the predator will affect the competition in the market and the price is below the seller’s cost.<sup>10</sup> In European Union, predatory pricing is dealt under Article 102 of the Treaty on the Functioning of the European Union, which stated that pricing below cost is prohibited where the seller has a dominant market position and the pricing will have an anti-competitive effect.<sup>11</sup> In India, predatory pricing is classified under Section 4 as an abuse of dominance. According to Explanation (b) at the end of Section (4), ‘predatory price’ means the sale of goods or provision of services at a price below cost with the subject to reduce competition or eliminate competitors. 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.<sup>12</sup> The Competition Commission of India in *In Re: Johnson And Johnson Ltd.*<sup>13</sup> said that “the essence of predatory pricing is pricing below one’s cost with a view to eliminating a rival.

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<sup>10</sup> Brooke Group Ltd v. Brown and Williamson Tobacco Corporation, 509 US 209 (1993).

<sup>11</sup> Slaughter and May, *An overview of the EU competition rules*, (Nov. 21, 09:40 AM), <https://www.slaughterandmay.com/media/64569/an-overview-of-the-eu-competition-rules.pdf>.

<sup>12</sup> Hovenkamp, *supra* note 2

<sup>13</sup> (1988) 64 Comp Cas 394 NULL.

### Essentials of Predatory Pricing

The problem every jurisdiction around the world come across is to distinguish between fair, aggressive and predatory pricing as there is no specific test for predatory pricing. Analysing judgements passed by US Supreme Court and ECJ, it can be said that in order to establish predatory pricing, an applicant has to prove that the firm engaged in predatory pricing has driven out the competitors or has intent to do so and, recoupment is possible after eliminating competition. As stated earlier, a firm engaging in predatory pricing should have deep financial reserves and there should be entry barriers in the relevant market.

In *Brooke Group Ltd v. Brown and Williamson Tobacco Corp.*<sup>14</sup>, the US Supreme Court has held that a claimant seeking to establish competitive injury resulting from a rival's low prices has to prove that the prices complained of are below an appropriate measure of its rival's costs. It is also necessary to prove the mala fide intent of eliminating competition by creating short phase of low pricing which other market players may not be able to withstand. The court also held that a price is not predatory unless it is below some measure of cost or even some measure of incremental cost and also required proof of recoupment.

Price reduction which is resorted to survive in the competition market, or to meet the predatory pricing policy followed by other competitors, could not be considered as a restrictive trade practice liable to be struck down.<sup>15</sup> In *Standard Oil Co. v. Trade Commission*<sup>16</sup>, the US Supreme Court held that "Section 2(b) of the Clayton Act permitted a seller to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily changing the seller's price to its other customers."

In *Pacific Bell Telephone Co. v. Link Line Communications, Inc.*<sup>17</sup>, the US Supreme Court held that to establish predatory pricing the plaintiff must prove that the alleged predator's prices were below an appropriate measure of its rival's costs and had dangerous probability of recouping its investment in below-cost prices.

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<sup>14</sup> Brooke Group Ltd, *supra* note 10

<sup>15</sup>Mr. Kumar Harshvardhan, *An Analysis Of The Law Relating To Predatory Pricing In India*, MANUPATRA (Nov. 21, 2017, 9:45 AM), <http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=3e7817b5-23f9-4313-9ac0-fd94a329de45&txtsearch=Subject:%20Competition%20/%20Antitrust>.

<sup>16</sup> 340 US 231 (1951).

<sup>17</sup> No. 07-512, 555 U.S. 2009.

In *France Telecom S.A. v. Commission of European Communities*<sup>18</sup>, the European Court of Justice held that a detailed cost and price analysis is necessary to determine predation and prices found below average variable costs<sup>19</sup> must be regarded as abusive, while prices below average total costs, but above average variable costs, may be abusive if it is proven that the dominant undertaking has a mala fide intention to eliminate competition in the relevant market. In *Tetra Pak International SA v. Commission of the European Communities*<sup>20</sup>, the ECJ held that prices below average total costs but above average variable costs are only to be considered abusive if an intention to eliminate can be shown. Thus in European Union, to establish predatory pricing the applicant must prove the mala fide intention of the predator and the price must be below the average variable price.

In *MCX Stock Exchange v. National Stock Exchange Ltd., DotEx International Ltd and Omneseys Technologies Pvt. Ltd.*<sup>21</sup> the Competition Commission of India held that to establish predatory pricing in a relevant market the claimant has to demonstrate the specific incidence of under-pricing and its impact in the market. CCI also held that dominant position of the predator in terms of market share may be considered in determining the ease with which he drive out other competitors but that dominant position does not mean that he has engaged in predatory pricing. It was also held that the claimant must demonstrate that the pricing scheme could drive the competitors out of the relevant market and there must be evidence that predator could then raise the prices to a level that will compensate it's losses during the initial phase of under-pricing.

### **Role of Competitors**

In a market, when a certain competitor shows growth in an instantaneous manner, in majority cases it is due to predatory pricing and abuse of dominant position. S. 4 (2) of the Competition Act 2002 describes dominant position as position of strength enjoyed by enterprise in the relevant market.

If a competitor has to attain a dominant position in the market, his shares should be higher than that of his rivals in the active market. The economic status or financial stability of the

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<sup>18</sup> C-202/07 France Telecom (2009).

<sup>19</sup> Average Variable Cost – describes how the marginal cost behaves, over a given range of output. It is calculated by identifying those costs that vary with output, adding them together and diving the result by the total number of units produced.

<sup>20</sup> Case C-333/94 P Judgment of the Court (Fifth Chamber) 1996.

<sup>21</sup> 2011 Comp LR 0129 (CCI).

dominant competitor plays an important role. However, the presence of rivals in the market and their position in the market is also an important aspect when analyzing the probability of the abuse of dominant position.

There is an analysis of the name Porter's 5 forces that explains 5 conditions important in ascertaining the abuse of dominant position. This analysis was developed by Michael E. Porter of the Harvard Business School<sup>22</sup>

- The bargaining power of customers (buyers)
- The threat of the entry of new competitors
- The bargaining power of suppliers
- The threat of substitute products or services
- The intensity of competitive rivalry

In *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, the concept of 'abuse of dominant position' has been defined as:

*"The concept of abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."*

Being a dominant competitor in the market is not illegal per-se. What becomes illegal is activities which adversely affect the healthy competition in the market or the abuse of the dominant position by the competitor.

### **Predatory Pricing and Legal Remedies**

In order to promote healthy competition in the market, the government introduced the Competition Act 2002 replacing the Monopolies and Restrictive Trade Practices Act 1969 which was in existence till then. The concept of abuse of dominant position as explained

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<sup>22</sup> Michael E. Porter, *The Five Competitive Forces That Shape Strategy*, Harvard Business Review 86, 78-93 137 (2008) .

under the Competition Act 2002 is borrowed from the English Competition Act 1988 and the Clayton Anti-Trust Act 1914.

*Section 4(2) (a)* of the *Competition Act, 2002* says that there will be an abuse of dominant position under the section if the an association of persons or a person in dominant position directly or indirectly, imposes unfair or discriminatory conditions in purchase or sale of goods or service; or price in purchase or sale (including predatory price) of goods or service. However, this do not include such discriminatory conditions or prices which may be adopted to meet the competition.

In 2007 S. 4 of the Competition Act was amended through the Competition amendment Act of 2007. The new provisions apply to an enterprise and not a group of enterprises.

### **Cases Related To Predatory Pricing Before The Competition Commission Of India**

#### **Ola and Taxi For Sure<sup>23</sup>**

The Competition Commission of India has dismissed allegations against ANI Technologies Private Limited, which operates Ola and Taxi for sure cabs regarding predatory pricing allegations. The grievance of the informants was that the opposite party, a radio taxi service provider running services under the brand names ‘Ola’ and ‘Taxi for Sure’, has been flouting the provisions of Section 4 of the Act by paying more money to drivers than they collect from passengers.

The allegation was that was driving out existing players from the market and also discouraging new ones from entering it.<sup>24</sup> The complainants asked for an investigation into the matter under S. 26 (1) of the Act and a direction from the part of the commission to stop indulging in predatory pricing. The Commission, after thorough analysis and deliberation, rejected the allegations as the company was found not to be in a dominant position.

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<sup>23</sup> In Re Vilakhan Kumar Yadav v. M/s ANI Technologies Pvt Limited, Case no 21 of 2016, CCI.

<sup>24</sup> Arunima Bhattacharya, *CCI dismisses allegations of predatory pricing against Ola, Taxi for sure*, LIVELAW (Nov. 21, 2017, 09:51 AM), <http://www.livelaw.in/cci-dismisses-allegations-predatory-pricing-ola-taxi-sure/>.

## **Reliance Jio**

The Indian Telecom Industry witnessed a sudden change recently caused by Reliance 'Jio' – a new entry in the sector which is a product of the Reliance Group of Industries. The unlimited calling and unlimited data offer was initially made available to its employees only, but later it was made accessible to the general public.

There was huge outcry in the telecom sector against reliance and its promotional offers.

Reliance jio had however opined that the so called financial stress in the telecom sector was mainly due to the fact that the other competitors in the industry did not invest on new technologies while jio took the risk to do so. The firm led by Mukesh Ambani pointed out before the commission that even though the operators made significant returns they did not invest in equity and unsustainable balance debts is due to the over dependence on debts. Jio also added that the operators instead of investing in new technologies invested in unrelated businesses or overseas acquisitions by extensive borrowing. The company also pointed that there is a strong sign of cartelization in the behaviour of the 3 big operators in the market as tariffs were aligned and designed to thwart entry of new operators, adding that both TRAI and CCI have found evidence of cartelization in the behaviour of Bharti Airtel, Vodafone and Idea. The new entrant said that the incumbent operators were not investing in technology, while passing the blame onto Jio for the existing problems in the sector. The other telecom operators alleged that the financial stress is due to predatory pricing committed by Jio by giving exceptional unlimited calling and data offers right from the time of its inception. However the Competition Commission of India dismissed these allegations.

## **Conclusion**

Predatory pricing is not always harmful. It is actually beneficial to the consumers in many cases as they are having an option to purchase the products at a lower cost. But this option will only be available initially. When the other competitors are drawn out of the scenario through predatory pricing the firm or enterprise will increase their price to make up the losses. But this may not be in most of the cases be successful as the other competitors will re-enter the market at this point and their market strategies would then force the enterprise or firm to lower the prices.