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## Prevalence of Predatory Pricing in Multi-Sided Markets: An Overview

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### ABSTRACT:

The practice of predatory pricing in multi-sided markets is becoming a big issue in the prospect of preserving free and fair competition and enhancing consumer choice. In the online market, it is very necessary to protect the interests of small players as there must be a helping hand for them to come up to promote innovation and increasing choice and in the broader picture – also finetuning the freedom of trade and commerce. The multisided markets are largely unregulated, and predatory pricing often goes unnoticed in this world – also, it needs to be seen that the present regime of the Competition Act is not adequate to cover this position. This practice adds to the abuse of the dominant position, locks in the consumer, and has foreclosing effects on the market. It includes the charging of price that is below the threshold levels set by the authorities and genuine competition that is regulated and then covering those costs after the competitor is driven out of the market. The dominant position of the undertakings is very much helpful for them in gaining an advantage over the other competing entities and often results in reduced innovation and also often leads to the acquisition of these entities. It is also being held as a tactic to retain dominance and gain more and more market share. In this light, various aspects of this study are covered.

### INTRODUCTION:

The practice of predatory pricing in the markets is considered the biggest threat to market competition as it involves the reduction of prices to drive out competitors and then charging high prices to make up for the losses. Various entities in the dominant position owning a significant market share in the multi-sided markets too, transfer their losses from one market to another. The *Browser Wars*<sup>1</sup> case laid down the presence of this concept whereby Microsoft's stance at the same arose when they started attaching free services of Browser compulsorily on the computer systems thereby strengthening their dominant position in that market. This tactic allows the company to attain an unfair advantage over the others, thereby

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<sup>1</sup> The browser war of Microsoft vs. Netscape was nearing its end with predictable results when the government entered the fray. In 1998, the U.S. Department of Justice and the attorneys general of 20 states filed suit against Microsoft, alleging violation of antitrust laws.

constricting consumer choice and foreclosing the market, and is detrimental to market competition. These techniques are very much prevalent in the multi-sided markets and have also been shown in Amazon's heavy discount on *Kindle*<sup>2</sup> strategy, it was also seen in its conduct of acquisition of *Quidsi*<sup>3</sup> by lowering its prices in this prospect and driving it out from the market competition. In the multi-sided markets of the digital domain, there is an absence of evaluation parameters, undetected abuse of dominance, and various non-price issues come into play as multi-faceted markets and data-driven externalities are played there. In the Indian position, the same is covered under s. 4 of the Competition Act<sup>4</sup> and under the same, s. 4(2)(a)<sup>5</sup> it shall be considered as an abuse of dominant position. In India, the digital markets are marred by Amazon and Flipkart often engage in predatory pricing and provide excessive discounts as pointed out by the Confederation of All India Traders ('CAIT'). Various aspects of this prospect are discussed herewith.

### **First Origins: Testing Predatory Pricing**

The economic modeling of predatory pricing must be considered in a different way as multi-sided markets operate in a peculiar way. Behringer and Filistrucchi have argued that it occurs when a dominant undertaking is making a loss at the margin. In a multi-sided market, we have to recognize that the price-cost margins on both sides are interlinked, so, the all-inclusive price levels are to be considered with the joint marginal cost of the market – hence, the marginal cost of the data is not viable to obtain, a comparison of overall price level with overall average variable cost<sup>6</sup>. The negative profit margins would be sufficient to justify predatory pricing on both sides of the market to apply the presumption of predatory pricing; negative margin on both sides where depends upon how negative the margin becomes and the financial dominance that is shown. Amelia Fletcher has also added that it is possible to track predatory pricing as there can be asymmetric pricing in both cases, but this might give some merit to the competition policy. Along with this, John Newman has confirmed that the recoupment test can be applied in the interrelated markets and can be employed to prevent errors in calculating predatory

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<sup>2</sup> AMAZON'S 'PREDATORY PRICING' QUESTIONED, <https://www.cnbc.com/2014/06/30/amazons-predatory-pricing-questioned.html> (last visited Jul. 4, 2023).

<sup>3</sup> CONFIRMED: AMAZON SPENDS \$545 MILLION ON DIAPERS.COM PARENT QUIDSI, <https://techcrunch.com/2010/11/08/confirmed-amazon-spends-545-million-on-diapers-com-parent-quidsi/> (last visited Jul. 5, 2023).

<sup>4</sup> Competition Act, 2002, § 4, No. 12, Acts of Parliament, 2002 (India).

<sup>5</sup> *Id.*, § 4(2)(a).

<sup>6</sup> Stefan Behringer, *Areeda-Turner in Two-Sided Markets*, 46 REV. OF IND. ORG. 287, 287-306 (2015).



pricing – but the factors like information and costs of attention when carrying out the assessment of predatory pricing.

### **Conceptual Outlook of Predatory Pricing**

Predatory pricing as a concept stands for the terms of practices and position that a particular predatory behavior implicates-if a particular entity carries on the practice of them charging below the costs to dismantle a competitor in the motive of gaining a dominant position and take out a competitor from the market to establish their dominance<sup>7</sup>. The very first step in determining whether a particular entity is dominant or not flows from the concept that it is dominant in a particular market, then it must be seen whether a particular entity charges prices below what is perceived to be normal in the relevant market considerations. These prices which are charged below cost thresholds, are necessary to maintain that the foreclosure of the market is done and that the losses are sustained right after the predation of an entity. The application of the theory of harm<sup>8</sup> is to be accorded for the comprehensive assessment that entails that the particular entity is inclusive of gaining a strengthened position by dominance, which is below cost thresholds, the intention of doing so, and the testing of recoupment ability.

### **Complexities of Multi-Sided Markets**

As we are aware that there is an absence of the parameters of evaluation of the competition in the digital markets, and there is an abuse of dominance by the players in the webspace which is majorly undetected. There are various non-price factors that come into play which are mostly centered around data. There is also an existence of multi-faceted markets which means that these markets assert the functioning of these markets on various levels. The major competition law issues in this regard are based upon predation, the practice of deep discounting, and other allied issues which also harm personal data privacy. With the transition from the conventional system of markets to the digital markets, it is very important to notice that the money considerations in these undertakings do not play a major role as such, it is usually the data that is responsible for determining the competition i.e., the more data owned by a particular player,

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<sup>7</sup> Aditya Bhattacharjea, Predatory Pricing in Platform Competition: Economic Theory and Indian Cases 2 MULT. DIMEN. APP. OF NEW TECH. 213, 213-230 (2018).

<sup>8</sup> The common ownership theory of harm outlines that when investors own shares in horizontal competitors, those competitors may have reduced incentives to compete – which can potentially lead to outcomes such as price collusion, reductions in R&D and innovation, or foreclosure of the relevant market to third parties.

the more is their dominance in the market. These entities function on the data-driven network effects which is the real reason why these players have access to immense wealth and the markets on the digital level are ever-expanding.

The issues of zero pricing<sup>9</sup> have also been brought to the forefront as many undertakings have started to give out their products and services like the applications of social media for instance, Facebook, WhatsApp, Instagram, etc. at no price which is basically free, a search engine like the Google also provides its services for free. Though their main revenue source is targeted advertising for the purposes of generation of revenue, it is majorly debated if these platforms are free or not as the consumer 'pays' attention as such to the advertisements that are posted on these platforms for revenue generation. It has also been stated that the consumers 'pay' for these services as there is a large amount of data that is processed, and it is transferred to other entities, which means the consumers pay this price by their personal data. In *Bharti Airtel v. Reliance Jio*,<sup>10</sup> it was seen how Bharti Airtel had pressed their claims upon Jio of being involved in the practices of predatory pricing by offering a zero-priced product that was based upon calling and giving free 4G data in an unlimited manner and also it was observed that Reliance is using its already established dominant position to enter the telecom sector, though the sufficient requisites for the predatory pricing claim to succeed were not established there was an important observation in the regard of a zero priced product and its implications.

### **Legislative Scheme and Study of Select Cases**

As per the mandate under Competition Act, the s. 4 has already appended an explanation to the Act, that defines predatory pricing in perspective stands for the contention that it stands for the sale of goods or services at a price that is below the cost which is determined by the regulations as such with a view that is sufficient or subject to drive the competitors of the market. It also depends on the definition of predatory pricing that is provided under the s. 4(2)(a) of the Act, that it is a part of the abuse of dominant position if the enterprise directly or indirectly is involved in the imposition of unfair or discriminatory conditions in the purchase or sale of

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<sup>9</sup> PANKHUDI KHANDELWAL, "INTERFACE BETWEEN COMPETITION LAW AND DATA PROTECTION LAW IN MONITORING ZERO-PRICE MARKETS: ACHIEVING THE BALANCE OF REGULATION", <http://iclr.in/wp-content/uploads/2020/05/INTERFACE-BETWEEN-COMPETITION-LAW-AND-DATA-PROTECTION-LAW-IN-MONITORING-ZERO-PRICE-MARKETS-ACHIEVING-THE-BALANCE-OF-REGULATION.pdf> (last visited Jul. 6, 2023).

<sup>10</sup> Case No. 3 of 2017.

goods and services. The multi-sided markets and their network effects and externalities are the ones that create this conundrum of lopsided assessment of digital market competition. This has been evident in the case-by-case development of the relevant market and their definitions as such; in the *Ashish Ahuja v. Snapdeal.com*,<sup>11</sup> it was seen that offline and online markets are different streams of the market and they do not belong to the same entity and are not considered as the same market for the purposes of assessment.

We have seen in the *Shamsher Kataria*<sup>12</sup> case how there were entry barriers to independent repairers in the automobile market as competing with the original equipment manufacturers ('OEMs'). The advantages of big data have also been there to Uber and Ola in the cab aggregator business as seen in the *Meru v. Uber*<sup>13</sup> case that gave the applications such as Uber and Ola the convenience to save the time of the customers, pinpointed pick up and drops, easy booking facilities, etc. which are not available to other cab aggregator companies thus acting as an entry barrier for them. In these cases, the data may be used by such enterprises for the purposes of colluding or forming a cartel in the sense of horizontal coordination in relation to the prices of insurance policies. The colluding parties, thus are to be probed by the CCI as there is no requirement of the law for showing that the cartels or collusion proceeded in a systematic manner, as observed in the *Express Industry Council of India and Jet Airways*<sup>14</sup> whereby it was noticed that they can also proceed in a manner that breaks through the gaps in the law and creates a façade of a behavior that is competitive. The exclusive supply agreements include the contracts that can be used for the benefit based upon the profit gains that can also lead to the ascertainment of supply sources on an exclusive basis; the *In Re: Shri Ramakant Kini and Hiranandani Hospital*<sup>15</sup> described widely the looming problem of exclusive supply agreements whereby there has been observed that the reduction in contracting costs, dealer loyalty, etc. tactics are used to disallow the smaller firms to pierce through the market and decrease the chances of smaller existing firms to expand their presence.

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<sup>11</sup> Case No. 17/2014.

<sup>12</sup> *Shamsher Singh Kataria v. Honda Siel Cars India Ltd.*, Case No. 03/2011.

<sup>13</sup> Case No. 81 of 2015.

<sup>14</sup> Case No. 30 of 2013.

<sup>15</sup> Case No. 39 of 2012.



### **Suggestions and Recommendations**

Based upon the study of predatory pricing and its interface with multi-sided markets it is pertinent to include the following suggestions and recommendations:

- Consumer harm and data network effects should be done with a comprehensive regime dealing with the multisided markets.
- The features of the accumulation of data and other services dealing with the collection of data should be regulated to ensure the ethical collection and usage of data.
- Major tests for the laying down of the criterion of realizing predatory pricing should be there to gauge predatory pricing and its effects on competition.
- Considering the economics of predatory pricing, it needs to be laid out that a test for instilling predatory pricing should be there.
- The ex-ante regulation of the competition sphere should be considered and the manpower for dealing with the digital markets should be there.

### **CONCLUSION:**

After the careful consideration of predatory pricing and economics of multi-sided markets that depend upon the network effects and data externalities whereby the technological giants have taken up this practice of using the data to their enhancement of services and fetch a dominant position in the markets thereof, fair competition is sacrificed in that prospect is basically undeniable and hence there has to be a perusal of personal data and its usages while dealing with the various ancillary considerations. The constriction of the market also has been held as an important factor following the merger reviews thereof and feedback and other strategies were also considered while driving the competitors out in the background again – the personalized pricing, exclusionary conduct, and strong entry barriers thus dealt with the account of large data sets and personalized pricing with huge entry constrictions for other players in the market. It must be seen how it would work for the problem of data protection and along with the functioning of the Competition Bill in the Digital Markets, which is again under wraps to correct the abuse of dominant position, anti-competitive conducts, and regulation of combinations and usage of data as a qualitative factor thereof.