

# LEGALFOXES LAW TIMES

## PREDATORY TACTICS IN INDIA : A LEGAL PERSPECTIVE

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The concept of Predatory Pricing can be well understood by the explanation that it is the practice of using very low prices to attract customers and the prices fixed are so low that it is below the cost of manufacturing the product or the cost of providing the services. This is done extensively to hold a considerable share in the market and once it has ousted its competitors from the market then increasing the prices of services or commodities in order to make huge profits as there would be absolutely less competition in the market and the company practising such policy would simply dominate the markets. Though it may seem that initially losses are being sustained by the company but eventually in the long run there will be huge profits as no other competitor company would survive in such a market created by such a company. In the short span of time it may be beneficial to the consumers as they will be getting products and services at much lower costs than the prices offered by their competitors and this will make them switch to the company following such a policy but in the long run once the competitors exit the markets, then the dominant company would raise prices of their products and services and may introduce any such policies which the consumers will be bound to accept, in absence of choices to switch to other brands.

In India, the Competition Act, 2002, lays down the regulation to prevent the companies to resort to such tactics, as that would fall under the head of abuse of dominant position by such a company. Under Section 4 of the Competition Act, 2002, predatory price is defined 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. To further elaborate predatory pricing helps a company in reaching a dominant position in the market and they start abusing it once when it starts affecting the competitors and consumers and manipulates the market system to work in its

favour. In the case of Transparent Energy Systems (P) Ltd. v. Tecpro Systems Ltd. (2013)<sup>1</sup> the CCI laid down that the following findings are relevant for the identification of predation :

- (a) The prices of the goods or services of the enterprise are at a very low level;
- (b) The agenda is to drive out competitors from the market, who due to the low pricing practices would be unable to compete at that price;
- (c) There is significant planning to recover the losses if any, after the market rises again; or
- (d) The competitors have already been forced out as they could not survive in such a market.

Furthermore, the Competition Commission of India has determined that for predatory pricing to take place, the average variable cost of the company shall be taken into account, it should be higher than the price of the product in order to adduce that the company is indulging in predatory pricing. (H.L.S. Asia Limited, New Delhi v. Schlumberger Asia Services Ltd. Gurgaon and Oil & Natural Gas Corp. Limited, New Delhi<sup>2</sup>)

In 2016 when Jio entered the market it introduced into the market 'Jio Welcome' offer which provided free voice calling, data, text messages, absolutely free which was in violation of section 4(2)(a)(ii) of the Competition Act. As it was seen as a predatory pricing tactic carried out by Jio to penetrate the Indian markets, Happy New Year offer was further introduced which extended further the free facilities, so Bharti Airtel in the case of Bharti Airtel v. Reliance Jio<sup>3</sup>, alleged Jio of taking part in predatory tactics which was harmful for it and the other competitors in the Telecom sector. It was argued that they were abusing its dominant position but the Competition Commission of India held that at that time Jio only held 7 percent of the relevant market and therefore was in no way in the position to dominate the market and there were various other players in the market so CCI dismissed the case saying that there was no abuse of dominant position by Reliance Jio at that time. The CCI took a very restricted interpretation into the matter and gave the decision in favour of Jio. Giving free services alone cannot be held to be abuse of dominant position by the company, for it to abuse the status it

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<sup>1</sup>M/s Transparent Energy Systems (P) Ltd. v. Tecpro Systems Limited [ Case no. 09 of 2013 CCI ]

<sup>2</sup>Case No. 80/2012 Competition Commission of India

<sup>3</sup>Bharti Airtel Limited v. Reliance Industries Limited [ Case No. 03 of 2017 Competition Commission of India ]

has to have a dominant share in the relevant market , which Jio lacked at that time. In the same case BhartiAirtel had also contended that Reliance Industrues had significant impact in the Indian Markets and therefore their dominance can itself be felt in Jio , but CCI held that mere having investments in a company cannot be treated to be anti-competitive and to be in a dominant position. Thus it cannot be held to be leveraging of dominant position. It was held to be merely a short term business strategy adopted by Jio.

In the telecommunication sector also predatory pricing tactics came up when Reliance Jio entered the Indian markets and offered such low rates for their internet services as well as calling rates , it was accused of predatory pricing mechanism to attract customers and also to defeat its competitors in the telecommunication sector , this phenomenon was also known by the penetrative pricing term , which means when an non-dominant entrant tries to capture the market in order to expand their market share in a very less amount of time as well as with the anticipation, preparation and objective to expeditiously attract the consumers' attention at the expense of suffering initial losses which may or may not be recouped once their identity is established through this short term incentive-based strategy. In the case of CCIv.BhartiAirtel<sup>4</sup>, the question arose as to whether the Competition Commission of India had the jurisdiction to take up the matters in the telecommunication sector as the sector was regulated by TRAI , as TRAI was established with special expertise to understand and regulate the matters related to the telecommunication sector in a much better way , the Hon'ble Supreme Court gave a decision as to unify both the regulators , it demarcated by saying at the first instance the TRAI would take up the matter related to the telecommunication sector but once its investigation is completed . CCI will have the jurisdiction to see whether the telecom companies have entered into ant-competitive agreements and investigate further under section 26 of the Competition Act , 2002 , it therefore held that CCI has jurisdiction but at a later stage , Section 60 of the Competition Act , 2002 was upheld which states that the provisiosn of the Competition will have an overriding effect notwithstanding any inconsistency with other Indian statutes.

In Meru Travel Solutions Private Limited v. Uber India Systems Private Limited , MERU filed a complaint with the CCI that Uber was indulging in predatory pricing tactics to cu competition in the Delhi –NCR Region and Uber was sustaining losses of Rs.204 per trip which did not make

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<sup>4</sup>Competition Commission of India v. BhartiAirtel Limited [ Civil Appeal No.5 11843 of 2018 ]

any sense and pointed directly to the predatory mechanism that it was facing initial losses to capture the market and oust the competitors like Meru cabs which is an app based cab services from the market , it further based its contentions under sections 3 and 4 of the Competition Act , 2002 that Uber was abusing its dominant position by undertaking predatory pricing. MERU also alleged that in violation of Section 3(1) , 3(2) and 3(4) , of the Act, UBER entered into contracts with the taxi unions to confine them from enter into contracts with other radio taxi operators which wre in competition with Uber , high discounts were also given to Uber customers to attract them . The Competition Commission of India ,held that there was no prima facie case against uber as the report of TECHSCI which Meru submitted to prove that Uber was in a dominant position was unreliable as well as the relevant market concerned was Delhi and no the Delhi-NCR region thereby the case was closed by the Commission under section 26(2) of the Competition Act , 2002 .

Contrary to this the Competition Appellate Tribunal reversed the order passed by CCI and held that the practicality of demarcating the relevant market between Delhi and the Delhi NCR Region made no sense at all as well the TechSci Report which Meru submitted to prove that Uber was in a dominant position in the market was not unreliable source as CCI had in a different case relied on such a report (Fast Track Call Cab Pvt. Ltd. v. Ani Technologies (P) Ltd. 2017 SCC Online CCI 36 ). Section 19(4) clauses b, (driving existing competitors out of the market); c, (foreclosure of competition by hindering entry into the market); d, (accrual of benefits to consumers) and e, (improvements in production or distribution of goods or provision of services) was brought to the attention of the CCI which provided various criterias as to decide whether the company is in a dominant position and thus gave a decision that the Directorate General is to initiate an investigation and submit a report to the commission with regards the complaint made by MERU CABS against UBER.

UBER appealed to the Supreme Court of India against the order passed by the Competition Appellate Tribunal but to its dismay, the Hon'ble Supreme Court upheld the decision taken by the Competition Appellate Tribunal and laid emphasis on the fact that losing Rs.204 per trips did not make any business sense and emphasised on the fact that this was done to cut the competition as per section 4 explanation a (ii) of the Competition Act , 2002 ,thereby an investigation is

necessary in the matter. An investigation was further required as to the issue whether there was a prima facie case or not.

In Conclusion, it can be said that the Competition Commission of India, set up in accordance to the Competition Act, 2002, regulates and prevents any anti-competitive behaviour and tactics which might be undertaken by the Companies in the Indian Markets. To give a fair playing ground to all the companies , laws have been made to enable them to keep doing business in India amidst an environment of healthy competition, Importance is given to both the new players as well as the already big players in the market so that the ultimate benefits goes to the consumers as well as the companies .

