Surviving the Duopoly: Threat of Predatory Pricing to Fair Competition In the Marketplace

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Abstract

The Indian market has witnessed a growing trend of emerging duopolies where there have been several instances of dominant companies engaging in anti-competitive practices like predatory pricing to eliminate competition which has become a threat to free competition and consumer welfare. This paper aims to analyse this issue by providing an overview of the current state of duopoly in different sectors in India, highlighting the consolidation of market power among a small number of dominant companies. The paper also delves into predatory pricing, where these dominant companies offer their products and services below cost to eliminate competition from the market.

Next, the paper discusses collective dominance, which refers to a situation where multiple firms collectively have a significant influence in the market and abuse their position. The paper argues that the Competition Act 2002 needs to recognise the issue of collective dominance citing several instances where appropriate action could not be taken against the perpetrators due to the existing limitation in the regulatory framework. Thus, the paper recommends including and recognising collective dominance in the Indian Competition Act as a crucial step towards addressing the issue of predatory pricing by dominant companies and promoting competition in emerging duopolies.

Key Words: Predatory Pricing, Duopoly, Abuse of Dominant Position, Collective Dominance, Anti-Competitive Practices

Introduction

A flat discount of 60% on their preferred products appeals to everyone. Companies use the strategy of offering lower prices to entice customers. While reducing costs has become an essential aspect of competition, predatory conduct by companies aimed at eliminating rivals remains a conundrum that has baffled antitrust experts for many years. Giant corporations, to dominate the market, offer their products at low prices, even below their cost of production, only to shoot up the prices later. Such cutthroat pricing eliminates rivals from the market, and these big fishes of the pond take advantage by discontinuing the giveaways and overcharging the customers. Other companies in the market experience significant losses and are eventually forced out.

As a result, consumers are left with limited options, often only one or two dominant firms in the market who have established their position through such price dumping tactics. Ultimately, consumers bear the brunt of these price wars, which lead to the creation of duopolies in the market.

In a fair and competitive market, the prices of products are established by the natural interplay of demand and supply. The free entry of new players into the market ensures healthy competition, which ensures consumer welfare by providing them with more options and lower prices. The Competition Act (hereinafter, the 'Act') was implemented to regulate anti-competitive behaviour to ensure market freedom and safeguard the interests of consumers. It prohibits predatory pricing as it is intended to impede competition. Although competition regulations aim to prevent corporate consolidation, there is a growing concern about duopolies in our nation's fair markets. Many sectors have limited consumer choices, such as the telecom industry, where only Jio and Airtel dominate or social media, where WhatsApp and Telegram have established dominance. These firms engage in anti-competitive collusions to manipulate the market and maximise profits, often at the expense of consumer welfare.

Although the Competition Act endeavours to uphold market freedom and curb anti-competitive practices, it has failed to address the problem of emerging duopolies engaged in anti-competitive practices like predatory pricing threatening free competition and consumer welfare.

The Concept of Predatory Pricing

Predatory pricing is a business strategy dominant market player employ to temporarily lower the price of their products or services below their production cost. This is done to impede competition and increase long-term profits by gaining a first-mover advantage, capturing and influencing market conditions, and eliminating rivals. The primary objective of predatory pricing is to either eliminate a market competitor or hinder the entry of a new player. However, this approach involves high risk, and the predator may have to sacrifice its profits, with uncertain chances of recoupment initially. Predatory pricing is used to increase market power. It is viewed as an abuse of dominance, as the predator can determine the cost without considering its fixed price, resulting in an unfair allocation of efficiency. Furthermore, this strategy can create barriers for new participants or drive them out of the market. Hence, it results in reduced competition, which is harmful to the overall market.

The concept of predatory pricing has been incorporated into the competition law of many countries belonging to the Organization for Economic Co-operation and Development (OECD). However, a common challenge with such legislation is the need for a clear standard to determine whether a market is facing predation. This raises the question of whether selling a product below its cost of production is sufficient to qualify as predatory pricing or whether other criteria should be considered to determine predation in a market.

Prerequisites of Predatory Pricing

Under the Indian Competition Law, predatory pricing is prohibited. It is defined as selling goods or providing services below the cost to eliminate or reduce competition. To establish predatory pricing, it is enough to show that the enterprise holds a dominant position and has been engaged in the practices outlined under Section 4 of the Act. Section 4 of the Competition Act provides list of practices that would per se be abuse of dominant position. Such practices are –

- Imposing unfair or discriminatory prices or conditions during purchase and sale of goods and services which also includes predatory pricing as defined in Section 4 Explanation (b). Section 4 Explanation (b) defines predatory pricing as sale of goods and services at price below cost of production with an intent to reduce competitors in the market.
- Control or limit production of goods and services in the market.
- Control or limit technical or scientific development relating to goods and services to the prejudice of consumers.
- Making conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
- Indulging in a conduct which results in market denial.
- Using dominance in one relevant market to enter into other relevant marketing.

Explanation (a) of section 4 defines dominant position. According to Explanation(a) of section 4 an enterprise enjoys dominant position when its position of strength in the relevant market makes it possible to –

1. Operate independently of its competitors in relevant markets.
2. Affects its competitors or consumers in its favour in the relevant market.

Predatory pricing, or predation, typically occurs in two phases. The first phase involves the firm setting prices for its products or services below the cost of production, resulting in losses. The second phase entails the firm recovering those losses in some manner. However, adding to the list, Mark Isaac and Vernon.L.Smith have given an experiment that determines the prerequisites of predatory pricing.

a. Dominant Position in the relevant market

Dominant position refers to the level of power and influence an enterprise holds in a specific market, allowing it to operate independently from the competitive pressure in the market. This can have favourable effects on the enterprise, such as influencing consumers or competitors in its favour . However, abusive use of dominant position occurs when the enterprise engages in practices denying access to the market or restricting the production of goods and services in a way detrimental to competition . For example, Google was accused of giving preferential treatment to its own vertical search services in its search results, potentially disadvantaging competing services . Therefore, an enterprise is considered to have gained a dominant position in the market when it has acquired a significant market share that enables it to operate freely without significant competition from rivals, suppliers, or consumers.

b. Deep Pockets that can help during the time of Predation

Predatory pricing, as defined by the Act , refers to selling goods or providing services at a price below the cost. This strategy requires a company to consistently sell its products at prices lower than the standard cost until its competitors are eliminated, resulting in sustained losses. Consequently, only market players with substantial financial resources and capital reserves can withstand such situations, making predatory pricing a tactic effectively utilised by dominant market players. Therefore, when a company intentionally incurs losses to eliminate existing competitors and prevent new entrants from entering the market, it is considered to have engaged in predatory pricing instead of maximising its profits.

c. Excess Production Capacity

When a company engages in predatory pricing, it deliberately sets low prices for its products or services, which leads to an increase in demand. This not only attracts new customers but also entices customers from other companies. As a result, the predatory company must have the excess production capacity to meet this heightened demand. If it fails to do so, the order may surpass the predator's output, creating an opportunity for competitors to re-enter the market.

d. A certain level of entry barrier or restriction in the market

When a firm deliberately operates at a loss for some time to capture the market, it allows the dominant firm to maintain its presence and withstand the competition. This puts pressure on its competitors, who may need more funds to sustain their businesses, ultimately leading them to exit the market. The difference in available resources between the dominant firm and its competitors plays a crucial role in the predatory firm's ability to gain an advantage in the market. The predatory pricing strategy threatens competition as the low prices set by the dominant firm make it difficult for new entrants or similar firms to compete in terms of capacity, given the resources and costs involved. The dominant firm's advantage in terms of price and resources puts potential competitors at a disadvantage and may discourage them from entering or continuing in the market.

Rules for Assessing Predatory Pricing

Assessing predatory pricing can be challenging due to the ambiguity surrounding the intent behind a firm's lower prices. It is still being determined whether the lower prices aim to eliminate competitors, maintain market share, or clear dead stock through hefty discounts. As a result, nations have developed various tests to monitor and identify instances of predatory pricing, as having standardised criteria can aid in identifying and penalising firms engaged in such schemes.

The First Rule: No Rule

Frank H. Easterbrook has elucidated the “no rule” concept in predatory pricing . The author argues that it becomes challenging to differentiate between predatory behaviour and legitimate competition in the market, as low-cost products can also benefit consumers. Anti-trust laws are designed to prioritise consumer welfare, and if a firm offers products at competitive prices that maximise consumer welfare, it may not be considered predatory pricing. Setting prices below the average cost may indicate market manipulation by the firm.

Still, it also depends on various market factors, such as changes in demand, supply, and production costs. In some cases, firms may sell products below cost due to reduced production costs resulting from increased market demand.
Easterbrook suggests that predatory pricing may not concern competition policy officials, as they must consider whether it harms consumers or leads to monopolistic practices. The author argues that predators may not achieve their goals through predatory pricing, as it would take years to recoup losses, and consumers may only demand products at low prices compared to rivals . Predators can only recoup losses by achieving a monopoly, and their strategy may fail if a rival firm can sustain the market and offer competitive prices. Predators can only succeed if they create entry barriers that competitors cannot overcome . It is further argued that if a firm incurs losses and does not acquire market power after providing low-cost products, there may be no need for government intervention to check predatory pricing. This concept is known as the "no rule", as it depends on factors that may not be achieved by the predatory firm and may not necessarily concern competition or consumer welfare but rather the losses incurred due to such a strategy.

The Second Rule: Short-Run Cost-Based Rule

The second rule of the short-run cost-based test, also known as the "Areeda-Turner test", suggests that a price will be considered predatory if the dominant firm's price falls below the Average Variable Cost (AVC) divided by all its variable costs by its output .
They prioritise short-run costs over long-run efficiency, believing that long-run efficiency is too speculative. They target firms that are at least close in efficiency to the predator firms. They argue that these firms can sustain price limiting in the short run but create competition for other firms in the long run, which may need to be able to compete and support like the predator firm. This indicates that the firm has engaged in a predatory pricing strategy. They further argue that if a predator firm does not hold market power due to predation, it cannot achieve desired profits . They also suggest a "per se" rule of pricing, which states that prices that maximise the firm's profit or minimise loss are considered legal. This rule applies to prices above the average production cost, even if they do not maximise profits in the short run. In this case, even if there is no gain, only less efficient firms that cannot switch will be prevented from entering the market.
Areeda and Turner classify prices below the marginal cost as predatory, while prices above the marginal cost but below the average cost are considered legal. In 1975, they extended this cost test to the average variable cost, stating that prices above or at the anticipated average variable cost would be permitted per se, while prices below this threshold would be considered illegal. This rule also prevents firms from adding additional charges, such as advertising, from meeting competitors' promotions or new entrants to meet the average variable costs. Areeda and Hovencamp argue that the "meeting competition defence" by the predatory firm would be illegal .
Subsequently, the authors revised the "per se rule" by replacing the standard of per se legality with a presumption of legitimacy . Under this new rule, prices above the total cost would still be considered legal, but any price below the average cost would be considered illegal per se.

However, there is some ambiguity as predatory firms could argue that price changes were due to market forces such as changes in demand or decreases in production costs or as a response to competition. Areeda and Turner would permit multi-market firms to use this defence, arguing that the firm was not dominant in a particular market .

Critics of this test argue that it is overly stringent and relies heavily on "cost-price analysis," making it challenging to establish whether predation has occurred. Proving that a predatory firm will be able to recoup its losses in the distant future and attain a dominant position in the market is difficult, especially considering the various strategies and defences that predatory firms can use, such as claiming to be "meeting the competition" or adjusting prices based on product demand, as costs are often inversely related to the market.

The Third Rule: Long-Term Cost-Based Rule

Richard Posner proposed an alternative approach to test predatory pricing by examining the firm’s long-term viability. He argued that short-term costs might not be reliable indicators, as predatory firms can drive equally competent or more efficient firms out of the market by setting prices that result in unsustainable losses in the short run . To overcome the challenge of determining marginal costs, predatory firms could substitute average costs from their balance sheets , as suggested by Posner. Joskow and Klevorick proposed a "two-tier" rule, which considers the market structure as a determining factor in assessing predation to clarify this approach further .

Joskow and Klevorick propose a two-step approach to evaluate predatory pricing. The first step involves assessing the predatory behavior. This assessement considers three key components: the short-run monopoly power, conditions of entry, and the dynamic effects of competitors and new entrants . To determine whether a firm possesses short-run monopoly power, factors such as price elasticity of demand and the market share of the firm must be examined. High market share and inelastic demand can indicate that a firm has the ability to temporarily raise prices above competitive levels. The conditions of entry or the ease or difficulty with which new competitors can enter the market is another crucial factor. Entry conditions are determined by various elements including capital requirements, consumer preferences, sequence of entry, and information about market risks . High barriers to entry can discourage potential competitors. The third component considers the dynamic effects of competitors and new entrants. If predatory pricing discourages potential entrants and leads to exit by existing competitors, it may suggest anticompetitive behaviour. In this step , the authors suggest considering a "no-pricing rule" and all price cuts. This means that antitrust authorities should monitor and investigate all price cuts made by alleged predatory firm. This rule emphasizes vigilance in scrutinizing any and all instances of price reductions that could harm competition. The second tier of Joskow and Klevorick's rule states that any price below the average cost or between the average variable cost would be considered prima facie predatory pricing. However, any price above the marginal cost would be deemed legal only if the price cut is not due to new entrants in the market.

By adopting this two-tier approach, antitrust authorities can better evaluate predatory pricing by taking into account not only cost-related factors but also broader market context.

Zero Pricing

The zero pricing strategy is when a business offers its products or services at no cost to customers, absorbing the expenses. Firms often use this approach to establish a presence in the market and build a customer base by providing free products or services. Although customers may perceive this as a beneficial offer, as they get something for free, the business may eventually start charging higher prices than the usual market price once it has acquired a significant customer base. Using the zero pricing strategy, the company aims to establish itself in the market and reduce competition, even though it may incur losses initially. This strategy makes it challenging for new entrants to compete with customers' expectations of free products or services. This raises the question of whether zero pricing can be considered predatory.

In the case of the MCX Stock Exchange, the tribunal found that the National Stock Exchange (NSE) had waived the market price to gain an advantage in the Currency Derivatives market by offering it at zero pricing. The tribunal further stated that for NSE to sell its Currency Derivatives below the average variable cost, its total variable cost must be zero. This case drew upon the European point of R v Hoffman, which stated that prices could be considered abusive if they are below the average total cost but above average variable costs. It was also noted that NSE could not justify offering its services for free when expenses such as workforce and resources need to be incurred.

In the case of WhatsApp, it was alleged that the company had acquired a dominant position in the market due to its free services and could engage in predatory pricing. However, the Commission determined that expanding competitors' businesses meant that entry barriers could not be alleged. Additionally, although WhatsApp held a dominant position, there was no substantial evidence of predatory pricing. Consumers also had the option to switch to other competitors due to price differences.

Non-Price Predation Method

This method is contrary to the predatory pricing method. In this method, the predator firm imposes increased costs on the rivals. Here, the general cost rises disproportionately with the decrease in output. Another way a predator firm raises the price of competitors is by sham court cases or the misuse of governmental power, and the firm starts to pay more on the cost. Ultimately, it increases the prices that benefit the predator by imposing predatory pricing on the rivals. Two conditions are required to identify non-price predation, i.e., the increase in the costs of the rival firms and the decrease in the output that the rival firm finds challenging to sustain in the market.

In the noted case of JCB India Ltd., the Commission assessed the topic, which was made by an informant before the High Court of Delhi. The Court held that the case by JCB was sham litigation alleging its right on the design was filed to harass and prevent the launch of its mark “BULL SMART”, which would have been competing with backhoe loaders of JCB in the relevant market. It was further held that JCB is using its dominant position in the relevant market to stifle the competition in contravention of Section 4 of the Act.

The Concept of Duopoly

A duopoly is a market structure characterised by two equally competent firms competing to provide products and services to a large number of buyers. It falls under the category of oligopoly, but with only two dominant sellers who have the power to set prices and determine production levels. In a duopoly, the actions of both firms are interdependent and impact each other's business strategies. They influence each other's product offerings and services, as an upgrade or change by one firm can affect the other's operations . This mutual dependence leads to heightened competition between the two firms, prompting them to constantly monitor and respond to each other's policies to sustain their market position. For instance, if one firm reduces its prices, the other firm may need to adjust its costs as well to retain its customer base, as consumers may be more drawn towards lower-priced goods and services.

Characteristics of Duopoly

1. Two Sellers: The seller or producers in a duopoly market are two in number. This gives higher bargaining power to the producers as the consumers are plenty in number depending on these two producers.
2. Interdependence of producers: One notable characteristic of a duopoly market is that the producers mutually depend on each other. This means that the actions taken by one
3. firm will significantly impact the decisions and strategies of the other firm.
4. Collusive behaviour of firms: As only two firms are in the market, they often engage in collusion, meaning they cooperate to raise profits by manipulating market conditions.
5. Fierce competition: Despite the limited number of firms in a duopoly, they fiercely compete with each other in various aspects to maintain their market share and protect their customer base.
6. Substantial monopoly power: Due to the market being divided between the two firms, one firm may have a monopoly-like situation with loyal customers for its differentiated product.

7. Entry barriers: The dominant firms in a duopoly market create barriers to entry for new competitors, making it challenging for them to enter and compete in the market.

8. Economies of scale: Since the duopoly firms produce at a larger scale and have a significant customer base, they enjoy economies of scale, resulting in cost advantages compared to smaller competitors.

Emerging Duopolies in India

Monopolistic practices at an international level can take various forms, but in India, it manifests as a duopoly, where only two companies dominate the market. This creates challenges as these firms appear to be competing, but in reality, they collude to fix prices or control output to the market. This was evident in the case of Coca-Cola and PepsiCo a decade ago, when smaller soft drink companies struggled to survive in India against these global giants. The situation persists today, with Pepsi and Coke constantly vying for market dominance. Similar scenarios had arisen with Myntra, Jabong, and Snapdeal when Amazon captured a significant share in the market, resulting in lower prices for products available on Amazon compared to these sites. With Zomato acquiring Uber Eats, the only two players in the market are Swiggy and Zomato.

Duopoly has been a recurring pattern in the market, where companies with substantial financial resources tend to offer discounted services initially to penetrate the market but quickly shift their focus towards profitability to streamline costs and assert market dominance. These companies often create a façade of competition, but in reality, they collaborate, coordinating price strategies and working together to gain prominence in the market. “Two giants control the narrative and essentially play ping pong. ”

1. Telecom Sector (Jio v. Airtel)

India has a large population and a significant telecom sector which once had twelve operating companies. However, there has been a drastic decline in the last decade, resulting in only four major players. This decline was further exacerbated by the merger of Vodafone and Idea, resulting in the rise of a duopoly in the Indian telecom sector, with Airtel and Jio holding the prominent market share .

In 2016, when Jio made its entry into the Indian telecom sector with its policy of offering free SIM cards and data, it had a significant adverse impact on competition. Established players like BSNL and Vodafone faced challenges and are grappling with significant financial crises. This shift in pricing policies has led to a duopoly in the market, with Airtel and Jio holding the majority of the market share and more than 80% of users preferring these network providers over others.

With the decline of several network providers, India is now facing a duopoly with several implications for market competition, as these firms have the power to set prices. As a result, new entrants may face challenges in entering the market and making significant investments to sustain their operations. This can lead to limited technological upgrades and lower-quality services at higher prices for customers.

The Competition Commission of India has expressed concerns about the potential duopoly in the Indian telecom sector. Telecom service providers have been engaging in non-price competition agreements with Over the Top (OTT) platforms that offer broadcasting and other services to consumers. The Competition Commission has determined that these agreements violate the provisions of Section 3 and Section 4 of the Act, which prohibit anti-competitive agreements and predatory pricing by firms that have attained a dominant position in the market. As a result, the Competition Commission of India has formulated frameworks for OTT and telecom service providers to align with the objectives of the Act .

2. Online Food Delivery Platforms (Swiggy v. Zomato)

In the past five to six years, India has witnessed a rapid change in the food consumption habits of its citizens. Whether it’s a house party or late-night work at the office, people now prefer ordering meals rather than searching for a place that offers their desired cuisine. On New Year’s Eve of 2022, both Swiggy and Zomato, the giants in the food delivery market, crossed 2 million orders each, marking the highest number of orders on a single day to date.

Recently, in the case of National Restaurant Association of India (NRAI) v. Zomato Limited and Others, NRAI has argued that Swiggy and Zomato combined hold over 90% of the market share in the food delivery market (the relevant market after Zomato’s Acquisition of UberEats). This has enabled them to create appreciable adverse effects on competition through their agreements. It has been further contended that these firms have established a dominant position in the market, as evidenced by a lack of significant entry by new players in the past three years.

These firms' access to funding has also created an entry barrier in the market. Additionally, their collection of customer data from past orders through emails, texts, and social media websites and the unilateral agreement with restaurant partners with termination clauses that provide sole termination rights to Zomato and Swiggy without cause at any time further solidifies their position of strength in the market .

The Competition Commission of India issued an order stating that the submissions made by both parties do not constitute prima facie indicate any adverse effects on competition. However, the Competition Commission of India has directed the Director General to conduct further investigation to determine whether the actions of the food delivery giants are in contravention of the Provisions of the Act under Section 3 and Section 4, which relate to anti-competitive agreements and abuse of dominant position, respectively.

3. Online Retail Market (Flipkart v. Amazon)

Be it an academic book or small daily-use equipment, we prefer to order online in our comfortable space. Now and then, there is a solution if it is not available on Amazon, it must be on Flipkart or vice-versa.

Competition Commission of India conducted a market study on e-commerce in India, revealing a widespread consensus among sellers and service providers across all categories that online discounts are the primary factor influencing competition. A significant majority of sellers and service providers indicated that metrics of price and discounts increasingly shape consumer preference. While lower prices may benefit consumers in the short term, the growing emphasis on discounts poses a potential risk to competition in non-price aspects such as quality and innovation, which could negatively affect consumer interests in the medium to long term. The study also revealed the platform price parity clause as a major issue with e-commerce platforms. A platform enforces a price parity clause prohibiting sellers or service providers from offering their goods or services at lower prices on other platforms. The platform contractually imposes this clause on sellers or service providers to ensure that the platform itself offers the lowest price .

In Re: Delhi Vyapar Mahasangh and Flipkart Internet Pvt. Ltd and Ors. , Delhi Vyapar Mahasangh (hereinafter, 'DVM'), a union of micro, small and medium enterprises, alleged that both Flipkart and Amazon had been involved in vertical agreements with selected sellers, resulting in the exclusion of other non-preferred sellers or traders from these online marketplaces. Such conduct is in direct contravention of Section 3(1) and Section 3(4) of the Act. These platforms were also accused of offering deep discounts and inventory advantages and collecting consumer data. They are able to allow pricing below cost due to substantial funding received from investors creating high entry barriers and capital costs for a new entrant in the market. Flipkart and Amazon comprise the bulk of the online retail market in India, holding 53% and 36% of the market share, respectively. Hence, jointly dominate and abuse their dominant position in the market.

The Competition Commission of India, concerning the above contentions, directed the Director General to investigate the matter to determine whether the conduct of these online platforms is in contravention of the provisions of the Act.

4. **Cab Services (Uber v. Ola)**
   With their affordable and convenient taxi services via online app-based platforms, the emergence of Ola and Uber has led to a substantial migration of passengers from traditional transportation methods to these innovative services. Through attractive discounts for passengers and driver incentives, Ola and Uber now collectively dominate nearly 95% of the cab-hailing market in metropolitan areas .
   In Uber v. Competition Commission of India, it was alleged that Uber provides high discounts to consumers and unreasonably high incentives to their drivers to squeeze competition. The Supreme Court held that the amount of incentive Uber provides to its driver exceeds its charges from the customers. Uber is losing Rs. 204/- per trip for every trip, which only makes economic sense as believing that Uber intends to reduce competition. It is a prima facie case contravention of Section 26(1) and Section 4 of the Act. It is clearly a case of predatory pricing and abuse of dominant position.

5. Stock Market (MCX Stock Exchange Ltd. and Ors. V. National Stock Exchange of India)
   The Competition Commission of India conducted a thorough examination of various concepts such as "dominant position," "relevant market," predatory pricing, and "abuse of dominant position" in the context of stock market services, specifically concerning the National Stock Exchange (NSE). The MCX Stock Exchange Ltd. (MCX-SX), which operates as a currency derivatives trading platform, accused NSE of engaging in anticompetitive conduct that violated the Competition Act of 2002. MCX-SX alleged that NSE eliminated competition from the currency derivative segment (CD Segment), discouraged potential entrants through leveraging and waiver of fees, and used exclusionary devices to hinder competition.
   The background of the case involves MCX-SX being approved by the Securities Exchange Board of India (SEBI) under Section 4 of the Securities Contract (Regulation) Act of 1956 (SCR Act of 1956) as a publicly-traded company operating an exchange platform for currency derivatives traders. MCX-SX is promoted by Financial Technologies of India Ltd. (FTIL) and MCX-SX. FTIL specialises in creating and selling software for the financial and securities markets, with its flagship product marketed under the brand name 'oDIN' being widely used by NSE, BSE, and IP companies.
   NSE, established in November 1992 and recognised as a stock exchange in April 1993 under the SCR Act of 1956, operates in various segments, including the CD segment. NSE partially owns Omnesys, a software developer for the financial and security industries, through its wholly-owned subsidiary DotEx, and introduced a new software called 'NoW' to replace FTIL's 'oDIN.' After acquiring a stake in Omnesys, DotEx offered NSE members 'NoW' free of charge for the subsequent year through individual communication.
   MCX-SX alleged that NSE violated sections 3 and 4 of the Competition Act of 2002 by engaging in anti-competitive agreements and abusing its market dominance to eliminate competitors. The fee waiver for one year and the requirement of a low deposit level in the CD segment were cited as examples of NSE's anti-competitive behaviour. Additionally, FTIL was denied access to the CD Segment APIC (Application Programming Interface and Communication) by NSE, preventing users of 'oDIN' from connecting to NSE's CD Segment. Notably, NSE did not levy any admission fees for CD Segment membership.

The issues involved in the case include determining the relevant market in the context of the Competition Act of 2002, whether NSE holds a dominant position in the relevant market, whether NSE is abusing its dominant position, and whether there is a leveraging of monopoly.

The Competition Commission of India conducted its analysis as follows:

The Competition Commission of India referenced the report of the internal working group of the RBI , which recommended the clear separation of the CD segment from other segments in any stock exchange. Drawing on this report, the Competition Commission of India concluded that stock exchange services for the CD segment constitute a separate and distinct relevant market. This determination considered the fundamental differences in the underlying assets, such as equities and currencies, and that the trading platforms for these two types of products are not interchangeable or substitutable.

The Competition Commission of India investigated NSE's market share and activities in multiple areas. It noted that NSE exhibits a high degree of vertical integration, encompassing its trading platform, front-end information technology, index services, and other aspects. Considering the provisions of Section 4 and Section 19(4) of the Act, the Competition Commission of India concluded that NSE holds a dominant position in the relevant market and possesses significant market power.

The Competition Commission of India reviewed the previous circulars issued by the National Stock Exchange (NSE) and found that the informant had been exempted from transaction costs from the outset. In contrast, the NSE's conduct in this regard was inconsistent. Although the Competition Commission of india did not find conclusive evidence to establish that the NSE consistently pursued a fee waiver policy in the nascent market, it concluded that the NSE's practice of offering zero pricing in the relevant market was unfair and constituted destructive pricing.

According to the Competition Commission of India, the NSE's strategy of not imposing transaction fees in the CD segment, which is open to competition, was a form of subsidisation that used monopoly earnings to strengthen its position. The Competition Commission of India also noted that the NSE's refusal to provide access to its Automated Price Improvement (APIC) feature in its 'NOW' program imposed restrictions on consumers of DIN software. Furthermore, the Competition Commission of India observed that IBM, the NSE's parent company, was leveraging its dominance in the non-CD segment to protect its position in the CD segment.

The Competition Appellate Tribunal provided its analysis by stating that the competition commission had outlined key concepts of competition, including relevant market, dominance, abuse of dominance, SSNIP test, predatory pricing, and monopolistic leveraging, in its order. However, it noted that the Competition Commission of India's investigation in this complex situation could have been more comprehensive and rigorous. The Competition Commission of India showed hesitation in addressing the issue of predatory pricing, as raised by MCX. It is essential for the Competition Commission of India to provide detailed guidelines on how penalties are to be computed and under what circumstances penalties may be increased or decreased.

Once the relevant market and dominance boundaries have been established, the subsequent crucial inquiry is whether the alleged activities constitute an abuse of dominance or a violation of Section 4. According to MCX, the NSE's actions can be classified as predatory pricing, an exploitative practice that firms with a dominant position in the relevant market can only undertake.

The first goal of predatory pricing is to acquire and dominate market terms. The NSE argued that since it does not incur any "variable cost" for running the CD Segment, the notion of pricing below cost, i.e., predatory pricing, does not apply, and the cost should be considered as an average variable cost. However, the Director General Report, in this case, examines the variables considered by other jurisdictions, legal precedents from various sources, and diverse studies to assess the concept of predatory pricing.

The NSE's defence of the embryonic market was entirely dismissed, and the act of waiving transaction costs, entrance fees, and data fees expenses were found to be a breach of Section 4 of the Act. The Competition Commission of India concluded that the NSE's practice of offering zero pricing was a blatant form of leveraging that aimed to impede potential rivals from accessing the market and hinder current competition, which was deemed unfair from a competition perspective. The argument of penetrative pricing falls apart as it may be understandable for the initial months but not for three years, indicating a possible strategy to capture the market. Hence, the above-mentioned case studies highlight the widespread existence of duopoly in different sectors of the Indian economy. Although a duopoly can benefit firms by allowing them to maximise profits with limited competition, it can pose risks to consumers with no other options but to depend on these firms and comply with their terms and conditions. Moreover, duopolies can create trade barriers and restrict consumer choices, further amplifying the potential drawbacks of this market structure.

As exemplified by the Uber Case, where the company was accused of engaging in predatory pricing by Competition Commission of India, it is evident that the prices set were unreasonably low, with no valid economic justification other than driving competitors out of the market. In such duopoly scenarios, customers may compare prices, but their choices are limited to these two dominant firms; these firms have the ability to dictate prices that can impact the entry of any potential competitor into the market. If other sellers do not align their prices with those set by these dominant firms, they risk losing customers and the worst case, being forced to exit the market.

Hence, it can be inferred that predatory pricing arises in the context of a dominant relevant market. Firms may first establish a dominant position and then engage in predatory pricing, or in some cases, they may resort to predatory pricing even before attaining a dominant market position.

Recommendations and Way Forward

The major obstacle Competition Commission of India encounters pertains to accurately predicting instances of predatory pricing and abuse of dominant market position. As Per the Act, informants are empowered to lodge complaints against enterprises that engage in such practices. However, suppose an informant falsely alleges such misconduct. In that case, it can adversely impact the reputation of the accused firm and result in frivolous litigation and court proceedings, causing a waste of time and resources for both courts and the business.

During his keynote speech , the chairman of Competition Commission of India highlighted the issue of duopolies in the Indian digital economy, where a few players control a significant market share. These digital giants exercise exclusive control over search engines, retail markets, social media applications, and network marketing infrastructure while providing direct-to-consumer services that compete with independent retailers. As a result, consumer demand and supply are now reliant on these platforms. “Apart from these, significant conundrums are associated with ‘Big Data. Tech giants like Google and Amazon have so much customer data that they always have an advantage over competitors. And this can lead to barriers for new entrants in the markets. Due to huge chunks of customer data, they can always track a customer’s need and work accordingly. The rise of artificial intelligence will increase the economy’s dependency on data. Algorithms can be used in a complex manner, making it hard to track data regarding the competition rules. The EU also considers “big data” as a structural barrier to entry into the market.”

An approach to addressing the issue of duopoly could be the inclusion of collective dominance in the legal framework. Currently, the Act only acknowledges dominance by a single entity and does not recognise the possibility of multiple entities jointly holding and abusing dominant market positions.

“Collective dominance refers to a situation wherein two or more enterprises jointly hold the position of dominance in the recognised market. Abuse of such collective dominance is observed when such multiple undertakings, who may individually hold minimal market share, form such common conduct or relationships that they act together in a way that there is no effective competition between them, at the expense of other competitors” . Article 102 of the Treaty on the Functioning of the European Union encompasses the concept of abuse of dominance by “one or more undertakings” . In Italian Flat Glass Case the Court ruled that “there is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators in the same market”.

The Competition (Amendment) Bill of 2012 proposed the concept of collective dominance by expanding the scope of Section 4 of the Act. However, it could not become an Act. This gap in the Act has had severe consequences, as there have been several instances where action could not be taken against entities abusing their dominant position. In the DVM Case, Competition Commission of India noted that the Act does not recognise the concept of collective dominance. Similarly, in Neeraj Malhotra v. Deutsche Post Bank Home Finance, the Competition Commission of India observed no contravention of Section 3 or Section 4 of the Act since none of the banks or financial institutions single-handedly dominated the market.

From the above cases, it becomes apparent that the existing loophole in the legal framework allows these dominant firms to evade liability with ease. Despite the fact that these firms may not hold a dominant position in the market individually, they engage in collusive practices to jointly establish and maintain their dominance. This collusion enables them to manipulate the market, resulting in anti-competitive behaviour that may harm consumers and hinder fair competition.

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