

## Discounts Deeper Than Mariana Trench: Predatory Pricing by Indian E-Commerce Giants

written by Pawan Khatri | January 16, 2020



Online shopping festivals such as “The Great Indian Sale” and “Big Billion Day” offer products at huge discounts and have always been a center of controversy wherein serious allegations of anti-trust and FDI

policy violations are made against top E-commerce giants by the association of

retail traders called The Confederation of All India Traders (“CAIT”) and various other parties.

CAIT has repeatedly made allegations against Flipkart and Amazon for following unethical and unfair trade practices wherein their deep pockets enable them to suffer losses and offer products at unfair or predatory prices as a measure to wipe out competition from the market. While the consumers do not realise anything wrong with huge discounts in the short run, the long-term impact of predatory pricing can be catastrophic as such e-commerce giants can exploit prices after wiping out the competition and capturing the market.

While the merit of allegations of antitrust violations is to be assessed by Competition Commission of India (“CCI”), we can take a look at what constitutes predatory pricing and whether preliminary analysis of the facts establishes a possibility of these e-commerce giants actually indulging in unfair trade practices by deep discounting and predatory pricing as a measure to wipe out the competition. What is

Predatory Pricing?

Predatory Pricing has been defined as a short term strategy adopted by market giants with deep pockets to sustain losses and reduce the prices of their products below the average variable cost as a measure of wiping out competition from the market.[1]

The Competition Act, 2002 “the Act” defines and prohibits the abuse of dominant position in Section 4 of the Act. Section 4(2)

further states that offering products or services at an unfair or discriminatory price either directly or indirectly constitutes abuse of dominant position. Further, Section 4(2) (a) (ii) mentions ‘Predatory

Pricing'

as a form of unfair or discriminatory pricing and ultimately as abuse of dominant position.

The reason why Predatory Pricing is illegal under the Act is simply because of the harmful impact it has on the competition in the market. The practice of Predatory Pricing creates hurdles for new entrants willing to enter the market and also adversely affects consumers in the long run when prices go up due to the lack of competition.

However, Predatory Pricing has been repeatedly termed as an inefficient method of capturing the market despite being illegal. Nevertheless, there have been instances where the practice has helped dominant players make good profit by exploiting the price higher after capturing the market.

Whether

Deep Discounts on Sale by E-Commerce Giants constitute Predatory Pricing?

E-commerce

giants have been directed to disclose the names of the top five sellers on their respective platforms, an elaborate list of price of goods of vendors suggested as site's preferred sellers and the kind of support which is provided

to the sellers. They have also been asked to fill in individual questionnaires

wherein they have to reveal and disclose their capital structure, elaborate note of business process and model as well as the inventory management system. The

crux of claims by e-commerce giants in response of the allegations was that they have little or no influence on the pricing mechanism as the sellers were provided with live dashboards enabling them to see prices being offered for specific products by fellow sellers and the sellers themselves decide on the discount they're willing to give and modify the prices offered for the products

accordingly. They further stated that the sellers unlock the possibility of good profits in short term despite the low margin of profit on each sale as the

collective or combined profit during the sale season is substantially high as compared to the normal days due to high sales. Another defence took up by the giants was that the losses incurred by them are not due to predatory discounting but due to investments in building the business and technology.

The stance taken by CCI & Competition Appellate

Tribunal ("COMPAT"), includes the following

test of recoupment and intention to ascertain if the facts and the factors constitute predatory pricing. In the case of *H.L.S. Asia Limited, New Delhi v.*

*Schlumberger Asia Services Ltd. Gurgaon and Oil & Natural Gas Corp. Limited, New Delhi*[2],

CCI held that if the aggrieved party is seeking a remedy for alleged predatory pricing, the most important factor is the determination of the average variable cost. Further, the said determined average variable cost should be higher than the current offered price of that product.

In the order of *M/s. Transparent Energy Systems Pvt. Ltd. v.*

*TECPRO Systems Ltd.*[3],

CCI held that three conditions have to be satisfied to ascertain whether the

practice of a dominant firm constitutes predatory pricing-

- The price being offered for the goods or service should be lower than the average cost of production of the product or acquisition of service.
- Such kind of manipulation in the price of the product was done with the intention of wiping out competitors from the market.
- A substantial plan exists with a motive of recovering or recoup the losses incurred due to dropping the prices by jacking the prices high again after eliminating the competitors from the market.  
This is not the first time that such allegations have been made against online retailers. CCI has examined similar cases in the past and rejected them due to various shortcomings in the essence of alleged practice to have any appreciable adverse effect on the competition in the relevant market.  
The position of an online marketplace is to be treated as part of the same relevant market as brick and mortar stores; this was made very clear by the CCI in SanDisk case<sup>[4]</sup> as they're separate channels of one relevant market and not distinct relevant markets.

Since Predatory Pricing is a form of abuse of dominant position as per Section 4 of the Act, it is a pre-requisite to establish that the alleged party is a dominant player in the market which is decided by the market share in the relevant market. And time and again, CCI has held that online marketplaces cannot be considered as dominant players on the basis of their current market share.

Even if they were to be considered as a dominant player in the market, the essentials of Predatory Pricing are hard to be fulfilled as discounts on online market places during such sale do not necessarily

constitute Predatory Pricing. The aggrieved party shall have to establish that

such discounts were financed by online retailers and not the vendors/sellers themselves. Further, they will also have to establish that the final offered price was lower than the average variable cost of such products.

Arguendo, the above two components are established.

The party shall still be required to establish that a plan exists with a motive

of recovering or recoup the losses incurred by jacking the prices high again after eliminating the competitors from the market.

Conclusion

Therefore, it is very hard to substantiate allegations of Predatory Pricing against e-commerce giants from a legal standpoint. As on preliminary analysis of the facts, it can be seen that the essence of the practice fails to establish any appreciable adverse effect on the competition in the relevant market. And, even with deeper analysis, it shall be farfetched to consider e-commerce retailers as dominant market players with their current market share as e-commerce is not considered as a distinct relevant market. However, a

probe has been initiated by CCI against Flipkart and Amazon due to allegations of vertical arrangements such as preferential listing, exclusive tie-ups, private labels and preferential sellers. Such allegations based on ongoing practices on these platforms are likely to be charged as a violation of Section 3(4) read with Section 3(1) and Section 4(2) read with Section 4(1) of the Act.

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- [\[1\]](#) Hovenkamp, H., Federal Antitrust Policy-The Law of Competition and its Practice, 3rd ed., 2005, Thompson West.
- [\[2\]](#) Case No. 80/2012, 2013.
- [\[3\]](#) Case No. 09/2013, 2013.
- [\[4\]](#) Ashish Ahuja v. Snapdeal.com through Mr. Kunal Bahl, CEO & Ors., Case No. 17/2014

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