Has the Supreme Court Changed Below-Cost Pricing to Predatory Pricing?

Soham Goswami
18 October 2019

The Supreme Court of India has passed an order dismissing the appeal against the erstwhile Competition Appellate Tribunal's (**"COMPAT"**) decision in *Meru Travel Solutions Pvt. Ltd.* v *Competition Commission of India.*Vide judgement dated 3 September 2019, Rohinton F Nariman and Surya Kant JJ affirm the COMPAT's decision.

Briefly: vide order dated 10th February 2016, the Competition Commission of India (**"CCI"**) had dismissed an Information filed by Meru Cabs on the grounds that conflicting statistical reports had been filed by the Informant and Uber was not a dominant player in the delineated market. In appeal, the COMPAT held that the CCI had selectively read the reports and misunderstood them as a result and further, did not take the other factors in assessing dominance under Section 19(4) into account; as a result, the COMPAT reversed the CCI decision and sent the matter to the Director General to investigate. Uber appealed the COMPAT order to the Supreme Court.

The Supreme Court's judgement (I shall refer to the same henceforth as a *dismissal order*; the Court has declined to hear this appeal on its merits) sets out the following reasons for not interfering with the COMPAT order:

The ingredients of abuse of dominance set out in section 4(1) are two, i.e. a dominant position and its abuse;

Explanation (b) to section 4(2)(a)(ii) (predatory price) would automatically attract scrutiny insofar as a dominant entity engages in below-cost pricing ("predatory pricing" in the language of the Competition Act 2002) thereby attracting this section *prima facie.* Notice the circular reasoning.

This reasoning could spell trouble for competition law jurisprudence in India. It implies, if not expressly provides for, *per-se* treatment of below-cost pricing. Note that below-cost pricing is arguably a misunderstood area of competition law, prone to errors known as Type I and II errors (false positives and false negatives, the latter being significantly more detrimental to consumer welfare) and can only turn predatory in a given set of circumstances. These decisions collectively state that:

below cost-pricing *under* the firm's average variable cost (AVC) is inherently predatory;

Pricing above AVC and below average total cost (ATC) are only predatory where there is an actual or likely detrimental effect on competition,

the firm accused is *unable to offer an objective justification.*

The CCI explained the framework to assess anti-competitive effects of predatory pricing in *MCX* v *National Stock Exchange & Ors.* This decision was affirmed by the erstwhile COMPAT:

"before a predatory pricing violation is found, it must be demonstrated that there has been a specific incidence of under-pricing and that the scheme of predatory pricing makes economic sense.

The size of Defendant's market share and the trend may be relevant in determining the ease with which he may drive out a competitor through alleged predatory pricing scheme-but it does not, standing alone, allow a presumption that this can occur. To achieve the recoupment requirement of a predatory pricing claim, a claimant must meet a two-prong test: first, a claimant must demonstrate that the scheme could actually drive the competitor out of the market; second, there must be evidence that the surviving monopolist could then raise prices to consumers long enough to recoup his costs without drawing new entrants to the market."

(emphasis mine.)

The two-prong test is in conformity with jurisprudence from the EU dealing with below-cost pricing, which is usually followed as precedent in the CCI and Appellate Tribunal. Supreme Court's decision would, in practice, reverse this test to require the enterprise accused by the informant herein to demonstrate either a lack of market power or that it had no intention to increase prices. Neither are supposed to be incumbent upon the accused enterprise.

The legislative framework of the Competition Act 2002 allows the CCI discretion *("if the Commission is of the opinion...")* in establishing a *prima facie* opinion; however, any case involving below-cost pricing is now, in the Court's language, predatory pricing and therefore a *prima facie* case:

"Explanation (a)(ii) would prima facie be attracted inasmuch as this would certainly affect the appellant's competitors in the appellant's favour or the relevant market in its favour.

Insofar as 'abuse' of dominant position is concerned, under Section 4(2)(a), so long as this dominant position, whether directly or indirectly, imposes an unfair price in purchase or sale including predatory price of services, abuse of dominant position also gets attracted."

The Supreme Court had, most recently in *West Bengal Electricity Regulatory Commission* v *Calcutta Electricity Supply Corporation*, set out the law relating to an appellate court's ambit of powers while considering a tribunal's decision. Merely because the appellate court believes that on review of the material before it that a contrary outcome is possible, it should not substitute its views for that of the regulator's. This is owing to the lack of expert qualifications on the appellate court's bench. Though the Supreme Court has affirmed the COMPAT order in the present case, it has gone a step further and substituted an arguably more reasoned order (the COMPAT order) with its own findings; the doctrine of merger will require that the COMPAT order will now merge into the Supreme Court's.

The CCI has no established competition policy; two attempts by the Ministry of Corporate Affairs to publish a national company policy never bore fruit. The legislative framework of the Competition Act 2002, however, allows the CCI to exercise a great deal of discretion at the section 26(1) stage (this is not a quasi-judicial order). As can be seen above, given that below-cost pricing issues need significant scrutiny, and therefore the CCI's discretion is warranted. However, the regulator must now necessarily treat all Informations dealing with below-cost pricing as predatory pricing complaints, and must refer the same to the Director General for investigation.

This has far reaching implications for a regulator that only last month celebrated ten years of its functioning. One might recall that the legal framework governing the CCI's predecessor, the Monopolies and Restrictive Trade Practices Commission, proceeded under the presumption that *any* restrictive trade practice was prejudicial to the public interest unless the parties could demonstrate that their case fell within the strict exceptions under section 38 of the old statute. The CCI should not proscribe below-cost pricing unless the test explained in *MCX* is satisfied, and by the informant; to do otherwise would be detrimental to Indian competition law.

It remains to be seen whether the Dismissal Order is applied by prospective Informants in claims involving below-cost pricing.

Civil Appeal 641 of 2017, against COMPAT Appeal 31 of 2016.

Competition Commission of India, Case 95 of 2016.

See Case C-62/86, *AKZO Chemie BV* v *Commission* [1991] ECR I-3559 and Case C-209/10, *Post Danmark A/S* v *Konkurrenceradet.*

Competition Commission of India, Case 13 of 2009.

(2002) 8 SCC 715.

s 38, Monopolies and Restrictive Trade Practices Act 1969.

Pic courtesy: By Petar Milošević – Own work, CC BY-SA 4.0, https://commons.wikimedia.org/w/index.php?curid=42775314

Cite as (OSCOLA, 5th ed.): Soham Goswami, 'Has the Supreme Court Changed Below-Cost Pricing to Predatory Pricing?' (*The Innovation Brief*, 18 October 2019) <https://innovationbrief.nludelhi.ac.in/essays/has-the-supreme-court-changed-below-cost-pricing-to-predatory-pricing> accessed 18 November 2026.

The opinions expressed in the Blog are personal to the author/writer. The University does not subscribe to the views expressed in the article / blog and does not take any responsibility for the same.

Published by the Centre for Innovation, Intellectual Property and Competition, National Law University Delhi. Read online at https://innovationbrief.nludelhi.ac.in/essays/has-the-supreme-court-changed-below-cost-pricing-to-predatory-pricing.