



Predation or Competition: Demystifying the Dilemma in Platform Markets

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Abstract

Predatory pricing, as an instrument of abuse of dominance, has always been a conundrum for antitrust regulators, academia, and businesses alike. Starting from the very rationality of predatory pricing strategy to various tests that form part of the assessment framework adopted by competition agencies and courts, there has hardly been a consensus. This paper starts by highlighting how frictions and dilemmas have been further intensified in digital economy markets and highlights how, faced with “hyper-competition,” and riding on network effects and big data, deep discounting and abysmally low pricing is the most widely adopted pricing strategy. This calls for a revised assessment framework to ensure that competition authorities do not end up penalising efficient low pricing. To this end, the paper highlights myths associated with low pricing strategies which may not merit antitrust intervention, while also pointing out fallacies of the existing assessment framework. The paper further suggests an alternative dominance assessment and pitches for developing novel theories of harm that factor in the characteristic features of digital markets.

Keywords: predatory pricing, digital platforms, dominance

Background

“Deregulators appear to be of two minds about antitrust. They denounce the actual practice of its enforcement. Yet, almost without exception, they endorse it in principle”.

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“Antitrust may be the last refuge of the notion of “enlightened” regulation: it is thought of as a target for regulatory reform, not deregulation”.

The above quotes by Fred L. Smith Jr. in his 1983 publication titled “Why not Abolish Antitrust,” in the context of antitrust in general cannot apply more to the concept and the enforcement of predatory pricing abuse in particular. It is indeed remarkable that there is still no unanimity even on the very basic concepts of predatory pricing, viz., whether predatory pricing is at all a rational business strategy from the seller’s perspective or whether a strategy resulting in lowering of prices for consumers warrants any antitrust intervention, given that lower prices are the most objective indicator of consumer welfare. To add to the issues relating to predatory pricing, the enforcement framework followed across jurisdictions is also debatable on all the touchstones involved, i.e., the test of dominance, price-cost tests, and other tests such as intent test or recoupment test.

The aforesaid frictions and dilemmas are further intensified in digital economy markets. Posed with the situation of “hyper-competition” and riding on network effects and big data, deep discounting and abysmally low pricing are the new normal for digital platforms, as such platforms operate on pricing models designed to develop the user base critical to their functioning and success. Thus, the business model inherent in platform markets, and accordingly, being the very basis of competition therein, may find itself tested for compliance with predatory pricing norms time and again, frustrating both the competitive process and the outcomes. Moreover, the limitations of enforcement approaches are magnified when applied to the platform markets, as the words “price” and “cost” in such markets may have multiple layers encompassing the interactions between stakeholders on various sides of the platform. Any inference of the “intent” based on circumstantial factors in such markets is likely to be clouded between being a competitive response or a predation strategy, etc.

In this paper, the authors seek to identify the basic concerns with predatory pricing as a potential abuse of dominance in general and in the context of digital platforms in particular. The objective is not to dismiss or reduce the gravity of the concern but to identify the factors which need

to be considered in the analysis so as to avoid/reduce temptations of overzealous enforcement and arrive at the desired outcome of preserving effective competition and upholding efficient market outcomes.

This paper is divided into four parts. Part 1 highlights the conceptual issues with the rationality of predatory pricing as a viable business strategy; Part 2 provides the broad assessment framework for examining any predatory pricing claim and brings out the conceptual issues in each leg/test of such assessment; Part 3 elucidates the features of digital platforms that set such markets aside from traditional markets from a predatory pricing assessment point of view. This part also briefly highlights certain myths associated with predatory pricing assessment in such markets besides highlighting the practical issues arising from the unique characteristics of digital platforms. Part 4 is the conclusion, which proposes certain ways to deal with some of the issues highlighted in the paper.

Part 1: Conceptual Issues with Rationality of Predatory Pricing as a Viable Business Strategy

Before discussing the “blizzard of rules” (Easterbrook, 1981) theorising unlawful predatory practices, it would be appropriate to discuss the protracted debate regarding the rationality of predatory pricing as a business strategy. There is a school of thought which, to a large extent, any likelihood of predatory pricing as a viable business strategy. McGee (1980), Easterbrook (1981), etc., lead this school of thought and argue that, considering factors such as (i) costs of the predator being larger and real (by virtue of dominant position); (ii) anticipated future gains needed to be discounted for both Present Value (PV) and uncertainty; (iii) factoring in the competitive response from prey which can complicate life for the predator and cause delay in the achievement of desired outcome adding to the already uncertain strategy; and (iv) the fact of alternative strategies such as mergers being legal and better in terms of process and outcomes, predatory pricing is not a viable and rational strategy.

While the factors highlighted above are very relevant, the key question is whether it is appropriate to apply them as generalised principles to rule out the possibility of existence of practice of predation. In fact, as noted

by Whish and Bailey (2015), the aforesaid is an extreme position which now has fairly few advocates. Conversely, it has been acknowledged that dominant firms are able to act in a predatory manner and game theory can demonstrate the same. However, strictly going by rationality, the debate is ongoing and far from settled. Lott, in his book *Are Predatory Commitments Credible? Who Should the Courts Believe?* (1999), tested one of the most important premises of game theory – that a potential predator could “credibly commit” to predatory pricing without necessarily having to engage in it. Lott studied 28 firms accused of predatory pricing and found the key implicit assumption of the “credible commitment” to be untrue.¹ As Lott (1999) put it, “The results seriously challenge the relevance of game-theoretic predatory models by showing that their assumptions are inconsistent with actual firm behavior”.

However, it is equally important to note that there may be more to decision making than rationality. Economists have often debated that, while conventional economic analysis confines itself to rational, quantifiable facts, economic decision-makers are often intuitive, emotional, and irrational. John Maynard Keynes wrote that data about long-term return is insufficient to support a truly rational calculation and that such decisions “can only be taken as a result of animal spirits” (Akerlof & Shiller, 2010). Thus, even if the notion that predation may not be a rational strategy is accepted, it may not necessarily rule out the existence of predation as a business strategy. Instead, it may be worthwhile to consider the aforesaid factors as a starting point in the analysis to set the framework for assessment, i.e., competition agencies may do well to analyse the alleged predation claim initially in aforesaid terms to evaluate what constitutes a “rational” behavior or what constitutes an “economic sense” under the circumstances, and the same could be vital to the overall investigation.

The aforesaid principles advocated against the plausibility of predation can and should be applied to all cases across the conventional and digital sectors to bring out what may constitute rationality for predation considering the specific characteristics of the case. However, as this paper is focused specifically on the possibility of predation in digital market platforms, it may be appropriate to apply the aforesaid framework to

evaluate in general terms whether predation can be a rational strategy in such markets.

- *Deterrence by virtue of larger costs of the predator:* The larger costs on a standalone basis do not communicate much regarding the viability of a predation strategy unless the same is seen in comparison with the associated revenue streams. The high technology markets are generally said to be characterised by a “winner takes all” outcome, and the same can be said to be the most diligently followed objective by most technology firms, implying that pricing decisions, incentives to innovate, etc., are all linked to the achievement of this *numero uno* monopoly state. Under such circumstances, the larger costs may not be a deterrence if the anticipated pay-offs from practices including predation are significantly large. Even moving away from the broad position as stated above, the technology industries are characterised by a significantly large share of fixed costs in their overall large cost base, which may also nudge firms to price at significantly lower levels without considering the fixed costs.
- *Discounting of anticipated future gains and competitive response of the prey:* The concept of discounting is relevant when higher pay-offs are anticipated for limited future period. The same may lose relevance if a firm anticipates a monopoly position for a significant period of time promising gains high enough in absolute terms to eliminate the loss of time value of profits foregone. This tendency is well exhibited in the prolonged price wars between such firms, wherein the firms are willing to put all at stake for eventual success at monopolising the market.
- *Mergers as an alternative?* Mergers and acquisitions though legal cannot be said to be better (by default). The realisation of potential synergies between firms depend to a large extent on the successful integration of firms, which is always fraught with uncertainties. In the event of a failed integration, unscrambling the combination can be costly. Further, such firms, at times, do not want to risk sharing information which may be a prerequisite for valuation, etc., for fear of loss of sensitive information in the event of a failed transaction. Additionally, mergers and acquisitions also require regulatory approvals, which further lend at least some degree of uncertainty in the outcome.

- *Digital platforms incentivise predation:* Besides the non-applicability of the aforesaid factors in digital platforms, an extremely relevant aspect of platform markets is that the business models in such markets by their very nature incentivise low pricing strategies, considering the importance of network effects. On the one hand, the increased availability of information/data with a successful digital platform may empower it to indulge in anti-competitive conduct such as predation and on the other, the consequent increase in the volume of transactions and resulting greater access to information can allow it to fort the position from future competition.

Thus, considering the aforesaid, it is argued that viable predation is not just a viable a strategy in digital markets, but the most sought after one, considering that competition is “for the market” and incentives are significant in the form of potential monopolisation of the entire market and associated gains.

Part 2: Conceptual Issues in the Assessment of Predatory Pricing Claims

On the assessment front, predatory pricing is defined in terms of practices and position of the predator and preyed firms. Simply put, in competition law terms, the strategy of a dominant firm (predator) to charge below its own cost in the short run to oust a viable competitor (preyed) firm from the market in the hopes of charging monopoly prices when such competitors are ousted is predation (Bhattacharjea, 2018). The first prerequisite of any examination of alleged predatory pricing case is assessing whether the firm alleged to be predating is in a dominant position or not. If a firm is concluded to be non-dominant, predation as a strategy is generally not perceived to make any sense, as the firm’s actions are not considered grave enough to drive any of its competitors out of the market so as to make future gains from expected enhanced market power a real possibility. Under such competitive market situations, low prices (even unreasonably low prices) are perceived to be efficient and reflective of competition dynamics. On the other hand, such low prices by a dominant firm triggers antitrust scrutiny. In the assessment framework, the next issue considered is whether the prices were actually

unreasonably low when tested against the acceptable cost threshold, such as MC^2 , AVC^3 , AAC^4 , etc. Further, a theory of harm in terms of the intent for such unreasonably low prices (and effect)⁵ needs to be developed for comprehensive assessment. In cases where prices are found to be unreasonably low or meeting the below-cost threshold, the period of predation may become a relevant factor to ascertain whether the same was long enough to cause foreclosure of existing firms and deter entry of new firms so as to enable the predator to exercise market power and make up for the losses sustained during the predation period. In a nutshell, the broader enforcement framework comprises the following foundational steps/tests in any predatory pricing assessment:

1. Test of Dominance;
2. Price-Cost thresholds;
3. Intent; and
4. Recoupment Ability Test

While there may be differences in exact enforcement approach followed by different jurisdictions, and all jurisdictions may not consider all tests as relevant or may use different versions of tests, the above tests reflect a broader framework which is relevant for any discussion on predatory pricing.

The following section discusses the broad theoretical as well as decisional frictions as regards each of the above stated foundation step/test in the traditional markets, with an array of anticipated frictions which may arise in platform markets.

Test of Dominance

In almost all competition law statutes, predation is seen as an antitrust issue when indulged in by a dominant firm. While, in the context of traditional markets, dominance being a prerequisite for predatory pricing has been widely accepted without friction and has not led to any incoherence that digital platforms pose different concerns owing to their distinct inherent characteristics.

Driven by network effects, the competition is “for the market” in digital platforms, and often, becoming a dominant player is the most sought-after outcome of such competition. During such “competition for the market” phase, players compete vigorously to ensure that the market tips in their favour. With this aim/expectation, firms have strong incentives to lower prices during the competitive process (also below relevant cost thresholds) to become such a dominant player. Once that phase is surpassed, there may not be any reason for such a player to predate anymore, because existing competitors would have exited the market, and the created network effects generally act as insurmountable entry barriers to dissuade new entry. So, once the first condition (dominant position) is achieved, there may not be any requirement/occasion for such players to indulge in price wars (below-cost pricing) that form the basis of the second condition. Thus, there exists a strong possibility in digital platforms that all subsequent conditions (i.e., below-cost pricing, intention to exclude a rival, and possibility of recoupment) are being met in the process of gaining dominance itself, i.e., without the entity being a dominant player as per conventional standards.^{6,7}

Alternatively, even if the conventional framework for the assessment of abusive conduct that prerequisites a positive finding on dominance is followed, it is imperative to devise a right framework for assessing such dominance. For example, in *Bharti Airtel Limited vs. Reliance Industries Limited & Other* (2017)⁸, the allegation of Bharti Airtel Limited was with regard to the free services provided by Reliance Jio since its inception. Guided by the assessment framework under the Competition Act (2002),⁹ CCI found Reliance Jio to be a new entrant in the market having a small customer/subscriber base and disagreed with the Informant’s contention of relying dominance assessment on Reliance’s financial strength to sustain a predatory pricing strategy. The assessment framework may have additionally factored in the overall position of the entity as reflected by its overall size and resources with a view to examine its ability for cross-subsidisation, instead of relying purely on market shares or market power in narrow contours of the relevant market in which predation has been alleged to have a negative effect on dominance. This would have

allowed a holistic consideration of the factors such as incentives to engage in predation as well as the impact of the alleged conduct.

Price-Cost Tests

The literature on predatory pricing depicts numerous attempts being made at framing appropriate costs thresholds/benchmarks to ascertain when a price is predatory. However, academicians as well as antitrust authorities are still far from having any meaningful consensus on the appropriate cost benchmark which can be considered as a baseline for predation. The *Report on Predatory Pricing* issued by the International Competition Network (2008) states that there is no single cost measure used by agencies and refers to the marginal cost, average variable cost, average avoidable cost, long run average incremental cost, and average total cost as cost measures commonly cited by agencies for price-cost tests for predation. Further, if myriad cost measures were not sufficient to imply lack of objectivity, the report states that, frequently, agencies have used more than one measure, i.e., agencies do not necessarily use the same cost measure in every case. Areeda and Turner necessarily (1975) suggested that a price use the same cost measure in every case. Should be deemed predatory (under US Law) when it is less than the dominant firm's AVC (Whish & Bailey, 2015). While that is more strictly based on cost standards, later commentaries and judicial pronouncements suggested that such price-cost comparison framework should be supplemented with intent and recoupment¹⁰ as part of the assessment framework for a more reasoned and logical framework.

The OECD (1989) report on predatory pricing takes note of the various relevant cost concepts and the problems they may pose in analysis but downplays the difference. It reads, "While there is dispute as to whether the focus should be short- or long-run cost, and full cost versus average variable cost, that dispute is perhaps narrower than it might seem. Areeda and Turner, the main proponents of a short-run average variable cost test, include a number of items in their definition of short-run average variable cost which tend to bring that cost measure closer to full cost." The indicated solution and reconciliation do in fact imply potentially more

subjectivity and bias, even in the application of an indicated cost test. It implies that it is quite possible for an agency which has prescribed AVC standard to stretch or compress the application to the desired end.

The aforesaid conceptual issues are just the tip of the iceberg, with issues such as lack of availability of relevant economic cost information, limitations of accounting records to reflect economic costs, scope of assumptions in allocation and apportionment of common costs for multi-product firms, nature of the industry to which the firms belong, etc., further clouding the analysis and results. Thus, the objective measure does not appear to be very objective, considering the above.

Intent Test

This leg of the test, by definition, is subjective. It comprises a qualitative analysis of conduct to establish whether the low-price strategy is intended to harm competition and oust competitors or to meet competition, or whether the same is inherent and efficient considering the nature of the industry and state of the allegedly predatory firm. Any deterministic findings on these aspects involve the analysis of a number of factors which would necessarily be complex and at times may unearth potentially contradictory aspects.

There has been a divide amongst jurisdictions and even economists with regard to whether evidence related to intent should form part of the assessment framework in predatory pricing cases. At least two reasons are apparent for such convergent views: firstly, there is no clear definition of what would constitute “anti-intent”; and secondly, how would one differentiate between intent to exclude when the process of competition also aims towards garnering a comparatively greater market share (which would imply excluding competitors).

In the AKZO case, the European Commission, while analysing the pricing strategy of AKZO for predatory price cutting, rejected the Areeda and Turner test that prices above AVC should be presumed lawful and rather, held that it is relevant to consider whether the dominant firm had reduced the prices as an overall plan to eliminate competition (Commission’s Decision of 14th December 1985 (IV/30.698 - ECS/AKZO),

1985). This was upheld in appeal by the European Court of Justice (ECJ), which laid down standards to determine when the prices are considered to be predatory. Thus, intent becomes an extremely relevant factor, when the prices are above AVC but below ATC¹¹ as “[s]uch prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them”.¹² This approach was largely reiterated and confirmed in later cases in the EU where pricing above AVC but below ATC was found to be predatory in cases where intent to eliminate was apparent.¹³ The approach of the Commission as regards the cost standards was confirmed by ECJ in *France Télécom SA v. Commission of the European Communities* (2009)¹⁴ and again in *Post Danmark vs. Konkurrenceradet* (2012),¹⁵ wherein ECJ specifically stated that prices above the average incremental costs (the measure used by the national competition authority in initial adjudication) but below ATC were unlikely to be abusive unless it was shown that the dominant firm had deliberately sought to eliminate a competitor. *Post Danmark*, however, also underlines greater emphasis on the relevance of assessing the real risks of foreclosing an “as-efficient competitor” (Rosenblatt et al., 2013).

In the US, however, the principles may not be as clear. While some courts hold that prices above AVC are lawful, others hold the presumption that prices between AVC and ATC can be rebutted by the plaintiff who shows that the defendant intended to act improperly. Unfortunately, for both antitrust plaintiffs and defendants, there is no consensus in US courts as to how proof of the defendant’s subjective intent to monopolise should be used, or whether such evidence is even relevant to claims of predation (Quinn, 1990). While in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* (1985),¹⁶ the US Supreme Court indicated that specific intent is germane to the issue of attempted monopolisation, in *Matsushita v. Zenith Radio* (1986)¹⁷ and *Atlantic Richfield v. USA Petroleum* (1990),¹⁸ the court failed to address the issue of subjective intent, discussing predation only in the context of antitrust injury.¹⁹ The more recent decisional practice in the US, e.g., the Supreme Court’s observations in *Brooke Group Ltd. v. Brown*

& *Williamson Tobacco Corp* (1993),²⁰ reveal that the subjective evidence of intent, no matter how strong and unambiguous that evidence may be, cannot establish predation unless objective market factors showed that recoupment is possible.

The aforesaid dilemmas and frictions get further intensified in the context of digital platforms due to the presence and intricate interactions between different sides of the platforms. Different intentions and motivations of different players involved in a transaction makes it difficult to ascertain whose intention needs to be seen in the third leg of predatory pricing analysis – for example, in the case of emarketplaces (Amazon/ Flipkart), should the intention of resellers selling through such platforms be seen or the intention of e-marketplace.

Recoupment Test

Generally, in traditional markets, recoupment would mean showing an increase in price after a competitor is ousted from the market. This also serves as a potent theory of harm as the consumer, having benefitted in the short run because of the aggressive price competition or predatory/ low prices, would have to pay more because of no-competition post elimination of competitor from the market. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp* (1993),²¹ the US Supreme Court categorically highlighted that absent recoupment and predatory pricing produce lower aggregate prices in the market, and consumer welfare is enhanced,²² thus not necessitating antitrust intervention if the objective is consumer welfare. Thus, at least in the US,²³ where showing “dangerous probability of recoupment” serves as a necessary pre-condition for penalising an entity for predatory pricing, non-increasing of prices, or such possibility post elimination of other competitors may act as a hindrance to conclude a finding of predatory pricing.

Besides the challenges of applying such concept of recoupment in zero-priced products/services, there can be challenges even in markets where digital platforms charge a monetary price for their offerings.

Commenting on one such market in his paper, i.e., e-marketplaces, Sussman (2019) argues that, for this precise reason, the current perception

of recoupment is too limited and that recoupment can occur without raising prices post-predation. In particular, his paper demonstrates that recoupment can be achieved in the post-predation stage by achieving greater technological or volume efficiencies that enable the attainment of a previously unattainable “break-even threshold.” Accordingly, the article suggests that, in certain circumstances, predatory pricing is a sound business decision with a high probability of successful recoupment even without raising the absolute prices. Thus, the paper argues that firstly, theoretically, it is possible that Amazon is engaging in short, medium, or even long-term phases of below AVC price predation as part of its overall expansion strategy. Secondly, that if such predation occurs, it is subsidised by short- and medium-term borrowing/funding. Thirdly, in the long run, recoupment will occur once Amazon achieves its “break-even threshold” and that this type of recoupment will not necessitate any rise in average prices.

It can be possibly argued that if the recoupment stage in digital platform markets is not leading to any increase in absolute prices, how does it lead to consumer harm. The authors are of the view that exclusion of competition by predation (i) takes away the opportunity to compare a counterfactual scenario where the increased efficiency (because of achieving the break-even threshold) could have been passed on to end consumers in terms of even lower prices; and (ii) it reduces consumer choice and also adversely impacts the process of innovation in product development, both considerations being detrimental to consumer welfare. Thus, apparently, the recoupment test as understood in traditional markets, i.e., an increase in prices by the predator once the rival is excluded from the market, may need to be revisited to evolve a different framework for digital platform markets.

Part 3A: Features of Digital Platform Markets and Consequent Practical Issues in Assessment

The features of digital platforms have become a subject of great debate and discussion in the context of predatory behaviour. In this part, the authors have attempted to discuss the features and consequent impact on predatory behaviour.

Busting the Myths

In the context of digital platforms, since low pricing is the basic characteristic, it is imperative to guard assessment from resulting in regulatory overreach. For this, it is necessary to first highlight issues which may look like predatory pricing from a layman's perspective, though they are not issues which should generally bother intervention by antitrust authorities.

These are: (i) the practice of deep discounting; and (ii) the fact of digital platforms making losses.

Deep Discounting is not a Predation Concern

The two terms which have been used together and, at times, interchangeably, in the context of price-related competition abuses in the Indian e-commerce sector are predatory pricing and deep discounting. At the outset, it would be appropriate to make clear the distinction between the two to set the course for further discussions.

Predatory pricing, as discussed above, is charging prices below the average variable cost, while deep discounting implies larger or greater than usual price reduction by a retailer and is seen in reference to the maximum retail price fixed by the manufacturer or the prices being generally charged by other retailers. Thus, by definition, it is possible that deeply discounted prices may still be above the relevant measure of cost, i.e., not predatory.

There are significant risks in considering deep discounting *per se* as a competition harming practice.²⁴ Deep discounting (falling short of predatory pricing) on the one hand may be argued to stifle or even cause the exclusion of retailers having limited sales volumes and making a case for their protection. However, on the other hand, it would imply denial of an opportunity to remedy the high MRPs²⁵ which may have been determined purely arbitrarily instead of being a useful value proposition. The imposition of any checks and balances on deep discounting based on the reference of MRPs need to be matched with commensurate checks and balances on the determination of MRPs, otherwise the system has

the potential to fail consumers by making a payment of higher prices relative to the economic value of a product as their *fait accompli*. MRPs in India are allowed to be determined freely and manufacturers are not even liable to pay taxes on the basis of such artificially inflated values. The excise regime had the provision for allowing significant abatement from the MRP to determine the assessable value of goods while, in case of the GST²⁶ regime, tax is payable on actual transaction value, which may be substantially different from the MRP. Under such circumstances, frowning on deep discounting or equating the same with predatory pricing may not be appropriate. It may be stated as a rider here that the presence of other exclusionary/anti-competitive practices along with deep discounting may create ecosystems which are amenable to distorting the level playing field; the suggestion of the authors is only limited to not seeing deep discounting as a concern per se, and further, not equating deep discounting with predatory pricing. Accordingly, the paper further focuses on only the predatory pricing issue and not deep discounting.

Losses of Platform Companies are not a Predation Concern

Another issue which is raised prominently to highlight the “menace” of predatory pricing in digital platforms is the extent of losses reflected in their financial statements.²⁷ However, considering that the theory of predation, for valid reasons, does not stress on total cost as a necessary condition, discussion around considering losses as a sign of predation lacks appreciation of significantly high fixed costs which characterise digital platforms.

That leads us to another relevant issue, i.e., what constitutes fixed costs vis-à-vis variable costs in platform markets. As discussed earlier, the platforms rely on network effects and their success is often associated with the size of network they create. During the initial stages, the focus is on growing the network. Depending upon network externalities offered by each side, the pricing structure is designed to make “joining” the network and “staying committed” to it, attractive to both/multiple sides. Thus, heavy discounts and incentives are offered. As the network grows, the

value derived by users exceeds the cost of staying on it, obviating the need to offer discounts/incentives.

In such cases, most of the predatory pricing allegations are based on a simple comparison of costs and revenues from one product/service, e.g., in *Meru Travels Pvt. Ltd. and Uber India Systems Pvt. Ltd. and others* (2021),²⁸ if we only compare the revenue these platforms earn from the drivers in the form of commission and equate it with the discounts and incentives they offer to riders and drivers, respectively, it may lead to a conclusion that these platforms charge below costs. However, such simplistic assessment ignores their business models, which primarily function with algorithms designed to collect and process data, with decisions made based on that data which may require high upfront sunk costs. Though the discounts to consumers and incentives to drivers are variable expenses in the sense that they are directly related to the customers/drivers taking/providing rides, they are also in the nature of investments that helps the platform build the network. Thus, categorising the cost associated with discounts to riders and incentives to drivers as purely variable costs may not be appropriate.

Further, in case of multi-sided platforms like Google and Amazon, this problem will be multiplied several times because of many revenue streams and cost centres.

Part 3B: Practical Issues Arising from the Unique Characteristics of Digital Platform Markets

Having dealt with some preliminary myths in Part 3A, this part will highlight certain key challenges in carrying out predation assessment in digital platforms, especially in applying the traditional assessment framework to digital platforms.

Demarcating the Boundaries of Relevant Market Correctly

Digital platforms are inherently complicated businesses considering the range of their offerings. A retail digital platform may be dealing in thousands of goods cutting across product categories which may or

may not have any functional relationship with each other. Under such circumstances, the first relevant question which arises would be how to assess any allegation of predation. Suppose the competition authority receives a complaint regarding predatory pricing in a particular product vertical, say a particular brand of TV. The key question which would arise is whether the investigation should focus on the factors specific to that particular TV only or broaden it to include a more broad-based analysis in terms of the relevant market for such TVs or a further broad-based analysis in terms of retail platform services encompassing all sorts of actual/potential product offerings. The aforesaid questions are highly relevant because, firstly, the decision on the relevant market would entail the assessment and findings on the dominant position of the retailer, which could be a make or break difference in conclusion on predatory pricing allegations; and secondly, the choice of relevant market is also tricky. If market is defined narrowly in terms of the product for which predatory pricing allegations have been received, the prices and costs will have a better visibility and validity; however, it would also imply a complete disregard to the platform effects. It has been widely accepted that platform markets are multi-sided and their operations cannot be evaluated in isolation of various relevant sides. Conversely, if the market is defined in broader terms and platform effects allowed free play, the representative price and cost data may lose visibility and validity.

Issues Related to Dominance Assessment

As highlighted earlier, competition in digital platform markets is often “for the market” and during such “competition for the market,” firms have strong incentives to lower prices (sometimes also below relevant cost thresholds to ensure that the market tips in their favour). Once that happens, incentives to predate may not exist. In such cases, it needs to be seen whether dominance as a prerequisite to assess alleged abusive conduct as understood in traditional markets should be applied in the same manner in digital platform markets (Ministry of Corporate Affairs, 2019).

Predation in Zero-Priced Markets

One of the unique features of platform markets is zero-priced or abysmally low-priced products. Creative content, online search functions, social media platforms, mobile applications, travel booking, mapping programs, etc., are widely available at zero “monetary” prices. Given that neoclassical economics revolves around prices (Newman, 2015), pre-eminent antitrust theorists often urge that, without prices, there can be no markets, and consequently, no market power. While debates regarding the applicability of antitrust law to such markets is outdated, with an evolved consensus that even zero-priced products can be subjected to antitrust scrutiny,²⁹ it remains a challenge to examine predatory pricing allegations and develop a plausible theory of harm, as price remains the central focus. So, if the product/service is available to consumers for a zero-price, what can constitute predatory?

Legal Challenges as to Who is Responsible

A platform is meant to bring various stakeholders together and ensure that this union of stakeholders is mutually beneficial. Consider an example of a digital retailer with different participating stakeholders being the seller, the platform provider, the banks/payment service providers, and the end consumers. The stakeholders operating on a platform tend to be intertwined in many ways. All the stakeholders have a revenue stream associated with their role, and the same can have different name or model. If each stakeholder has some contribution in lowering the price to the end consumer, for example, higher discount offered by the seller, discount offered by platform service provider from its own revenue, and discounts funded by payment service providers in the form of cashbacks, no cost EMIs, etc., there would be a grave problem of identifying the exact party responsible for predation, as all the parties may have contributed partially to the price reduction, and they may have different perceptions regarding the economic value of their actions and their actions may also be based on significantly different competition dynamics in their own specific areas of operation. Under such circumstances, it may become difficult, if not impossible, to investigate and fix responsibility/liability.

Apportioning Costs to Apply Relevant Costs Test/Threshold

Apportionment of common costs is already a typical exercise involving some degree of ambiguity, even for a single product firm, and for a multi-product, then for a multi-sided platform, the task can assume proportions beyond objective comprehension. Further, since most of the cost thresholds in predatory pricing assessment ignores fixed costs, it is necessary to segregate fixed costs and variable costs. As highlighted previously, it may be challenging in platform markets to do so with great precision as many costs have attributes of both fixed as well as variable costs, e.g. discounts offered to end users – on the one hand, such discounts are associated with variable sales, and on the other hand, they also lead to network creation, which gives long.

Part 4: Way Forward – Bringing Predation Assessment Framework in Sync with Digital Platform Markets

Given the aforesaid difficulties/challenges, the key question is whether we should allow predatory pricing as a competition abuse to sink. The authors firmly believe that, despite all the issues in the examination of cases involving allegations of predation, predatory pricing is a reality of market competition, and giving up on the same as competition abuse would be tantamount to throwing the baby out with the bathwater. In this section, we made a few recommendations which, though may not fully fix the issues, may make the predation assessment more suitable to digital platform markets.

Altering the Dominance Assessment

Dominance or market power is examined considering various factors, *inter alia*, the size and resources of a firm and that of its rivals, its market position reflected in its market share, entry barriers, etc. Over-emphasis on market shares in digital platform markets may irreversibly taint the dominance assessment. Though competition authorities recognise the limitation of market shares in digital market cases,³⁰ the other factors often used are also derivative of market shares, e.g., network strength, relative size of competitors, etc. Since in digital markets, the integration of business

verticals is both possible as well as plausible due to the fungibility of data, the market share or position in a particular market may not necessarily indicate the strength of the entity to exclude its rival through exclusionary strategies. It is possible that a firm operating in one market may gather important data which allows it to enter another market and quickly change competition dynamics without even having any market share to begin with. Thus, in case of digital platforms, the resource that may need the closest scrutiny is the information or data which a firm may possess. Further, the deep-pockets the firm has to sustain losses over a period of time are also relevant. Therefore, dominance assessment must cover the position of a firm on all sides of a digital platform which can be linked with the same base data.

Evolving Novel Theories of Harm

In her seminal paper, Khan (2016) argues that, “[w]e cannot cognize the potential harms to competition posed by Amazon’s dominance if we measure competition primarily through price and output.” Further, in case of zero-priced products/services, which are widely prevalent in platform markets, over reliance on monetary price/cost to end users to ascertain predation may lead to false negatives. Thus, it may be essential to broaden the contours of what may amount to predation in such cases. More specifically, theories of harm need to factor in data, quality of service, privacy, and innovation in addition to price.

Role and Relevance of Incentives and Ability

Generally, any assessment of exclusionary abuse requires a clear postulation of “ability” (dominance) as well as “incentives” (exclusion motive) to foreclose the market. Often, in case of traditional markets, “ability” assumes more weight in the assessment being an objective assessment standard than the “incentives,” which is primarily a subjective standard. In case of digital platforms, the authors suggest that ability should be adjudged more as an ability to sustain predatory strategy owing to deep pockets than the position of dominance, which are more useful in traditional markets’ tests of high market shares, etc. Even an otherwise resourceful entrant with low market share may find predation

to be a sensible economic strategy. The “incentives to exclude” are generally examined considering the revenues associated with a particular product/service, which is the subject matter of assessment. Accordingly, it is possible that an inference may be drawn regarding the platform not having the incentive to predate if the concerned product/service is not likely to contribute substantially to the overall revenues. However, with the broad range of products/services sold on the platform, the revenue of each product may not be substantial, and accordingly, an assessment as above may lead to false negative outcomes. Therefore, it may be more appropriate to consider economic impact from the perspective of both the predator and the prey, and if it is found that, while the proportion of revenue from such business segment is small to the predator, it is significant for the prey, the strategy is more likely to be followed and to be successful.

Need to Work on ex-ante Prevention of Predatory Pricing Abuse

Predatory pricing, by definition, is meant to cause lasting changes in competition in the sector. In case of digital platforms, considering the inherent characteristics in terms of data build up, synergies across business segments, substantial cost of developing an economically viable scale of platform, etc., a successful predation strategy can result in elimination of competition. The changes in market structure may be irreversible as, on one hand, predation would oust existing competitors and, on the other hand, would make re-entry nearly impossible save for a significant innovation leading to change in consumer preferences. Thus, in an *ex-post* framework, even if an antitrust authority is able to make a case for predation and impose penalties, etc., it may not restore market competition.

Buoyed by the aforesaid concerns, the Indian telecom sector regulator, Telecom Regulatory Authority of India (TRAI) introduced a test for predation by defining significant market power and thereafter, predation in terms of Price-AVC test and test of intent (Telecom Regulatory Authority of India, 2018). However, the provisions were set aside by the appellate tribunal, namely, TDSAT,³¹ citing, *inter alia*, that TRAI cannot assume the

role of an adjudicator of contested issues in a *lis* like situation. TDSAT further held that the complex concept of predation dependent upon the determination of intent with the requirement of evidence is neither desirable nor objective to be laid down by TRAI (*Bharti Airtel Ltd. & Anr. vs. Telecom Regulatory Authority of India*, 2018). However, TDSAT added that straightforward and simple objective yardsticks for enforcing the requirements relating to non-predation can be laid down as a condition of tariff formulation by TRAI. The matter is presently pending adjudication before the Hon'ble Supreme Court of India.

Under such circumstances, there is a point for introducing some bright-line tests of predation which can help the analysis and investigation in terms of saving valuable time, which is of the essence for the preys. This is one area where research is required to lay down a framework in terms of dominance/significant market power, price-cost test, etc. This will also address the issue highlighted in the preceding part of this paper with regard to predation being generally adopted by entities during “competition for the market” phase rather than in the post dominance/monopoly phase.

Conclusion

Predatory pricing has often been a subject for divergent views, starting from the very rationality of such a strategy to the various tests that form part of the assessment framework adopted by competition agencies and courts.

The authors have opined that predation is not just a viable strategy in digital markets, but the most sought after one, considering that competition is “for the market” and incentives are significant in the form of potential monopolisation of the entire market and associated gains. Posed with “hyper-competition” and riding on network effects and big data, deep discounting, and abysmally low pricing, competition authorities may witness an upsurge of cases alleging predation. Considering such a likely spurt of cases and in order to achieve an optimum enforcement approach that is capable of filtering the efficient low pricing from predatory

conduct, this paper highlights the myths associated with low pricing strategies which may not merit antitrust intervention while also pointing out fallacies of the existing assessment framework, and suggests ways to strengthen the same.

The authors have highlighted why dominance as assessed in the conventional antitrust context and seen as a prerequisite in digital market cases may lead to a false negative. Accordingly, an alternative dominance assessment moving beyond market shares and other associated parameters has been suggested, which is more focused on the role of data in creating insurmountable entry barriers and deep pockets of the firm to sustain losses over a period of time. The authors have also pitched for evolving novel theories of harm to factor in data, quality of service, privacy, and innovation in addition to price. Lastly, the paper also argues for an *ex-ante* framework, at least in sectors where market distortion and potential harm are difficult to dilute at a later stage in an *ex-post* framework.

Endnotes

¹Helland, E. A. (n. d.). Are Predatory Commitments Credible? Who Should the Courts Believe? *Independent Review* 5,(3).

²Marginal Cost

³Average Variable Cost

⁴Average Avoidable Cost

⁵Such effect may be ascertained in the form of possibility of the competitor being ousted because such elimination makes the probability of the dominant firm raising its prices or otherwise affecting consumer welfare adversely in qualitative terms.

⁶Similar observations have been made in the Report of *Competition Law Review Committee* (2019), available at <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>

⁷In many of the cases dealt by CCI, especially in the cab aggregators market, there has been an allegation of predatory pricing by Ola/Uber. However, those cases were closed primarily on the grounds that those

cab aggregators were not found to be dominant in the relevant market. While whether a full-fledged assessment of their pricing strategies would have indicated the existence of predation or not cannot be stated, the fact remains that such assessment stopped at them not being dominant. For detailed reading, refer to Case No. 06 & 74 of 2015, wherein predatory pricing by Ola was under scrutiny [*Fast Track Call Cabs Pvt. Ltd. & Anr vs. ANI Technologies* available at <https://www.cci.gov.in/sites/default/files/6%20%26%2074%20of%202015.pdf>] and Case No. 96 of 2015, wherein predatory pricing by Uber was alleged [*Meru vs. Uber*, available at <https://www.cci.gov.in/sites/default/files/96-of-2015.pdf>].

⁸*Bharti Airtel Limited vs. Reliance Industries Limited & Other*. Case No. 03 of 2017 (CCI).

⁹Competition Act, 2002, §4

¹⁰It may be clarified that different commentators/economists and courts/jurisdictions have varying views on whether both (intent and recoupment) are necessary or only intent without there being the necessity to show recoupment would be sufficient. These are discussed in detail under appropriate heads of Part 2 of the paper.

¹¹Average total cost.

¹²Prices that are set above AVC but below ATC are to be considered predatory only if the price is part of a plan for eliminating competition. *AKZO vs. Commission* [EU:C:1991:286], Para 72.

¹³For example, in the *Wanadoo* case [COMP/38.233 - Wanadoo Interactive, Commission decision of 16th July 2003 available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/38233/38233_87_1.pdf], the European Commission applied the AKZO rule, where the prices by AV subsidiary of France Telecom for its residential broadband internet services were found to be below AVC and subsequently though slightly above AVC but significantly below ATC for most part of the assessment period. The Commission's decision observed that the existence of predatory prices is established in case of the non-recovery of ATC, where this is accompanied by a plan indicative of an intention to eliminate competitors.

¹⁴*France Télécom SA v. Commission of the European Communities*. Case C-202/07 P (EU:C:2009:214)

¹⁵*Post Danmark vs. Konkurrenceradet*. Case C-209/10 [EU:T:2012:172ee]

¹⁶*Aspen Skiing Co. vs. Aspen Highlands Skiing Corp.* 472 U.S. 585 (1985)

¹⁷*Matsushita vs. Zenith Radio*, 475 US 574 (1986).

¹⁸*Atlantic Richfield vs. USA Petroleum*, 495 U.S. 328 (1990).

¹⁹*Ibid.*

²⁰*Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

²¹*Ibid.*

²²*Ibid.* Also see, Niels, Jenkins, & Kavanagh. (2016). *Economics for Competition Lawyers*. Oxford University Press.

²³Though the EU does not lay much emphasis on recoupment and has not taken it into consideration in the predation assessment, more recent rulings do recognise it as an additional factor in the assessment framework, e.g., in the France Telecom ruling [Case C-202/07 P [EU:C:2009:214], ECJ acknowledged for the first time that recoupment may be relevant to the predation assessment, though not a necessary condition to establish predation. See Niels, Jenkins, and Kavanagh (2016).

²⁴It may be highlighted that CCI, while ordering investigation in one of the cases concerning e-marketplaces, has taken note of deep discounting [Case No. 40 of 2019, *Delhi Vyapar Mahasangh vs. Amazon and Flipkart*, available at <https://www.cci.gov.in/sites/default/files/40-of-2019.pdf>]. However, firstly, deep discounting is not seen as an issue in itself; it is only in conjunction with other issues like exclusive arrangements and preferential listing that it was seen as having a cumulative effect; and, secondly, that case is not with regard to abuse of dominant position, but with regard to vertical restraints. For more details, refer to the Commission's order, available at <https://cci.gov.in/sites/default/files/40-of-2019.pdf>.

²⁵MRP refers to the Maximum Retail Price which is published on packaged goods by manufacturers so as to indicate the maximum price that can be charged by the retailer to the end consumer.

²⁶GST refer to the Goods and Services Tax.

²⁷Refer to Case Nos. 6&74 of 2015 [*Fast Track Call Cabs Pvt. Ltd. & Anr vs. ANI Technologies*, available at <https://www.cci.gov.in/sites/default/>]

files/6%20%26%2074%20of%202015.pdf], where Fast Track/Meru alleged that Ola was able to sustain its pricing strategy and Uber was able to catch up only because of their financial abilities and fundings that it received [para 17, 18, 56 and 122], Case No. 96 of 2015 [*Meru vs. Uber*, available at <https://www.cci.gov.in/sites/default/files/96-of-2015.pdf>], where Meru alleged that Uber has incurred losses as depicted in its financial statements [para 51 and 57].

²⁸See, Case No. 96 of 2015 *supra*.

²⁹For example, in *MCX vs. NSE* [Case No. 13 of 2009 available at https://www.cci.gov.in/sites/default/files/MCXMainOrder240611_0.pdf], NSE argued before the Commission that since it is charging zero price for its CD segment, there is no need to enter any complicated exercise for determining appropriate cost pricing. Thus, as argued by NSE, little would turn on, whether AVC, ATC, LRAIC, AAC, or any other cost measure is used for establishing guilt. CCI, while finding NSE's conduct to be predatory, did not accept this argument. Similarly, in the Google Search Bias case [*Matrimony.com Ltd. vs. Google*, Case No. 07 & 30 of 2012, available at <https://www.cci.gov.in/sites/default/files/07%20%26%20%2030%20of%202012.pdf>], Google argued that since its search services are offered for free, there is no purchase or sale of goods or services. The Commission rejected this argument stating that such an argument misses the role and nature of "big data," i.e., an aggregate of eyeballs/choices which is being provided by users while availing the search services offered by a search engine.

³⁰For example, in Case No. 06&74 of 2015 [*Fast Track Call Cabs vs. ANI Technologies*], CCI disregarded the high market share held by Ola, realising that over-reliance on market shares in the assessment of such cases may lead to absurd outcomes. CCI noted that, though market share can be an important indicator for lack of competitive constraints, there cannot be any set guideline and criteria for determining uniform market share thresholds and a standard time-period to apply in all cases. CCI also specifically recognised the limitation of market shares as an indicator of market power in digital market cases.

³¹Telecommunications Dispute Settlement and Appellate Tribunal.

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