
REASSESSING INDIA'S APPROACH TO PREDATORY PRICING: A COMPARATIVE STUDY OF INDIA AND USA

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ABSTRACT

This research paper aims to critically analyze the statutory framework and significant judicial pronouncements that have shaped the interpretation of the provisions of Predatory Pricing given under Competition Act, 2002. It assesses whether exclusionary pricing tactics in modern marketplaces are sufficiently addressed by the current legal standards, especially the requirement to establish dominant position and cost-based benchmarks.

India's legal framework continues to face challenges in detecting and controlling predatory pricing. Market players such as Reliance Jio in the telecom sector are able to use below-cost pricing measures that initially create consumer dependence driving rivals out of the market and ultimately jeopardizes market fairness and customer welfare. In light of this, the paper conducts a thorough examination of the predatory pricing framework in the United States, which has developed as a result of judicial pronouncements establishing tests like the Areeda-Turner cost test and the recoupment criterion and Brooke test. A comparison of the U.S. and Indian legal framework reveals valuable insights that could improve India's competition law framework.

The paper calls for a more economically coherent framework that strikes a balance between aggressive price competition, long-term consumer welfare, and market integrity by identifying structural shortcomings in the Indian approach through doctrinal and comparative analysis.

HYPOTHESIS

The inadequacy of India's Competition Act, 2002 in addressing predatory pricing enables firms to engage in anti-competitive below-cost pricing, thereby threatening market competition and consumer welfare. Strengthening legal provisions, clarifying standards for intent and cost assessment, and improving enforcement mechanisms are likely to reduce predatory pricing practices and foster a fairer, more competitive market environment.

METHODOLOGY

This project has been made using the doctrinal method of research. Various primary sources such as statutes as well as secondary sources like textbooks, journal articles, and commentary articles were accessed to make this project. The information thus collected was thoroughly studied and critically analysed.

INTRODUCTION

The practice of predatory pricing, also known as below-cost pricing, is when businesses purposefully set prices at absurdly low levels, frequently below their cost of production, in an effort to force rivals out of the market. Even though these tactics might appear advantageous to customers at first because they get the products or services at a very low rate, but these practices have negative long-term effects as well, leading to market monopolisation, increased costs, fewer options for consumers, and less innovation. Once competition is eliminated, dominant firms can manipulate market conditions, undermining the principles of fair competition and economic efficiency.

Under the Competition Act, 2002¹, Competition Commission of India (CCI) is entrusted with preventing anti-competitive practices such as predatory pricing, treating it as an abuse of a dominant position under Section 4. But even with the legislative structure in place, India still has trouble identifying and substantiating cases of exploitative pricing. Effective enforcement is frequently hampered by problems including ambiguity in defining "dominance," establishing "intention," identifying pertinent markets, and evaluating "below-cost pricing." These restrictions make it possible for big businesses to take advantage of weaknesses, endangering

¹ The Competition Act, 2002 (12 Of 2003).

both fair competition and the welfare of consumers.

UNDERSTANDING THE CONCEPT OF PREDATORY PRICING

Predatory pricing refers to the practice wherein a firm deliberately sets its prices at an unreasonably low level to drive competitors out of the market and subsequently raise prices to recoup losses. Instead of improving consumer welfare, it is a calculated use of pricing power to stifle market competition. Predatory pricing generally occurs in two phases: the predation phase, during which dominant firms use lower prices to eliminate competitors and suffer short-term losses; and the recoupment phase, during which the firm, having gained market dominance, raises prices to make up for its previous losses.

Economically, predatory pricing is a complex phenomenon. Competition law exists to regulate monopolising and exclusionary behaviour in the market, as only in a competitive environment can both businesses and consumers flourish. Consumers and the efficiency of the market as a whole suffer when there is no competition because businesses are less motivated to develop and may take advantage of their position by charging exorbitant prices. In *A.A. Poultry Farms Inc. v. Rose Acre Farms Inc.*², the Court observed that “*the gravamen [of a predatory pricing claim] is that the aggressor sold goods for too little money, hoping to cripple or discipline rivals so that it might sell its wares for a monopoly price later, recouping the losses and adding a hefty profit, to the detriment of consumers*”.

The logic of predatory pricing has been debated by academicians. Chicago School of economics contends that predatory pricing is typically unprofitable and therefore illogical since the predator suffers larger losses than competitors and may encounter new competitors during the recovery/recoupment period. “*On the flip side, game theory offers a different perspective, suggesting that predatory pricing can be a rational choice in situations where information is imperfect*”³. By lowering prices, a dominant business can demonstrate its cost-effectiveness, which may cause competitors to reevaluate their place in the market and, in certain situations, leave the market altogether. By using pricing strategically, the dominant firm can push out

² *A.A. Poultry Farms Inc. v. Rose Acre Farms Inc* 683 F. Supp. 680 (1988).

³ Badrinarayan Rath, ‘Predatory Pricing And Its Implications: An Analysis Under Indian Competition Act ’ (2025) 6(6) Indian Journal of Law and Legal Research <https://3fdef50c-add3-4615-a675-a91741bcb5c0.usrfiles.com/ugd/3fdef5_3c4116b4b3ef4a639d3e8f278d1993ea.pdf> accessed 30 September 2025 .

rivals and possibly recover losses incurred during the predation phase.

Predatory pricing has distinct short and long-term implications. Lower costs and greater affordability help consumers in the short term, increasing consumer surplus. On the other hand, the market frequently declines over time. Eliminating competitors causes the dominant company to increase prices, lower the quality of its products, and limit options, which results in monopolistic inefficiency and less innovation. Furthermore, such behaviour creates substantial obstacles to entry, discouraging new businesses from entering the market. Thus, predatory pricing reflects a strategic interplay between competitive advantage and market control, where temporary gains mask long-term risks to both competition and consumer welfare.

PREDATORY PRICING UNDER INDIAN LAW

Enacted in 2002, the Competition Act aims to protect the interests of consumers while promoting and maintaining competition in Indian marketplaces. The Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) was replaced by this law since MRTP Act was no longer sufficient to handle the changing market conditions after India's economic liberalisation in 1991. By preventing anti-competitive behaviour and guaranteeing that all market players can function freely and fairly, the Act aims to preserve an atmosphere that encourages competition, which will improve consumer welfare and market efficiency.

The main regulatory body in charge of upholding the provisions of the Act is the Competition Commission of India (CCI), which was founded under the said law. The CCI has the authority to decide matters involving Act's violations and to investigate anti-competitive agreements and abuses of dominance on the basis of complaints or suo motu. Following receipt of a complaint, the CCI reviews the claims and schedules a meeting to ascertain whether there is a sufficient basis for an investigation. The CCI's investigative arm, the office of the Director General (DG), is instructed to conduct an investigation and provide a report if the Commission determines that there are grounds for one that is if prima facie case is established. Only once the Commission issues an order does the DG begin the inquiry. Based on the DG's report and the parties' arguments, the CCI comes to a decision. In addition to monitoring mergers and acquisitions to avoid combinations that could seriously hamper competition, it has the authority to penalise businesses found guilty of anti-competitive behaviour. Further, in addition to enforcing the law, the CCI also engages in advocacy efforts to raise consumer and business

knowledge of competition law. Additionally, CCI verdicts are subject to appeal before the Competition Appellate Tribunal (CAT).

Section 4 of the Competition Act, which forbids businesses or organisations from abusing their dominating market position, expressly recognises predatory pricing as an act involving abuse of dominant position. Dominant position is a position of strength of an enterprise or a company. A significant market share, which enables an organisation to function somewhat independently of competing forces, is a sign of a dominant position. Section 4 defines predatory pricing as the sale of goods or provision of services “at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.”⁴ Two fundamental criteria are used by the CCI to assess predatory pricing: first, the company must provide goods or services at a lower price than its average variable or total cost; second, there must be enough proof that the pricing strategy is meant to drive out competitors and that the company intends to recover its losses after dominance is achieved. The methods to determine the cost of production are outlined in the CCI (Determination of Cost of Production) Regulations, 2025⁵, which repealed the earlier 2009 regulations, providing a clear framework for assessing predatory pricing claims. In *MCX- SE v NSE*⁶ the CCI observed with respect to predatory pricing that - *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.*⁷

In order to better understand the effectiveness of the provisions relating to predatory pricing in real life market scenarios this paper will now undertake a study of some of the judicial decisions-

MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd.⁸

MCX Stock Exchange Ltd. (MCX-SX), promoted by Financial Technologies India Ltd.

⁴ The Competition Act, 2002 (12 Of 2003) s4.

⁵ The Competition Commission of India (Determination of Cost of Production) Regulations, 2025, CG-DL-E-07052025-262951.

⁶ *MCX- SE v NSE* 2011 SCC ONLINE CCI 52.

⁷ *MCX- SE v NSE* 2011 SCC ONLINE CCI 52.

⁸ *MCX- SE v NSE* 2011 SCC ONLINE CCI 52.

(FTIL), operates a currency derivatives (CD) segment recognized by SEBI. Directly competing with FTIL's "ODIN," the National Stock Exchange of India Ltd. (NSE), a prominent multi-segment exchange, created its own CD segment and software called "NOW." MCX-SX claimed that NSE had exploited its position of dominance by restricting API access to ODIN, imposing zero pricing in the CD segment, waiving transaction and data feed fees, and utilising earnings from other segments to subsidise the CD segment. In accordance with Sections 4(2)(a)⁹ and 4(2)(e)¹⁰ of the Competition Act, MCX-SX contended that these actions hindered its capacity to draw in investors and engage in competition.

The CCI identified the primary issues as whether NSE engaged in unfair or predatory pricing by abusing its dominant position and whether it leveraged dominance in one market to protect another. The Commission first ruled that NSE did hold a dominating position in the relevant market because of its broad financial capacity, integrated operations, and long-term loss tolerance. Such strength, it reasoned, allowed NSE to keep prices at zero for a considerable amount of time, possibly eradicating competition. After considering whether this qualified as abuse under Section 4, the Commission concluded that although network industries, like stock exchanges, frequently use value-based pricing models rather than cost-based ones, and initial zero prices can be a valid part of market-building tactics, these justifications cannot go on forever. Zero pricing may at first encourage competition and liquidity, but if it persists for an extended length of time, especially when rivals lack equal financial resources as it may become unjust or exclusionary. Due to the extended period of fee exemptions (more than two years), the calculated timing of fee impositions and waivers in other segments, and the lack of segment-wise accounting by NSE, the Commission dismissed NSE's defence of promotional pricing and nascent market development regarding abuse. It was decided that the zero price policy was unjust and was detrimental to competition by making rivals forego fees and incur long-term losses that were unsupportable. It was determined that FTIL's placement on a watch list and the denial of APIC access to ODIN software constituted exclusionary conduct, preventing competition in the trading software aftermarket and strengthening NSE's hegemonic position in the primary market.

With respect to predatory pricing two important criteria were established by the Competition Commission of India (CCI) to identify predatory pricing: first, there must be specific instances

⁹ The Competition Act, 2002 (12 Of 2003) s4(2)(a).

¹⁰ The Competition Act, 2002 (12 Of 2003) s4(2)(e).

of underpricing; second, there must be proof that such pricing could force competitors out of the market and allow the surviving monopolist to recoup costs through later price increases. The Competition Appellate Tribunal upheld the CCI's findings on dominance and unfair pricing.

Though the Commission's reasoning reflects certain limitations. Although NSE's financial strength and ability to maintain long-term zero pricing allowed the CCI to accurately identify its dominance, it did not specifically assess whether NSE's actions met the legal requirements for predatory pricing under Explanation (b) to Section 4, which calls for evidence of below-cost pricing with the intention of eradicating competition and recoupment potential. Instead, the Commission called the NSE's protracted zero-price policy "annihilating or destructive pricing" and described it as "unfair." By switching from a cost-based examination to a fairness-based evaluation, the line between "unfair" and "predatory" pricing became less sharp, weakening analytical rigour.

***Fast Track Call Cab Pvt. Ltd. v. Ani Technologies Pvt. Ltd*¹¹**

Fast Track Call Cab claimed that Ola was using predatory tactics by providing drivers with large incentives and severe discounts, which made it hard for rivals to remain in business. After reviewing these allegations, the Competition Commission of India (CCI) determined that Ola's pricing methods could not be deemed predatory under Section 4¹² of the Competition Act, since the company did not have a dominant position in the relevant market. The Commission underlined that aggressive pricing by non-dominant firms is frequently a valid competitive strategy intended to enter and expand the market, particularly in a rising and dynamic industry. The CCI also observed that Ola's dominance was unsubstantiated because of the following factors: the market was growing quickly, new competitors had successfully entered, the operator's market share was gradually decreasing, entry barriers were not insurmountable, and countervailing market forces limited any anti-competitive behaviour.

The decision emphasises the necessity of assessing market structure, entry barriers, and countervailing forces before classifying competitive activity as anti-competitive. It also reaffirms the idea that predatory pricing allegations require both dominance and purpose to

¹¹ *Fast Track Call Cab Pvt. Ltd. v. Ani Technologies Pvt. Ltd* 2015 SCC ONLINE CCI 70.

¹² The Competition Act, 2002 (12 Of 2003) s4

drive out competitors.

Vaibhav Mishra v. Sppin India Pvt. Ltd.¹³

The online marketplace Shopee was accused of supplying goods at costs much lower than their true value in an attempt to drive out smaller competitors. According to Sections 3¹⁴ and 4¹⁵ of the Competition Act, informant Vaibhav Mishra argued that Shopee's steep discounts and predatory pricing tactics on products including wallets, mugs, and Kurtis amounted to unfair trade practices. Despite admitting that Shopee's prices were predatory, the CCI rejected the complaint because Shopee lacked a dominant position in the relevant online marketplace, which is a requirement for proving a breach under Section 4(2)(a)(ii)¹⁶. The Commission stressed that even if a company uses aggressive pricing, dominance cannot be assumed in dynamic, fiercely competitive platform markets. The case highlighted the difference between predatory pricing and legal market-entry tactics like penetrative pricing, in which new competitors cut their prices in an effort to capture market share. Citing previous rulings as precedent, the CCI explained that market share, financial strength, obstacles to entry, and the capacity to function independently of competitive pressures are among the elements listed in Section 19(4)¹⁷ of the Act that must be used to determine dominance.

A notable restriction in the existing implementation of predatory pricing regulations under Indian competition law is demonstrated by this case. Although Shopee was found to have engaged in below-cost pricing with the intention of driving out smaller competitors, Section 4(2)(a)(ii) did not allow for responsibility due to the lack of evidence of dominant position. Because of this rigid reliance on dominance, there is a regulatory loophole that permits financially strong but non-dominant entrants to employ penetrative pricing and steep discounts to gain market share, thereby hurting smaller competitors and distorting competition. The case draws attention to the necessity of making a clear distinction between legal market-entry tactics meant to gain traction and predatory pricing meant to eradicate competition. Furthermore, it emphasises how crucial it is to take into account elements other than market share for determining dominance under Section 19(4), such as financial stability, position of power, entry hurdles, and the capacity to sway rivals. By doing this, competition authorities can better

¹³ *Vaibhav Mishra v. Sppin India Pvt. Ltd.* 2022 SCC ONLINE CCI 4.

¹⁴ The Competition Act, 2002 (12 Of 2003) s3.

¹⁵ The Competition Act, 2002 (12 Of 2003) s4.

¹⁶ The Competition Act, 2002 (12 Of 2003) s4(2)(a)(ii).

¹⁷ The Competition Act, 2002 (12 Of 2003) s19(4).

spot anti-competitive behaviour in platform-based, dynamic markets and stop large, resource-rich companies from using aggressive pricing tactics to subtly shut out smaller competitors, protecting a fair and competitive marketplace.

***C. Shanmugham and Manish Gandhi v. Reliance Jio Infocomm Ltd.*¹⁸**

Bharti Airtel made allegations of predatory pricing under Sections 3¹⁹ and 4²⁰ of the Competition Act, against Reliance Jio Infocomm Ltd. (RJio). By using its financial power in other markets and its substantial 4G LTE spectrum, Airtel said that RJio's free and heavily discounted telecom services, such as the "Happy New Year Offer" and the "Welcome Offer," were intended to force rivals out of the market. Airtel claimed that RJio had abused its dominant position under Section 4(2)(a)(ii)²¹ by using aggressive marketing tactics and low prices. But RJio insisted that its pricing was meant to break into the market and draw customers rather than drive out rivals, and that it was a newcomer up against well-established firms like Vodafone, Idea, and Airtel.

The CCI came to the conclusion that, at the time of these offers, RJio could not be regarded as dominant in the relevant telecom market. It underlined that unless there is proof of intent to exclude competitors and then recover losses, a non-dominant entrant's offering of free or reduced services does not, by itself, amount to predatory pricing. The Commission found no discernible negative impact on competition because there are other rival operators in the market and customers can move providers. The CCI added that Jio's technology advances, including its fibre optic networks and widespread 4G deployment, decreased operating costs and allowed for cheaper prices without engaging in anti-competitive behaviour. Furthermore, as part of the "Digital India" project, the zero-price approach contributed to the expansion of internet access and wider economic and social advantages.

The RJio case serves as an example of the difference between predatory and penetrative pricing under Indian competition law. Due to its lack of dominance, RJio's pricing was aggressive at first and was not anti-competitive; nevertheless, as the firm grew its market share, it created a more consolidated telecom market with fewer rivals. After starting out relatively low, prices have since gone up a lot, which has limited actual customer choice and raised concerns about

¹⁸ *C. Shanmugham and Manish Gandhi v. Reliance Jio Infocomm Ltd.* 2017 SCC ONLINE CCI 27.

¹⁹ The Competition Act, 2002 (12 Of 2003) s3.

²⁰ The Competition Act, 2002 (12 Of 2003) s4.

²¹ The Competition Act, 2002 (12 Of 2003) s4(2)(a)(ii).

market strength and long-term repercussions on competition. The absence of dominance at the launch allowed RJio to legally offer deep discounts, potentially disadvantageous to smaller competitors. This case emphasises how competition authorities must refine the criteria for dominance and distinguish between penetrative pricing and truly exclusionary predatory pricing, taking into account both the short-term entry phase and long-term market concentration when assessing aggressive pricing strategies, technological advantages, and the risk of indirect anti-competitive effects.

PREDATORY PRICING UNDER THE U.S. LAW

In the United States, the Sherman Act and the Robinson-Patman Act are the two main pieces of legislation that provide the legal basis for combating predatory pricing. When predatory pricing is used to obtain or preserve monopoly power, it is covered by Section 2 of the Sherman Act²², which forbids monopolisation and attempts to monopolise. Additionally, the Robinson-Patman Act²³ prohibits price discrimination that hurts competition, especially when a company sets lower prices in new or regional markets than in its established ones, which hurts competition. Courts have traditionally recognized three types of competitive injury under this framework — a substantial lessening of competition, a tendency to create a monopoly, and injury to competition involving any person knowingly benefitting from price discrimination. Furthermore, other federal laws that address antitrust and unjust pricing practices include the Federal Trade Commission Act²⁴ and the Clayton Act²⁵.

Position before 1975

Before 1975, however, there was no explicit cost-based standard to determine what constituted predatory pricing. Courts used a number of general guidelines to determine whether a company's actions constituted an unlawful attempt at monopolisation. Since it was considered unrealistic for enterprises with small market shares to prey on others, the first guiding premise was the presence of strong market dominance or the dangerous possibility of achieving monopoly control. The second premise was pricing below cost, especially below average total or variable cost, which was seen as a sign of a desire to crush competition rather than compete

²² Sherman Act 1890, 15 USC § 2.

²³ Robinson-Patman Act, 1936, 15 U.S.C.A.

²⁴ Federal Trade Commission Act 1914, 15 U.S.C.

²⁵ Clayton Antitrust Act of 1914, 15 U.S.C.

on the basis of merit. Potential or actual harm to competition, as seen by less market competition or competitors' forced withdrawal, even in the event of a brief drop in consumer prices, was another significant indicator. Lastly, although not usually necessary, intent to monopolise was taken into consideration where it demonstrated a conscious plan to stifle competition.

Since aggressive pricing can also help consumers, courts have come to recognise that not all price decreases are detrimental to competition. Later years saw the development of more structured, cost-based tests as a result of this conflict between promoting and preserving competition. Courts were also growing more cautious when it came to classifying low pricing as predatory unless there was evidence of long-term market harm and a clear exclusionary intent.

Position post 1975 : The Areeda–Turner Rule

After the Areeda–Turner article was published in 1975, there was a major change in the conceptual framework and enforcement of predatory pricing in the United States. Before this, the main goal of predatory pricing regulation was to shield small local businesses against larger sellers' price cuts, and plaintiff success rates were remarkably high. The early Robinson-Patman Act era was known as a "populist era" in predatory pricing enforcement because it placed more emphasis on intent and harm to competitors than on consumer welfare or market efficiency.

In order to establish predatory pricing, Areeda and Turner proposed a cost-based criterion that introduced a marginal cost, or more realistically, an average variable cost (AVC) test. Subject to some caveats, such as high demand conditions, the rule stated that selling above marginal cost was presumed to be legal and pricing below marginal cost was presumed to be illegal. This reasoning was largely accepted by state and federal courts. The Areeda–Turner cost test was used in important cases, like *California Computer Products v. IBM (1979)*²⁶, to differentiate between predatory and legal competitive pricing. The key focus of this methodology was if prices dropped below the applicable cost benchmarks, with intent being mostly seen as immaterial.

²⁶ *California Computer Products v. IBM* 613 F.2d 727 (1979).

The Areeda-Turner Rule, however, was heavily criticised from an economic perspective, highlighting the fact that short-term cost tests were unable to capture the long-term, strategic character of predatory pricing. Predation, according to critics, frequently entailed intentional intertemporal tactics, such as warning rivals of impending danger and preparing price reversals after rivals were forced out.

In practice, courts soon augmented the original Areeda-Turner formulation. Although prices above average total cost remained definitively legal and those below AVC were still assumed illegal, courts started to consider other aspects including market structure and intent when determining pricing between these benchmarks. In addition to mitigating the excessively defendant-favorable outcomes that initially emerged from the rigid per se AVC standard, the expanded rule addressed litigation challenges related to cost determination. This change progressively improved the enforcement balance by preserving the presumption of lawfulness for competitive pricing while permitting actionable claims for egregious predation.

The Areeda-Turner Rule had a profound effect on litigation; in the seven years after it was published, plaintiff victory rates fell precipitously to roughly 8% from 77 percent in the years prior to 1975. Courts gradually improved the rule by adding non-cost considerations, resulting in a more equitable strategy that discouraged predatory behaviour without unduly penalising competitive pricing.

One of the examples of application of this rule is *United States v. Microsoft Corp*²⁷(1998) case. Microsoft offered its browser, Internet Explorer, for free. Pricing at or above the average variable cost, however, is not seen as predatory under the Areeda-Turner cost test. The court did not consider Microsoft's price to be predatory because Internet Explorer's effective average variable cost was nearly zero, and it might have even been negative when accounting for software sales and advertising.

Overall, the post-1975 era shaped later legal doctrine and enforcement by signalling a move in the US towards a cost-based, economically educated, and strategically nuanced approach to predatory pricing.

²⁷ *United States v. Microsoft Corp* 253 F.3d 34 (D.C. Cir. 2001).

Post-1993 – The Brooke Group Standard

A major turning point in U.S. predatory pricing jurisprudence was the 1993 decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*²⁸ Building on previous instances such as the Areeda-Turner cost test, Brooke Group created a more stringent evidential framework that still defines the American approach to predatory pricing. While specifically refusing to adopt a single cost threshold, the Supreme Court reiterated that "only below-cost prices should suffice" as the foundation for a predation claim. The Court proceeded in Brooke Group based on the practical acceptance by both parties that the average variable cost (AVC) was the pertinent measure.

The Brooke Group judgment introduced a two-pronged test that plaintiffs must satisfy to establish predatory pricing. The plaintiff must first demonstrate that the alleged predator set its prices below a reasonable cost. Second, and perhaps more importantly, the plaintiff needs to show that there is a "dangerous probability" or "reasonable prospect" that the predator will eventually raise prices to supracompetitive levels in order to make up for the losses incurred during the predatory phase. In contrast to previous laws that frequently considered exclusionary purpose or temporary harm to competitors to be adequate, this recoupment requirement marked a significant change.

The recoupment test requires demonstrating both that the predator could raise prices above the competitive level (recoupment capability) for a long enough period of time to make up for previous losses (recoupment sufficiency) and that the below-cost pricing successfully disciplined or excluded competitors. The Court underlined that this type of recovery was only possible in situations when market structure enabled predation, namely where there was a high level of market concentration, large entry obstacles, and the ability to absorb the rival's market share. When these structural prerequisites were not present in a case, courts routinely dismissed predatory pricing allegations, resulting in a marked reduction in successful litigation outcomes in the United States.

In Brooke Group, the Supreme Court upheld dismissal of the case, concluding that the plaintiff had failed to demonstrate the likelihood of supracompetitive price recovery. The Court found no reasonable probability of recoupment despite evidence that the defendant, Brown &

²⁸ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* 509 U.S. 209 (1993).

Williamson, had suffered significant losses for almost 18 months by pricing its non-branded "black and white" cigarettes below AVC. The notion of predation by tacit coordination was deemed "economically implausible" due to the oligopolistic character of the market, the non-significant market share of the alleged predator, and the lack of explicit collusion. Given the fluctuation of demand and the variety of incentives among rival producers, the Court expressed doubts about the fact that companies could continue to pursue a planned predatory approach without direct communication.

By requiring evidence of both below-cost pricing and probable recoupment, the Brooke Group standard successfully brought U.S. antitrust law into line with the economic theory of the Chicago School, which maintained that predation was an uncommon and illogical tactic in the majority of market circumstances. Due to this increased burden of proof, successful predatory pricing allegations are now extremely uncommon and following Brooke Group, plaintiffs have lost almost 90% of these cases. Most cases were dismissed at the summary judgment stage, reflecting the Court's emphasis on disposing of weak claims early and its skepticism about predation as a rational strategy. Though it set high hurdles for proving predation, it clarified the law by grounding enforcement in economic reasoning and prioritizing consumer welfare. However, this strict threshold, according to critics, undervalues the strategic reasons for contemporary predatory behaviour, such as reputational repercussions, deterrence of future competition, or cross-market signalling, which can have long-term anticompetitive advantages even in the absence of rapid recovery.

However, more recent cases have shown a gradual willingness to consider modern economic theories, such as reputation effects—the idea that firms may engage in below-cost pricing to deter future competition across markets. For example, in *Advo, Inc. v. Philadelphia Newspapers, Inc.*²⁹, the court acknowledged that predatory behaviour could go beyond the intended market if it deterred entry in other areas. This change was reflected in the strategic approach taken by the U.S. Department of Transportation in its proposed guidelines on airline competition, which acknowledged that reputation-based recoupment, rather than stringent cost criteria, may be used to establish predation. Although the Brooke framework is still the most often used legal norm in the US, these rules represent a minor shift towards incorporating strategic economic thinking into predatory pricing examination.

²⁹ *Advo, Inc. v. Philadelphia Newspapers, Inc* 854 F. Supp. 367 (E.D. Pa. 1994).

COMPARATIVE ANALYSIS OF INDIA AND THE U.S. FRAMEWORKS

The larger objective of maintaining competition is the backdrop for provisions relating to predatory pricing in both the United States and India, but the two countries take very different stances and have rather different standards. Section 4 of the Competition Act in India states that only businesses with a "dominant position" in the relevant market may be sued for predatory pricing. In the Jio case, for example, aggressive, below-cost pricing by a new entrant was not considered predatory since Jio did not initially have market dominance, despite the fact that its tactics ultimately decreased competition and consumer choice. This criteria has resulted in huge enforcement gaps. U.S. law, on the other hand as per the Brooke Group rule looks at below-cost pricing along with the likelihood of recoupment, also demands that the company have enough market strength to recover losses from below-cost pricing. Therefore, market domination or substantial market strength is required in all jurisdictions; yet, the Indian law's emphasis on dominance as a fixed threshold may allow penetrative pricing tactics to remain unregulated until dominance is attained.

Cost is a crucial metric in both legal systems, but the evaluation is different. Indian law does not legally take into account above-cost predation, cross-subsidization, or sophisticated recoupment tactics; instead, it views below-cost pricing as a sign of predatory intent. In contrast, U.S. jurisprudence provides a more comprehensive assessment of predation and its long-term effects on competition by using an economically informed, cost-based approach that takes into account market structure, average variable cost thresholds, and recoupment possibilities through the Areeda–Turner framework and Brooke Group.

In India, proving intent and recoupment in predatory pricing cases is challenging, as recoupment is often inferred only from later price increases, which may not capture strategic practices like cost-cutting or market consolidation. This disparity is demonstrated by the Jio case: its original approach of zero pricing allowed for quick market entry and subsequent price hikes in a market with fewer competitors, which eventually reduced consumer choice and is a result that the present framework finds difficult to remedy. Similarly, Indian law largely shields new entrants, allowing penetrative pricing strategies that can evolve into anti-competitive dominance without triggering liability.

In contrast, U.S. law under Brooke Group places more emphasis on market dominance and long-term anti-competitive impacts than on subjective intent, thereby determining whether a

corporation may actually recover losses from below-cost pricing. Any company that can recover losses that harm competition could be held accountable; newcomers are not always excluded. U.S. courts also implicitly consider cross-subsidization and above-cost strategies within the broader economic analysis, allowing a more comprehensive assessment of anti-competitive effects than is currently recognized under Indian law.

CONCLUSION & SUGGESTION

Under Section 4 of the Competition Act, 2002, predatory pricing is prohibited for firms holding a dominant position in a relevant market, with below-cost pricing often taken as prima facie evidence of anti-competitive intent. The Act attempts to safeguard consumer welfare and maintain market competitiveness. Indian jurisprudence does, however, point out significant limitations on the application of these clauses. In cases such as *C. Shanmugham and Manish Gandhi v. Reliance Jio Infocomm Ltd.*³⁰ aggressive low pricing by a new entrant was not regarded as predatory because the firm did not have dominance at first, even if it eventually gained a significant market share and reduced customer choice. Similar to this, the Commission acknowledged NSE's dominance in *MCX Stock Exchange Ltd. v. NSE*³¹ because of its sound financial standing and capacity to maintain long-term zero pricing, but it did not specifically determine whether NSE's actions met the requirements for predatory pricing under Explanation (b) to Section 4. Additionally, the problem of cross-subsidization and market-specific strategic pricing was not addressed, demonstrating that enforcement frequently ignores sophisticated predatory tactics like above-cost predation, cost-cutting recoupment, and market consolidation tactics.

These findings support the hypothesis that predatory pricing is not sufficiently addressed by India's Competition Act. Although the law offers a framework for preventing anti-competitive behaviour, aggressive pricing techniques might evade scrutiny due to its rigorous focus on formal dominance and below-cost pricing. Firms can engage in penetrative pricing or leverage cross-market dominance without triggering enforcement until dominance is clearly established. Thus, there is a need to strengthen the Act and develop detailed guidelines on predatory pricing and the factors for its evaluation.

³⁰ *C. Shanmugham and Manish Gandhi v. Reliance Jio Infocomm Ltd.* 2017 SCC ONLINE CCI 27.

³¹ *MCX- SE v NSE* 2011 SCC ONLINE CCI 52.

Suggestion -

A number of actions could be taken to improve India's framework against predatory pricing. First, as the Jio case shows, initial low rates meant for market entry might subsequently result in recoupment and anti-competitive dominance, therefore it is important to regulate penetrative pricing by new entrants. Second, the law must strike a balance between combating predatory behaviour and ensuring that legitimate competitive pricing is not penalised in order to prevent healthy price competition. Finally, adopting a “rule of reason” approach for below-cost pricing, where it serves as a probative factor rather than conclusive evidence, along with a structured analysis of barriers to entry and recoupment, would allow a more nuanced assessment of predatory behavior while preserving fairness and consumer welfare.

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