

How CCI failed to distinguish Abusive Discount from legitimate price competition: New FDI policy on e-commerce to the rescue

Kluwer Competition Law Blog
July 29, 2019

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Please refer to this post as: Barkha Dwivedi, Dhiraj Yadav, 'How CCI failed to distinguish Abusive Discount from legitimate price competition: New FDI policy on e-commerce to the rescue', Kluwer Competition Law Blog, July 29, 2019, <http://competitionlawblog.kluwercompetitionlaw.com/2019/07/29/how-cci-failed-to-distinguish-abusive-discount-from-legitimate-price-competition-new-fdi-policy-on-e-commerce-to-the-rescue/>

The affair of deep discounting and predatory pricing is not unknown to the market. In fact, the same has been a conundrum in the e-commerce market for a long time. The brick and mortar retailers have been accusing the e-commerce players of selling the products below its cost price by offering disruptive discounts. According to the physical retailers, the same is being done with an intention of driving the competitors out of the market. Whereas the e-commerce players contend that e-commerce is still in its infancy since sale through e-commerce became prevalent in India only in 2012. Therefore, in order to gain and sustain buyers, the e-commerce players are left with no choice but to offer discounted prices. The same proposition was also supported by Competition Commission of India ("CCI") in *Ashish Ahuja v. Snapdeal.com*, wherein the CCI observed that e-commerce market thrives on special discounts and deals. And therefore, for an e-commerce player, which is not dominant in its market, offering discounts and deals cannot be held as anti-competitive. Section 4 of the Competition Act, 2002 ("Act") states that "predatory price" means 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. However, it is only when this aggressive pricing is targeted at driving out the competitors or may have an appreciable adverse effect on competition. Moreover, the pre-requisite to establish predatory pricing is to determine whether an enterprise enjoys dominant position in the relevant market. If yes, then whether such position has been abused or not under provision of 4(1) and 4(2) of the Act.

The reason why none of the cases of deep discounting by e-commerce giants saw the light of the day, can be very well understood from CCI's order in *Ashish Ahuja v. Snapdeal.com*. According to CCI, none of the e-commerce players can be said to be dominant in the market. The same conclusion has been derived by taking the combined retail space i.e., physical retailers and e-retailers together as relevant market. CCI then in *Mohit Manghani v. Flipkart India Pvt. Ltd. and Ors.* went a step further and held that "Irrespective of whether we consider e-portal market as a separate relevant product market or as a sub-segment of the market for distribution, none of the OPs seems to be individually dominant." Regardless of the potential anti-competitive effect of the deep discounting, the criteria for determining the predatory pricing i.e., dominant position in the relevant market has time and again restrained CCI from subjecting the same to review and condemnation.

However, it seems that the new policy on FDI in e-commerce ("The Policy") has come to the rescue, as it lays down general restrictions on the activities of the e-commerce in India. In a move to clamp down on 'predatory behaviour' of e-commerce giants who have access to FDI that lets them fund deep discounts, the government introduced new FDI policy that came into effect in February 2019.

The new policy has smashed the core of business model of online players. They have to now realign their structure to comply with the new guidelines. In order to ensure that these guidelines and compliances are being adhered and complied with properly, the renewed policy has made it mandatory for marketplace entities to give a certificate coupled with a report of a statutory auditor to the Reserve Bank of India by 30th September every year, for the previous year.

The policy aims at keeping a check and regulating deep discounting and predatory pricing by e-commerce players. With this objective, it explicitly prohibits exclusive arrangements like OnePlus-Amazon partnership and also aims to regulate the cash back provided to the customer by the group of companies of a marketplace.

In the year 2014, a complaint was filed against five online retailers namely Flipkart India, Snapdeal, Jabong, Amazon Seller Services and Myntra. It was contended that there was an exclusive sale agreement for Chetan Bhagat's upcoming book "Half Girlfriend, which was solely available on Flipkart. The same had an appreciable adverse effect on competition, thereby violating section 3 and 4 of the Competition Act, 2002. It was further alleged that these online retailers were accountable for the steadily eradicating physical players in the market and creating product specific monopoly in the marketplace. The CCI disagreed, holding that individual products cannot be construed as relevant market by themselves and none of the online players seem to be individually dominant.

The CCI failed to address the issue related to exclusivity and disregarded the prospective and potential effect of such agreements on the exiting competition. The stand until the new FDI policy was that exclusive tie up agreements is per se not anti-competitive. However, the new FDI policy discourages and prohibits such arrangements altogether.

A cap of 25% is introduced on the inventory that an ecommerce platform can purchase from any vendor, as e-commerce giants misused their buying capacity to control over inventory from affiliated vendors so as to create an unfair marketplace where they can offer deep discounts on some products. After the introduction of revised policy, e-commerce players are now not permitted to control ownership of the goods sold on their platform.

Apart from this, new policy also curtails sale of those products on a marketplace entity's platform where the entity or its group has equity participation. Due to this, e-commerce giants like Amazon and Flipkart (Walmart-owned) have pulled out numerous products from their stores. It is obvious that the online market places can't build brands now. They will be left with no option but to stick to just connecting buyers and sellers.

Conclusion

The policy thrives to create a level-playing field in the retail space and tries to bring everyone on the same pedestal. It embraces the principles of fair play and maintenance of competition in the market. The new policy has been criticised severely by the ecommerce giants. It is predicted according to a draft analysis by consultancy PwC that the revised policy could lead to fall in online sales by \$ 46 billion in the coming two years. On the other hand, it has been welcomed with open arms by the brick and mortar retailers and platforms like Snapdeal, which could not keep up in the discount battle with cash rich giants like Flipkart (Walmart-owned) and Amazon.

It is to be observed whether in dealing with the antitrust issues such as exclusive arrangements and predatory pricing, the pre-requisite conditions, as laid down in the provisions of the Competition act would prevail over the general restrictions laid down by the policy or not. Pursuant to the same the restrictions laid down by the policy on FDI in e-commerce is a move that in short term might have paved the way to mitigate the conundrum of deep discounting by regulating the activities of e-commerce entities but in the longer perspective it has blurred the line of jurisdiction of CCI over antitrust issues.