

The Deep Discounting Conundrum

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Background

The changing market dynamics in the digital era have raised several concerns with competition regulators across the world, triggering a host of studies for better understanding the issue. In doing its part, the Competition Commission of India ("CCI") released the 'Market Study on E-commerce in India' highlighting various regulatory issues in the e-commerce market. Even though the Report makes far reaching observations on the competition issues arising from the business model of e-commerce platforms, the impact of the Report on CCI's regulatory attitude remains debatable. So far, it has only suggested self-regulatory mechanisms for e-commerce platforms. It is important to note here that the report identifies deep discounting as a potential threat to competition.

Following the Report, the CCI's recent order in *In Re: Delhi Vyapar Mahasangh and Flipkart Internet Pvt Ltd & Ors.* held that there is *prima facie* evidence of anti-competitive practices against Amazon and Flipkart and launched an investigation on accounts of exclusive agreements, deep discounting and preferential listing. Even though the Karnataka High Court recently granted an interim stay against this order, an analysis of the same is still necessary to understand the stance taken by India's competition watchdog for targeting deep discounting by e-commerce platforms.

Understanding the Present Order

Under the Indian Competition Act, deep discounting is not per se anti-competitive and it can be investigated under allegations of anti-competitive agreements or abuse of dominance. In the present order, the CCI studied the issue of deep discounting by linking it to exclusive agreements between e-commerce platforms and sellers/distributors of goods and services. It was alleged that Flipkart and Amazon sent communications to their sellers for incurring a part of the discounts offered during the big sale events like the Big Billion Days of Flipkart and the Great Indian Festival of Amazon. The CCI argued that such deep discounts connected to existing exclusive agreements raise competition concerns and attract investigation under Section 3(4) of the Act.

Notably, a contrary stance was taken in *In Re: Mohit Manglani and Ms Flipkart India* where the CCI held that exclusive agreements between e-commerce platforms and sellers/distributors of goods and services do not cause appreciable adverse effect on competition. Here, the CCI had also highlighted the benefits accruing from e-commerce platforms. The present order does not offer any points of distinction with *Mohit Manglani* and fails to analyse the same. If the previous reasoning is upheld by the Karnataka High Court, the CCI will not have the locus to investigate deep discounting under Section 3(4) of the Act.

An alternate solution?

In the present order, the CCI held that the Indian Competition Act does not recognise collective dominance and dismissed allegations under Section 4 of the Act. However, the question whether an investigation can also be launched for abuse of dominance, individually against Amazon and Flipkart, merits attention. In this regard, it is relevant to note that the Supreme Court of India ordered an investigation against Uber for abuse of dominance under Section 4 of the Act. Here, the Court took into account the prices offered by Uber and the apparent loss of ₹ 204 incurred for every ride. The Court did not go into consideration of market share for determining dominance. Rather, it argued that Uber, by virtue of its position of strength, is able to operate at a loss and affect competitors in its favour and thus launched an investigation for predatory pricing which was originally dismissed by the CCI.

A similar line of reasoning can be used against Amazon and Flipkart. Both the platforms are arguably at a position of strength whereby they are able to affect competitors in their favour. As the Supreme Court's order shifted the attention to the practices adopted by the parties, the defence of lack of dominant market share will no longer suffice for evading investigation under Section 4 of the Act. Even though the CCI's order did not go into the question of individual dominance, it is important to note that this is merely a *prima facie* order and the final order might discuss the issue. It has previously been clarified that CCI's order triggering investigation does not restrict the Director General's investigation to those allegations. Therefore, if the order of investigation is later upheld, the Director General has the power to investigate abuse of dominance by Amazon and Flipkart.

The Road Ahead

Interestingly, the present order comes nearly a year after CCI's dismissal of investigation against Flipkart for anti-competitive practices where it highlighted that the nascent stage of the e-commerce market necessitates any intervention to be carefully tested. The CCI in the present order does not provide any analysis of the same or offer a reason for the change in regulatory stance. This contrary stance is liable to create further doubts on the issue. The final order will set a precedent substantially determine the business models of e-commerce platforms.