

IS DUMPING OF FOREIGN CAPITAL TO OFFER DISCOUNTS “ANTI COMPETITIVE”?

E-commerce marketplaces have been a game changer when it comes to online retail trading in India. The e-commerce market players have been resorting to any means possible to acquire a customer base for the purpose of enhancing their gross merchandise value. For some years these online players have been able to lure customers by providing deep discounts to them which has as a result increased the tendency of the customers to rely more on such e-commerce offers and sales.

Offers and discounts provided by e-commerce players and predatory pricing have for long now been in entanglements with each other. Physical retailers or brick and mortar stores have been pressing the issue against the online players of unfair practices that have intention of adversely affecting competition in India for a long time.

The physical retailers community has always been concerned about the infusion of foreign capital in e-commerce marketplaces in India and has continuously been accusing such e-commerce players of dumping foreign capital to offer disruptive prices with an intention to diminish healthy competition in the market. However, now even the domestic e-commerce players have started raising some eyebrows over the easy accessibility of foreign capital to the foreign e-commerce marketplaces operating in India and the hefty discounts and offers provided by such marketplaces to the customers.

The Department of Industrial Policy and Promotion (“DIPP”) vide its Press Note 3 of 2016 (“**Press Note**”) dated March 29, 2016 while allowing 100% FDI under the automatic route in marketplaces also imposed certain condition upon them including the restriction from directly or indirectly influencing the sale price of goods or services. This move taken by the DIPP to curb any form of influence that e-commerce giants might have over the sale price of goods or services was to provide a level playing ground and equal opportunities to the bricks and mortars stores.

However, the Competition Commission of India (“CCI”) has as yet remained silent on the issue despite the fact that the issue of predatory pricing falls within the ambit of CCI.

Do discounts amount to Predatory Pricing?

Under Section 4(b) of the Competition Act, 2002 (“**Act**”), predatory pricing is defined to mean “*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, in order to establish predatory pricing, it is essential to determine whether an entity is enjoying a dominant position in the market and whether at the same time such entity is abusing the same.

There has always been a substantial difference between the sale prices of goods offered by the offline retailers and e-commerce players. Going by the assertions put forth by the brick and mortar stores, such marked difference in prices is because the online marketplaces which are flooded with foreign capital, fund the discounts with an intention to eliminate competition from the market.

In the case of the *All Delhi Computer Trader Association*, several complaints were filed against various online retail platforms for selling products at extremely low prices that the brick and mortar retail outlets could not compete with. However, the Competition Commission of India (“CCI”) held that the e-commerce players had no dominance in the market as the entire e-commerce industry forms only a miniscule part of the entire retail market in India. Thus, it was prima facie held that the conduct of such online retail platforms was not anti-competitive as per Section 4 of the Competition Act.

Position under US Anti-trust law

In 2009, Apple Inc. announced the release of 'iBookstore' which sold e-copies of books that were priced accordingly by the respective publishers. Amazon on the other hand, priced these copies at a comparatively lower cost, according to the customer base. Pursuant to the same, Apple executed agreements with major publishing companies to ensure that their prices are further lowered to compete with those of other resellers in order to maintain dominance. However, the US Supreme Court found Apple to be in violation of the US Anti-trust law and levied a penalty of \$450 taking into consideration the dominant position enjoyed by Apple in the US and the intention of creating a monopoly.¹

The officials of DIPP have also vide certain press statements maintained that the Press Note does not restrict e-commerce vendors from offering discounts and no action can be taken against them unless it is established that such e-commerce players have resorted to predatory pricing.

Limitation of CCI's jurisdiction

CCI's jurisdiction is limited by the criteria for determination of existence of predatory pricing stipulated under the Competition Act, as per which predatory pricing can only be established if an entity enjoys a dominant position in the relevant market. Thus, if an e-commerce entity with a minimum market share in the relevant market is providing products or services at a price lower than the cost price of such products or services, such an entity cannot be held guilty of predatory pricing since it does not hold a dominant position in the relevant market. In a complaint filed by Meru Travel Solutions Pvt. Ltd. against Uber group with the CCI in relation to reduction of the fares and discounts provided by Uber, CCI held that e-commerce players such as Uber cannot be abstained from providing discounts to their consumers since they are not dominant players in their relevant market.

However, DIPP has vide the Press Note imposed a blanket condition on the e-commerce marketplaces without setting out any criteria for determination of predatory pricing such as market shares, dominant position and the intent.

Thus, on one hand, any e-commerce marketplace flouting the condition prescribed by the DIPP by directly or indirectly influencing the sale price of the goods or services shall be liable to be probed by the DIPP, however, on the other hand under Section 4 of the Competition Act, none of the e-commerce players can be held liable for exercising predatory pricing since they hold a miniscule market presence in the relevant market which also includes brick and mortar stores.

Conclusion:

An extreme argument on the condition under the Press Note can be that any activity done by the online marketplace to meet up the competition can fall under the purview of 'indirectly or directly influencing prices', violating their fundamental right to freedom of trade.

Under the Competition Act, an e-commerce entity cannot be held liable for adversely impacting competition in the market until it becomes a dominant player in such relevant market, does that give a right to such e-commerce entities to continue resorting to anti-competitive measures to maintain sustainability in the market?

The DIPP has placed general restrictions on marketplace entities without taking into consideration the objective criterion provided by the Competition Act to prevent predatory pricing. Pursuant to the same, the Press Note has created a dilemma as to whether the provisions of the Competition Act would prevail over the condition set out under the Press Note considering the fact that CCI enjoys sole jurisdiction over the antitrust issues. It would be quite interesting to see if CCI rises to this occasion to clear the dilemma.

¹ *United States v. Apple, Inc.*, No. 13 – 3741 (2d Cir. 2015)

Further, taking into account the present scenario, a question arises as to whether there is a requirement for an anti-dumping law or regulation to provide checks and balances in relation to dumping or utilization of foreign capital by e-commerce players? India is still progressing towards opening up the market for overseas investors. Will a step towards setting up of a regime to check or impose conditions on utilization of overseas capital be progressive or digressive?