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Interplay of Competition Act in E-commerce sector

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ABSTRACT

The main objective behind the enactment of the Competition Act, 2002 is to maintain the healthy competition in the economy. With the emergence of E-commerce the issues regarding the anticompetitive sale by online platforms is always being highlighted and several cases has been filed in regards with the same. In this article we will see the interplay of the e-commerce giants and Competition Act, 2002. Also the approach of Competition Commission of India with regards to the exclusive agreements, deeper discount offer by the e-commerce giant and the concept of predatory pricing. The article will analyse the difference between supply agreement, different discount policies in the offline and online market. With the help of the case laws and past judicial approach the article will conclude the need of Competition Act and it's important in e-commerce sector.

I. INTRODUCTION

India is becoming the world's fastest-growing economy. The important reason behind that is the digital economy and the digital India campaign. E-commerce plays an important role in the digital economy. From the last few decades, the world is observing extensive growth in the e-commerce industry globally, and India is not an exception for the same. Since 2010 and onwards, the online markets and e-commerce industry becomes the fastest growing sector under the Indian economy. With the spread and growth of the sector, it changes the customer's behaviour. The chain of distribution also has tremendously changed with the invent e-commerce sector as this sector provides a large number of buyers and sellers through the Internet. In India, the e-commerce market is at the initial stage, and hence they are offering a considerable discount. Owing to such heavy discounts, the traditional stores are making an effort to catch up with the provision of such services and experiences which have never been offered to the consumers. Despite that, these stores sell witness consumers who visit the shops only to personally see the product while making a final online order. Due to this scenario, people are tent to buy the product from the e-commerce sector, creating a conflict between the online markets i.e., e-commerce and physical markets. To maintain the healthy competition between the competitors in the economy, the Competition Act (hereinafter Act) was enacted in

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2002. The reason behind the enactment of the Act is to prevent the competitors from misusing their economic position. For any anti-competitive activity, the Competition Commission of India (CCI) will look after all such anti-competitive activities. But the Commission's (CCI's) position as a regulator reflects a new paradigm with the growth of the e-commerce market.

II. What is the relevant Market in E-Commerce?

One of the crucial questions that arise while studying the interplay between the competition Act and E-Commerce is the relevant market? Are e-commerce and the traditional physical markets are part of the same relevant market of not? This issue has not yet been decided in any case and still the topic for research. The jurisprudence regarding the relevant market in the E-Commerce sector is still in developing nature.

Section 2(r) of the Act defines the relevant market as:

"Relevant market" means the market which may be determined by the commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets."

Means the CCI can define the relevant market with reference to both relevant geographical market and relevant product market.[2]

Taken into account the value of the transaction effectiveness Internet as a trading platform,

Ecommerce can, in some cases, reflect an additional marketing platform for the same products while developing new goods, markets, and markets in other marketplaces.[3]

In the case of the e-commerce market, there are mainly two different markets taken into consideration. The first one is the offline market, and the second is the online market. In the case of ***Mr. Mohit Manglani v. M/s Flipkart India Ltd. & Ors.***[4] In which CCI has made it clear that the online market does not constitute a separate individual market as such, and it is part and parcel of a single relevant market. Also, CCI noted that the online and offline are not two different markets nut merely a different channel of one relevant market.

Further, in the case of ***Mr. Asish Ahuja v. Snapdeal.com***,[5] in which CCI marked that both the online and offline markets are different in there purchase experience as there is a different discount policy in both the markets. In such cases, the customer will look for the options available to him and decide as per his/her will. In case the offline market is offering more

[2] Section 2(r) of the Competition Act, 2002.
[3] http://cci.gov.in/images/media/ResearchReports/E-Commerce%20and%20Competition%20Law.pdf
[4] Mr. Mohit Manglani v. M/s Flipkart India Ltd. & Ors, Case No.80 of 2014.
[5] Mr. Asish Ahuja v. Snapdeal.com, Case No.14 of 2014.

discounts, then the consumer will tend to buy the product from the offline market and vice-versa. With this reasoning, the commission has the opinion that the offline and online markets are not two different markets but only two different channels with different discount policies.

With the study and the reference of the cases mentioned above, it can interpret that for defining the geographical market in e-commerce, it is necessary to consider whether the offline retailers or sellers are available with a defined service or product or not as defining relevant geographical market is not easy in a giant network of the internet. Moreover, hence it is to be noted that the definition of the relevant market in the case of e-commerce will differ from case to case until there is a separate provision added to the Act.

III. Competition Concern in E-commerce:

The e-commerce markets adopting different creative approaches, measures and methods for creating customer base for better development of business. This different approaches creating a competitive issues which includes exclusive agreement, heavy discount and predatory pricing.

(A) Exclusive Agreements:

The exclusive agreements is defined under Section 3(4) (b) and Section 3(4) (c) which says that, the exclusive agreement is nothing but refusal to deal with certain persons. As there are large number of distributors available, but to choose a particular group of distributor and dealing with them and refuse to deal with others is exclusive agreement. When it comes to the ecommerce sector the point of exclusive agreement has often discussed. In the era of digital economy many products are only available at ecommerce website. E.g. newly launched smartphones which are often available only at their respective websites or on particular e-commerce website.

Similar issue has been discussed in the case of ***Mr. Mohit Manglani v. M/s Flipkart India Pvt. Ltd. & Ors***.[6] In this case the book titiled “Half Girlfriend” written by Chetan Bhagat which was exclusively available on Flipkart only. The complaint was filed before the CCI with allegation that such an arrangement which makes only the online seller to deal with particular goods is destroying the physical market infrastructure and hence it is said to be an anticompetitive arrangement. But the CCI rejected the allegations made on the observation that:

“A selective plan between a maker and an e-gateway would not make any entry obstructions since products sold via online portals face competitive constraints.”

[6] Mr. Mohit Manglani v. M/s Flipkart India Ltd. & Ors, Case No.80 of 2014.

However CCI's observation in the case of ***Snapdeal v. Kaff Appliances***[7], in which the suit was filed by the Snapdeal against the Kaff Appliances that, they are imposing unnecessary restriction on the retailers who are selling their product through online modes. It was alleged by the Snapdeal that the manufacturer is imposing a blanket ban on online seller to provide after sale warranties. In this case it was held by the CCI that the conduct of the Kaff Appliances was by its very nature a unilateral policy and involved coercion.

Hence the exclusive arrangements entered into between a distributor and an ORP, by itself is not anti-competitive but must be viewed under the lens of Section 19(3) of the Act. Hence, to determine the anti-competitive nature of such arrangements, factors such as creation of entry barriers, foreclosure of competition in the market, accrual of benefits to consumers etc. must also be taken into consideration.[8]

(B) Predatory Pricing

The predatory pricing can be defined as a strategy adopted by the sellers in the market in which for the short period of time where seller is selling the product with deep pocket losses and reduces the price of the product below the average variable cost with motive of wiping out competition from the market[9].

As per Competition Act, 2002 the predatory pricing falls under the ambit of abuse of dominant position under Section 4 of the Act. Section 4(2) of the Act says that offering product or services at below average price or at discriminatory price, directly or indirectly then such offer of selling product or service amounts to predatory pricing. Section 4(2) (a) (ii) mentions 'Predatory Pricing' as a form of unfair or discriminatory pricing and ultimately as abuse of dominant position. The predatory pricing is considered as a factor which is going to affect the healthy competition in the economy as it restricts the new comers in economy and creates a hurdle for their entry.

Under E-commerce the question of predatory pricing often come into picture when it come to the sales offer by the various online platforms. E.g. "Great India Amazon sale", "Big Billion Sale" etc. many times The Confederation of All India Traders ("**CAIT**") and various other parties has made a complaint against such a sales which are against the anti-trust and FDI policies.

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[7] Snapdeal v. Kaff Appliances, Case No.61 of 2014.

[8] Divye Sharma, "Competition Law and E-commerce: A Concern For the Future", 27 May 2015, https://www.mondaq.com/india/antitrust-eu-competition-/400368/competition-law-and-e-commerce-a-concern-for-the-future (lastly accessed on 31/08/2020)

[9] Hovenkamp, H.,Federal Antitrust Policy-The Law of Competition and its Practice,3rd ed., 2005, Thompson West

In the case of ***H.L.S. Asia Limited, New Delhi v. Schlumberger Asia Services Ltd. Gurgaon and Oil & Natural Gas Corp. Limited, New Delhi***[10] CCI held that if the aggrieved party is seeking a remedy for alleged predatory pricing, the most important factor is the determination of the average variable cost. Further, the said determined average variable cost should be higher than the current offered price of that product.[11]

In the another case of ***M/s. Transparent Energy Systems Pvt. Ltd. v. TECPRO Systems Ltd.***[12] *The CCI has laid down three important conditions to determine the dominant position* constitutes predatory pricing

- The price of the product or service must be lower than the cost of production.
- Such predatory pricing must be done with the intention to throughout the competitor out of the market.
- A substantial plan exists with a motive of recovering or recoup the losses incurred due to dropping the prices by jacking the prices high again after eliminating the competitors from the market.

In the case of ***M/s Fast Track Call Cab Private Limited v. ANI Technologies***[13], it was alleged by the complainant that OLA is providing a huge deep discount to its customer due to which traditional taxi drivers facing issues. In this case the CCI finds that the OLA is offering the discount with bearing the losses and hence it was found to a predatory pricing on part of OLA.

The predatory pricing is a form of abuse of dominance as per Section 4 of the Act and hence it is necessary for the alleged party to established that he is the dominant player in the market and same will be decided with the market share of the company. CCI cleared that the online marketplaces cannot be considered as dominant players on the basis of their current market share.

It is very difficult to prove that the deep discount offered by the e-commerce Platform is predatory in nature. The aggrieved party shall have to show that the discount is financed by the online venders which is not easy to establish.

And, hence the deeper discount and lower prices offered by the e- commerce platform always

[10] *H.L.S. Asia Limited, New Delhi v. Schlumberger Asia Services Ltd. Gurgaon and Oil & Natural Gas Corp. Limited, New Delhi, Case No. 80 of 2012.*
[11] Pawan Khatri, "Discounts Deeper Than Mariana Trench: Predatory Pricing by Indian E-Commerce Giants", 17 January, 2020, https://www.mondaq.com/india/antitrust-eu-competition-/884554/discounts-deeper-than-mariana-trench-predatory-pricing-by-indian-e-commerce-giants (lastly accessed on 31/08/2020)
[12] *M/s. Transparent Energy Systems Pvt. Ltd. v. TECPRO Systems Ltd. , Case No. 09 of 2013.*
[13] M/s Fast Track Call Cab Private Limited v. ANI Technologies, Case No.06 of 2015.

consider as predatory pricing. It depends upon situation and fact of the case.

IV. CONCLUSION.

The Competition Act, 2002 is trying to maintain the balance between both online i.e. e-commerce and the offline stores. The e-commerce is new channel of distribution and for sure it is going to expand a lot in coming future. So time come for reviewing the Competition Act, 2002 with rapid changing economy. With the growing economy and the increased number of online vendors CCI should take into the problems such as Price obfuscation, Vertical restraints are restrictions imposed by parties on different levels of the distribution chain etc. and should suggest its suggestion based on the past judicial approach for better enforcement and direct applicability of Competition Act to e-commerce sector. Even though at present stage the Indian Competition law is creating an enough space for the new comers in the field of e-commerce. At the same time the Competition Act is able to secure the interest of both traditional bricks and motor companies and also of the e-commerce platforms.

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