

Unforeseeable Scenario In E-Commerce Activities Compelled DIPP To Rectify The Consolidated FDI Policy, 2017

written by Shreya Dasgupta | January 16, 2019

Towards the end of 2018, there were two strikingly dissimilar views presented by the Competition Commission of India ("CCI") and the Department of Industrial Policy and Promotion ("DIPP"), in relation to e-commerce businesses in India. In this article, an attempt has been taken to co-relate these incidents and understand the rationale behind the same

All

India Online Vendors Association vs. Flipkart India Private Limited and Anr. before

the CCI

All India Online Vendors Association ("AIOVA") had approached the CCI as an informant under Section 19(1)(a) of the Competition Act, 2002, alleging that Flipkart Internet Private Limited ("Flipkart Internet") was abusing its dominant position, through its group company, Flipkart India Private Limited ("Flipkart India") and its non-group company, WS Retail Services Private Limited ("WS Retail").

Flipkart India is a company, which is

involved in the business of wholesale trading/ distribution of books, mobiles,

computers and related accessories. It was alleged by AIOVA that Flipkart India

sells its goods at highly discounted prices to a retailer named WS Retail (which was previously owned by the promoters of Flipkart Internet, until 2012)

and few other non-related retailers, who in turn sells the goods on the portal

of Flipkart Internet. These goods sold by such retailers are on high discounted

price and with huge cashbacks offered by Flipkart Internet, trying to boost the

sales of its group company, Flipkart India. As an outcome, the other small retailers/sellers end up either giving huge discounts to the customers or having very negligible or no sale for their products, which leads them to suffer immense losses, for them.

It was further stated by AIOVA that practises

of such nature exhibits "preferential treatment" to certain retailers/sellers like WS Retail etc. and falls under the ambit of "unfair trade practises".

The

informant also prayed to the CCI to lift the corporate veil and assess the economic nexus between Flipkart Internet, Flipkart India and the retailers/sellers like WS Retail to whom Flipkart India sells its goods at a discounted rate.

The CCI on November 7, 2018 in the case of All

India Online Vendors Association vs. Flipkart India Private Limited and Anr.[1] , after analysing all the facts, figures and

current framework of law, concluded the following:

- The market in which Flipkart India and Flipkart Internet operates are distinct in nature. While Flipkart Internet manoeuvres in a B2C model,

Flipkart

India operates in a B2B model;

- There are several other marketplace e-commerce players like Amazon, Shopclues, PayTm Mall etc, and thus Flipkart Internet is not a dominant player in the market under Section 4 of the Competition Act, 2002;
- There are several sellers/retailers on the platform of Flipkart Internet and each seller has to comply with the same terms and conditions to trade its goods on this platform;
- WS Retail was previously owned by the founders of Flipkart Internet until 2012, however, currently WS Retail has no relationship with Flipkart Internet and thus passes the "ownership" test as was set out in the then Consolidated Foreign Direct Investment ("FDI") Policy, 2017;

In light of above observation, the CCI

concluded that Flipkart Internet is not in contravention with Section- 4 of the

Competition Act, 2002 and is not abusing its dominant position.

Press

note issued by the DIPP

While the order brought in great relief to

various e-commerce entities and their group companies, the DIPP issued the Press Note 2 (2018 Series) on December

26, 2018 ("Press Note")^[2]

, wherein FDI policies for e-commerce business set in Consolidated FDI Policy,

2017, were amended and shall be effective from February 01, 2019.

Under the existing framework, the only

criteria to differentiate an inventory based model of e-commerce from a marketplace based model of e-commerce was "ownership". The ownership of the marketplace entities/ its group companies could not, in any way be, same or similar to the ownership of the sellers/retailers on its platform, directly. The marketplace entities were also prohibited to permit total sales value on its platform from one seller or such seller's group companies in excess of 25%

of such marketplace's total sales value in a financial year.

As per the reviewed policy, if the seller,

even one who is non-related to marketplace entity in terms of ownership, purchases more than 25% of its inventory from the group companies of the marketplace entity and sells it on the platform of the marketplace entity, then

the marketplace entity would be considered to have control over the inventory of the vendor thereby leading to the e-commerce activity as an inventory based

e-commerce activity.

Supplementary to the above, DIPP has stated

in the Press Note that any seller/vendor or its group company wherein a marketplace entity or its group company has control of any nature like ownership or inventory, or vice-versa cannot sell its goods on the platform of

this marketplace entity.

DIPP has moreover prohibited sale of any product exclusively on one e-commerce marketplace. Additionally, every e-commerce marketplace entity will be mandatorily required to furnish a certificate along with the statutory auditor's report to the Reserve Bank of India, confirming compliance to these guidelines by 30th September every for the previous financial year. It has also barred the marketplace entity to be unfair or discriminatory towards the vendors for any of the services it provides like logistics, warehousing, cashbacks, advertisement etc.

Co-relation

between the case and the Press Note

In consideration of above order passed by CCI

and the Press Note released by DIPP, we may notice that the case which was decided by CCI had let one of the largest e-commerce entity to roam scot-free and enjoy all the privileges of a marketplace based e-commerce entity under the

FDI policy, even where they were carrying out inventory based activities, indirectly, because of the gap in the existing legal framework. CCI and other judicial/quasi-judicial bodies in India, being bound by the laws made by the legislature strictly, cannot go beyond the line, and hence this order was passed.

However, the DIPP after this order, realised

the flaw in the Consolidated FDI Policy, 2017 and rectified the same by this Press Note issued by it, on 26 December 2018.

Conclusion

This is a classic case wherein

quasi-judicial/statutory body passed an order in line with the existing laws but against the principles of natural justice and the legislature recognized the cavities of the existing policies, through this case.

Law itself being a human science, it is

difficult for any law-maker, be it the best, to comprehend all the scenarios, while drafting a particular legislation. The companies, on the other hand, always try to push the boundaries and read between the lines of the policies to

recognise the rift, to maximise their profit in all directions, as much as possible. Nevertheless, the objective of law and law-makers is always to protect the interest of the general public, and not to let such companies to twist the law, and implement it for their own advantages. Therefore, cases like

this, enable the legislature to realise the minute gaps of the policy, and fill

them up, and restore the balance.

Contributed by – Shreya Dasgupta - Associate

[1] CCI Case No. 20 of 2018

[2] <http://pib.nic.in/PressReleaseDetail.aspx?PRID=1557380>

King Stubb & Kasiva,

Advocates & Attorneys

[Click Here to Get in Touch](#)

New Delhi | Mumbai | Bangalore | Chennai | Hyderabad | Kochi

Tel: +91 11 41032969 | Email: info@ksandk.com