

GOQii-Flipkart Spat And The Devil Of Predatory Pricing

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Predatory pricing by online retailers is again in the spotlight after GOQii sent a legal notice to Flipkart for selling its fitness trackers at a deep discount.

The smart wearable maker asked Walmart-owned e-commerce company to stop selling its products at a discount of 70-80 percent without authorisation from the company. BloombergQuint has reviewed the copy of the legal notice.

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The concerns are not new. Small traders have been accusing Flipkart and Amazon deep of spending billions to offer deep discounts. In 2014, dozens of them wrote to the competition watchdog accusing Flipkart and Snapdeal of predatory pricing. Even Lenovo, Dell, HP, Nikon and others, facing disproportionate discounting, had warned customers against online shopping, saying they were not authorised sellers.

"There has been a lot of abuse of the might by the big Indian e-commerce firms," Satish Meena, senior forecast analyst at Forrester Inc, said. "This will lead to greater scrutiny by the Competition Commission of India in the marketplace business," he said over the phone. If Flipkart is found to be in violation, he said, that will give small sellers the confidence of challenging online retailers against deep discounting.

What's The Issue

GOQii struck a pact with Flipkart India Pvt. Ltd. in 2016, later amended in 2018, to sell its Vital, Pulse and Stride fitness trackers, according to the notice sent to the online retailer. The two later mutually agreed over email to determine the price at which GOQii will sell goods manufactured by it to Flipkart India, the e-commerce company's wholesale arm.

The minimum selling price of GOQii Vital, according to the notice, was Rs 1,999, or about 43 percent discount to an MRP of Rs 3,499. Similar agreements were struck for other products as well.

To be sure, it's not clear whether the agreement was to set the minimum selling price for trackers on Flipkart.com or the minimum price for sale to Flipkart's wholesale arm.

A person privy to the development told BloombergQuint that the agreement said Flipkart will not sell the products to re-sellers beyond the lowest price. He didn't want to be identified as the matter is pending in court.

When 70-80 percent discounting of the trackers was found by the wearable firm, the company wrote to Flipkart on May 18 saying that it was offering "unauthorised discounted prices and that is leading to predatory pricing, and violated the agreement", the notice said. It asked Flipkart to stop selling products at an unauthorised price.

Flipkart Denies Charges

The online retailer, in its reply on May 22, said Flipkart India is a wholesale distributor and has no control over the pricing. Also, it said, the supply agreement with GOQii does not say that the price at which Flipkart India sells to a re-seller is capped, but only governs the price at which GOQii sells to the wholesaler.

GOQii, however, in its May 26 reply, said Flipkart violated the supply agreement as the two had agreed that the online retailer needed the company's authorisation for selling its products at a discounted price.

GOQii alleged that after a WhatsApp conversation between both the parties, Flipkart updated the original pricing of the products, suggesting that the e-commerce company has control over the pricing, according to the notice. And the fitness tracker company said it has evidence in the form of emails and messages to show Flipkart's control over pricing and discounting.

In response to BloombergQuint's queries, GOQii, however, declined to provide details. The company also declined to comment saying the matter is pending in court.

GOQii also said it never had any contract with third-party sellers and only had a pact with Flipkart directly for its products, according to the notice. Re-sellers retailing GOQii products at 80 percent discount are not authorised, and could be counterfeit, it said.

The Bombay High Court on May 27 provided GOQii interim relief, ordering sellers to remove the company's wearable devices from the Flipkart marketplace.

A Flipkart spokesperson, in a statement to BloombergQuint, said the company is fully compliant with the Indian law. "This is a legal matter with a supplier and we cannot comment on the details of a legal case, but we are engaged with the supplier to come to a swift resolution."

Legal Take Lawyers

BloombergQuint spoke with suggested Flipkart could be in trouble if it's proven that it did influence the pricing of goods sold by re-sellers on the marketplace.

"One way of indirect influence can be through involvement of a group entity (such as the wholesale company)," Prashant Prakhar, a lawyer in the regulatory team of Nishith Desai Associates, said. "It will be a factual determination, probably determined by whose books took the hit for the discount offered to customers."

The foreign direct investment policy doesn't allow e-commerce marketplaces to directly or indirectly influence the sale of goods or services, and calls for maintaining a level-playing field.

But there is no legal impediment on a wholesaler to contractually agree on the price at which it purchases the goods from a manufacturer and sells it to a re-seller, said Vaibhav Kakkar, partner at L&L Partners. "This remains a determination of facts as to whether the ultimate price at which the re-seller was selling the products of GOQii has been influenced," he said. "Unless that is made, the marketplace entity cannot be construed to have violated the e-commerce policy."

Arul George Scaria, assistant professor of law and co-director at Centre for Innovation, Intellectual Property and Competition, agreed but with a rider. He pointed a flaw in the supply agreement that could essentially put Flipkart and GOQii in trouble.

"The lowest price drop clause in the agreement which GOQii claims could spell trouble for both if any such agreement is made that puts a cap on the reselling price and is against the competition as per as per Sec 3(4) (e) of Competition Act 2002," he said.

He, however, said the matter of predatory pricing should be left to the Competition Commission of India. "One needs to be extra cautious about over-regulation that could hamper the growth of this nascent industry."