

CCI's Take on The Indian E-Commerce Market: Protect Competition, Not Competitors

Introduction

With the recent surge in internet users given the improved access to smart phones, and the convenience of the world wide web at our fingertips, the e-commerce market in India is witnessing an unprecedented growth spurt. One of the most promising sectors of the Indian market, the annual revenue of the e-commerce sector is projected to cross USD 16 billion by the end of 2015.¹ The Indian e-commerce market includes travel, financial services, real estate and other classifieds, online retail and various other services. Although online retail occupies less than 1% share of the overall retail market in India,² it is growing rapidly. The success of the online retail start-ups is expected to achieve annual revenue of USD 7 billion in 2016 with a compound annual growth rate of over 60%.³ With such exponential projected growth rate and investments pooling into online retail start-ups, various market regulators have frowned upon the lack of regulations in the e-commerce sector. The lack of clarity regarding the levy of service tax and value added tax on online retail and the prohibition of foreign direct investment in e-commerce companies providing goods and services directly to consumers has added to these concerns. Given these circumstances, it is not surprising that the Competition Commission of India (“**CCI**”) has recently looked into allegations of unfair trade practices by some major companies operating in this sector, viz., Flipkart, SnapDeal, Jabong, Myntra and Amazon.⁴

This newsletter examines the impact of the CCI's order on the Indian e-commerce market, especially the CCI's interpretation of the relevant market and the effect of online retail business models on price and non-price competition.

1. Facts

The investigation was started as a result of information filed by Mr. Mohit Manglani (the “**Informant**”) against four major online retail players of the Indian e-commerce industry, namely, Flipkart, Jasper Infotech, Xerion Retail, Amazon and Vector E-commerce (collectively, the “**Opposite Parties**”). The Informant alleged that the Opposite Parties have been indulging in anti-competitive practices in violation of the Competition Act, 2002 (the “**Act**”), by means of

¹ Fast and Furious: The beginning of multi-year explosive growth, Thematic, November 2014, accessible at <http://www.motilaloswal.com/site/rreports/HTML/635513814725455509/index.htm> (last accessed on 11th May, 2015)

² Evolution of e-commerce in India: Creating the Bricks Behind the Clicks, August 2014, Price Waterhouse Coopers, accessible at <http://www.pwc.in/assets/pdfs/publications/2014/evolution-of-e-commerce-in-india.pdf>, (last accessed on 11th May, 2015)

³ Supra note 1

⁴ *In Re: Mohit Manglani v. M/s Flipkart India Private Limited and Others*, Case No. 80 of 2014, decided on 23rd April, 2015

exclusive supply and distribution agreements with manufacturers/sellers of goods and services.⁵ The Informant also stipulated that the Opposite Parties had executed exclusive agreements for sale of certain products to the exclusion of other e-portals or physical channels. For instance, he cited writer Chetan Bhagat's latest novel which was launched exclusively on Flipkart. This, according to the Informant, enables the Opposite Parties to control the supply of the goods exclusively sold on their portals, thereby, creating an impression of scarcity, which often leads to foreclosure of the market for the traders operating in the physical market. This, in turn, causes an appreciable adverse effect on competition ("AAEC"). The Informant also alleged that due to such exclusive arrangements, the Opposite Parties had acquired a product specific monopoly, i.e., each of the Opposite Parties had a 100% dominance in the market for those goods that were exclusively sold on their portals. According to the Informant, this enabled them to manipulate prices and impose other terms and conditions detrimental to the interest of the consumers.

Similar allegations had been leveled against individual online retail companies by their brick and mortar counterparts, in complaints received by the CCI, previously. Their main grievance was that the practices adopted by these companies were driving these proprietors out of business. To address the prevailing concerns in the market, the CCI decided to take into account a similar complaint filed against the Opposite Parties, by the All Delhi Computer Traders Association ("ADCTA"), forwarded to it by the Director General in December 2014. The ADCTA had alleged that the Opposite Parties were engaged in predatory pricing, by purchasing goods from distributors or dealers on 21-30 days' credit and subsequently selling these products at prices lower than their purchase prices, to the detriment of such distributors and dealers. The ADCTA had also alleged that the Opposite Parties were abusing their dominant position in the market to impose quantity and resale restrictions, which affected the distributors and dealers operating in the physical market. The CCI heard the ADCTA, alongside the Informant and the Opposite Parties, to arrive at its prima facie opinion in this case.

2. Stand taken by the Opposite Parties

The Opposite Parties contended that the relevant market in question cannot be construed as product specific for each exclusive dealing agreement, *per se*, since the relevant market for a product would also include its close substitutes. Therefore, products which were able to exercise a price constraint on such products would also form part of the relevant product market. For instance, the relevant product market for a book could be delineated on the basis of language, genre, etc. but could not be confined to each book which was marketed through a particular portal. They also contended that the e-portals operate on a marketplace model, wherein the e-portal is not the owner of the goods sold, but simply a distribution channel. Therefore, the online and offline (or physical) retail markets are merely subsets of the organized retail market in India, and do not constitute separate relevant markets. The Opposite Parties further contended that India's organized retail market itself accounts for merely 8% of the Indian retail market, and online retail being a subset of the organized retail market, its market share is not significant enough to constitute a dominant position.

⁵ Exclusive supply agreements are considered to be anti-competitive under Section 3(4)(b) of the Act, and exclusive distribution agreements are considered to be anti-competitive under Section 3(4)(c) of the Act, if they cause any appreciable adverse effect on competition

With regard to their exclusive arrangements with manufacturers and suppliers, the Opposite Parties alleged that such vertical agreements⁶ were not presumed to have AAEC. The Act required these vertical agreements to be evaluated on the touchstone of various factors laid down under Section 19(3), so as to determine whether they deter, or in fact, improve competition. Therefore, the Opposite Parties contended that the exclusivity of their alleged vertical agreements, was limited to the exclusion of other online portals, and did not prohibit the manufacturer/supplier to sell their product on their own websites or in the physical market. They further argued that given the wide range of available substitutes and the existing competition in the retail market as well as amongst the e-portals themselves, no single manufacturer was able to exercise enough market power to affect competition in the relevant market.

3. CCI's Order

The CCI agreed with the Opposite Parties in determining that the relevant market could not be product specific as it includes all substitutes of a product. Therefore, it could not be said that the Opposite Parties were 100% dominant in the market for those products which were exclusively marketed by them. The CCI went on to state that irrespective of whether the online retail market is considered to be a separate relevant product market or a subset of the retail market, none of the Opposite Parties could be said to be individually dominant, given the multitude of e-portals in the market offering similar facilities. Based on this reasoning, the CCI refused to comment further on allegations of abuse of the alleged dominance of the Opposite Parties.

Evaluating the impugned exclusive agreements on the touchstone of the factors laid down under Section 19(3) of the Act,⁷ the CCI concluded that any exclusive arrangement between a manufacturer and an e-portal does not seem to create any entry barriers in the market. Moreover, the availability of substitutable products creates sufficient competitive constraints so as to deter any scope of monopoly or dominance. The CCI, in fact, noted that new e-portals are entering into the market which rather indicates a growth in competition. It further observed that as online distribution channels, the Opposite Parties help the consumers make a more informed decision by comparing prices and products. Based on these observations, the CCI concluded that the alleged exclusive arrangements do not cause any AAEC in the relevant market.

The key findings of the CCI with regard to the effect that the Opposite Parties have on competition in the retail market can be summarized as follows:

- (i) The relevant market for a product marketed through an e-portal is not product specific, but includes all its substitutes which can exercise a restraint on the pricing of such product.

⁶ Vertical agreements refer to arrangements between entities operating at different levels in the production and distribution chain, e.g., an agreement between a manufacturer and a distributor

⁷ The factors that were considered by the CCI in this case, include creation of entry barriers in the market, elimination of existing competitors, foreclosure of competition, accrual of benefits to consumers, improvements in production or distribution chain and promotion of technical, scientific and economic development

- (ii) The exclusive marketing arrangements between e-portals and manufacturers/suppliers do not create any entry barriers in the market, as the manufacturers/suppliers are free to sell their products on their own websites as well as the physical market.
- (iii) The availability of a large number of substitutable products, coupled with the multitude of companies operating e-portal services in the market, is enough to prevent the dominance of any single entity in this sector.
- (iv) E-portals, in fact, improve price transparency, allowing consumers to make a more informed decision, and thereby enhance competition.

4. Impact of the Order

The CCI had earlier, on another occasion, rejected the segregation of online and offline retail markets, holding that “these two markets are different channels of distribution of the same product and are not two different relevant markets.”⁸ However, in the same order, the CCI had also acknowledged that online and offline markets differ primarily in terms of discounts and the shopping experience they offer to their consumers. Hence, there appears to be a high degree of substitutability, *inter se*, within the two distribution channels from a consumer’s point of view. This enabled the traders dealing in the physical market, to allege that the unfair trade practices by their online counterparts, was driving them out of the market. However, this order has not only clarified the position regarding what would constitute the relevant market for the Indian e-commerce sector, but also acknowledged that the advent of online retail has, in fact, enhanced competition in the market.

The CCI has observed that online distribution channels provide consumers with an opportunity to compare prices as well as the pros and cons of a product much more easily than their brick and mortar counterparts. This implies that price competition⁹ as well as inter brand competition¹⁰ is intensified, both within the online sub-segment of retail as well as between online and offline retail markets. The CCI order has also acknowledged that while the alleged exclusive dealing arrangements between e-portals and manufacturers/suppliers only exclude other e-portals, they do not prohibit such manufacturer/supplier from selling the said product on their own websites. Therefore, although they may have some impact on the intra brand competition¹¹ across both the distribution channels; however, within the online distribution channel, their impact on intra brand competition appears to be negligible.

⁸ *Ashish Abuja v. SnapDeal and Another*, Case No. 17 of 2014, at paragraph 16, decided on 19th May, 2014

⁹ Price competition refers to the condition of a free market economy where all the competitors sell the same product, the demand for which is driven by the prices charged by each seller for that product

¹⁰ Inter-brand competition refers to the competition between two brands or manufacturers producing similar or perfectly substitutable goods

¹¹ Intra-brand competition refers to the competition between two retailers or distributors dealing in goods of the same brand

Conclusion

With the accelerated growth of the Indian e-commerce market, various market regulators have been keeping a close eye on the operational dynamics of the entities operating in the e-commerce market. Moreover, the recurring grievances of the brick and mortar shops against their online counterparts in the retail market, implores the Indian competition authorities to look into the competition repercussions of such business practices. In such a scenario, the CCI's effort to put to rest certain basic questions pertaining to the commercial practices of such online retail companies is laudable. By passing this order the CCI has reaffirmed the fact that the objective of the Act is to protect "competition" and not the "competitors".

Author

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