

COMPETITION LAW & E-COMMERCE: EMERGING TRENDS

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INTRODUCTION

E-commerce industry popularly described as a sun-rise industry of India is set to cross business worth \$16 billion by the end of the year 2015. ¹These figures are not surprising as both demand and supply side factors cumulate to set a galloping growth of e-commerce in the future. Such factors include- the rise of smartphones & mobile apps, growing young population of India, emergence of smart cities & wifi zones on one hand; and growing national and international capital funding in the e-commerce sector on the other.

While e-travel accounts for a lion's share of e-commerce business covering 60-70% of space, next in line are e-tailing services which account for 30% market space. ² E-commerce is further characterized by its expansion in product basket and outreach in geographical space. Therefore, a wide variety of product and services become accessible to larger masses across remote districts and towns of India by a single 'click'. The same is facilitated as e-commerce displays an era where partnership between online platforms and good/service providers, i.e. brands, is ubiquitous and involves diverse types of purchase, supply or distribution agreements operating at both horizontal and vertical levels. ³ It is here that the interface between competition law and e-commerce become nuanced.

Increasingly, companies i.e. those operating in the e-commerce space exclusively (e.g. flipkart) and those featuring dual presence (e.g. Shopper's Stop which has a presence in both bricks and mortar as well as online segment) are taking note of e-commerce compliance and enforcement. Ironically, even though a nascent legal regime in itself, competition law has proven to be more directly applicable to e-commerce companies rather than traditional laws such as those pertaining to foreign investment, taxation, cyber & commercial laws where applicable rules with respect to e-commerce are still being evolved!

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¹*E-commerce market to touch \$16 billion in India this year*, THE TIMES OF INDIA (TECH) April 9, 2015, available at: <http://timesofindia.indiatimes.com/tech/tech-news/E-commerce-market-to-touch-16-billion-in-India-this-year/articleshow/46864759.cms>

²*Is India in an e-commerce bubble?*, BUSINESS STANDARD April 16, 2015, available at: http://www.business-standard.com/article/companies/is-india-in-an-e-commerce-bubble-115041600253_1.html

³ *E-commerce in India: Accelerating growth*, PWC REPORT available at: https://www.pwc.in/en_IN/in/assets/pdfs/publications/2015/ecommerce-in-india-accelerating-growth.pdf

From the perspective of the Indian competition regulator, i.e. Competition Commission of India (CCI)⁴, the analysis of e-commerce jurisprudence represents a new paradigm. Clearly traditional principles of consumer preference, product substitutability, and business efficiency cannot be directly applied to the e-commerce space as most transactions involve only a virtual interface with the product/service. Furthermore, the presence of intermediaries in the e-commerce industry, whether in the form of retail platforms e.g. Flipkart, Snapdeal or aggregators e.g. O lacabs, Oyorooms etc. create room for more complex problems of competition law. It is therefore a ripe time to study the trends of competition law enforcement and compliance issues in the light of e-commerce industry. The focus of the subsequent parts of the paper would be to analyze the law of abuse of dominance and anti-competitive agreements in the context of e-commerce actors, i.e. service providers, online platforms, aggregators and consumers.

INTERFACE BETWEEN COMPETITION LAW & E-COMMERCE: ANALYSIS OF ISSUES

Competition law issues arise in the e-commerce industry in several ways. The Indian e-commerce industry houses both domestic and international players. Therefore, any merger or amalgamation of e-commerce firms whether in India or off-shore which may have an impact in India, remains liable for notification under Section 6 of the Competition Act, 2002 (Act).

Similarly, every agreement pertaining to transactions in the e-commerce space across producers, between producer and distributor, between producer/distributor and consumer remains subject to competition compliance as such terms may take an anti-competitive flavor under Section 3 of the Act causing an appreciable adverse effect on competition.

The conduct of certain e-commerce players who enjoy dominance by virtue of their market share or other factors such as commercial advantage, service network etc. may also be brought under the radar of competition law. Such conduct under Section 4 of the Act may involve imposition of unfair terms or discriminatory conditions on commercial transactions such as sale or distribution in e-commerce space, setting of final price of the commodity/service for the consumer, denying market space to new entrants or using one's power in one market to gain entry in another market.

⁴ Note, there are no COMPAT decisions on e-commerce issues, even though some of CCI orders in this context are currently under appeal.

Some of the issues reflecting the interface between competition law and e-commerce are discussed below. The issues arise from situations/instances that have been brought before the CCI. The analysis of the cases depicts the jurisprudential trends emanating from CCI's orders and its possible implications on future cases in the e-commerce segment.

ASCERTAINMENT OF RELEVANT MARKET

Ascertaining the relevant market is the first step in assessing an abuse of dominance claim. In the context of e-commerce, one may argue that online and off-line markets could be considered as distinct markets and therefore online market alone may be characterized as a relevant market. In this regard, the approach of CCI in determining this question remains vital. First, in the Flipkart case, CCI left open the question of whether e-portal markets may be treated as a separate relevant product market or as a mere sub-segment of the market for distribution.⁵ However, in the Snapdeal case,⁶ CCI clarified that both offline and online markets differ in terms of discounts and shopping experience. Similarly, buyers weight the options available in both the markets and decide accordingly. Therefore, if the price in online market increases significantly, then the consumer is likely to shift towards the offline market and vice versa. Following this reasoning, the Commission opined that the two markets-online and offline, are only different channels of distribution of the same product and are do not constitute as different relevant markets.

TREATMENT OF EXCLUSIVE ARRANGEMENTS AND MINIMUM RESALE PRICE

Choosing exclusive dealers/distributors thereby refusing to deal with other players in the market has remained a prevalent conflict under competition laws. This issue is surfacing in the context of e-commerce and manifesting itself in various ways.

In modern day, it is most often seen that several products, e.g. specific brands of mobile phones are only available for purchase through e-tailers.⁷ While it may be manufacturer's choice to adopt such policies to reach to a wider audience in a cost effective manner, the anti-competitive effects of such arrangements and concerns regarding foreclosure of market for other players continue to prevail. This issue has reached the CCI in the context of the sale of Chetan Bhagat's book, -Half Girlfriend|| which was exclusively available on Flipkart's website. Allegations were raised that such arrangements slowly destroy players in the

⁵ *Mr. Mohit Manglani v. M/s Flipkart India Pvt Ltd. & Ors.*, (Case No. 80 of 2014) [Flipkart Order], Para 18 ⁶*Mr. Ashish Ahuja v. Snapdeal.com through Mr. Kunal Bahl, CEO & Ors.* (Case No. 17 of 2014) [Snapdeal Order], Para 16

⁷ Some mobile phones belonging to Motorola brand are available for purchase only on Flipkart.

physical market and tend to create product specific monopoly leading to manipulation of price, control of production and supply, imposition of terms and conditions detrimental to interests of consumers and distortion of fair competition in the marketplace.⁸

However, CCI did not agree with these allegations and opined that an exclusive arrangement between a manufacturer and an e-portal would not create any entry barriers as most of the products as illustrated in the information to be sold through exclusive e-partners (i.e. online platforms) face competitive constraints. In CCI's views, mobile phones, tablets, books, camera etc., are neither alleged nor seem to be trodden by monopoly or dominance. Furthermore, there was no concrete evidence that by virtue of such exclusive agreements any of the existing players in the retail market were getting adversely affected. CCI was of the opinion that in the new e-commerce era, with the entry of new e-portals into the market, competition only seems to be growing, thereby allaying anti-competitive concerns.⁹

Given that e-commerce is a new age industry, the collection and presentation of data regarding the impact of e-commerce is likely to take some time. However, once such data becomes readily available, the market based economic evidences may play a crucial role in shifting CCI's attitude towards these issues.

Another related issue in e-commerce industry arises from the actual conduct of manufacturers in their restrictions/ refusal to deal with online platforms/distribution verticals. Companies through their internal policies are increasingly imposing bans on online warranties or sending circulars to their dealers instructing them not to provide the manufactured products on e-platforms. In- fact such activities have gathered momentum in the past one year with companies such as Lenovo, Nikon issuing public statements indicating that e-tailers such as Flipkart, Snapdeal and Amazon do not qualify as their authorized agents.¹⁰ While some such statements have been withdrawn¹¹ and some e-tailers, e.g. Snapdeal have also approached the

⁸Flipkart Order, Para 4

⁹*ibid*, Para 16

¹⁰*Lenovo: Flipkart, Snapdeal and Amazon not our authorized resellers*, THE TIMES OF INDIA February 19, 2014, available at: <http://timesofindia.indiatimes.com/tech/tech-news/Lenovo-Flipkart-Snapdeal-and-Amazon-not-our-authorized-resellers/articleshow/30685068.cms>

¹¹*Sony, Panasonic lift ban from online sales to cash in on the growth of ecommerce in India*, THE ECONOMIC TIMES February 4, 2015, available at: http://articles.economictimes.indiatimes.com/2015-02-04/news/58795785_1_sunil-nayyar-sony-india-online-sales; *Kiss n' make-up: Sony, Samsung et al set to resume online sales in India*, FIRST POST February 4, 2015, available at: <http://www.firstpost.com/business/kiss-n-make-up-sony-samsung-et-al-set-to-resume-online-sales-in-india-2079067.html>

CCI against such discriminatory treatment met against products sold through their online channel,¹² the issue continues to abound industry wise.

As discussed above, various techniques may be used by companies to refrain their dealers from dealing with players online. In one instance, a dealer instituted a complaint against Snapdeal and the company Sandisk as it was forced to obtain a No Objection Certificate (NOC) from the manufacturer without which it could not list its products on its online platform. The Commission declining to agree with the informant opined that practices at the behest of companies requiring a NOC for online sale cannot be considered abusive as it is within the rights of entities to protect the sanctity of its distribution channels. CCI stated that in a quality driven market, brand image and goodwill remain important concerns and it appears a prudent business policy that sale of products emanating from unknown/unverified/unauthorized sources are not encouraged/allowed.¹³ Justifying the validity of the circular mandating such NOC to be obtained, CCI clarified that the manufacturer who has a full range of all India after sales and warranty services offered by it is limited to those products brought from its authorized national distributors. Therefore the conduct in issuing such circular is a part of normal business practice, cannot be an abuse of dominance.¹⁴

However, in a similar such fact situation wherein Snapdeal instituted a complaint against a manufacturer which had placed restrictions on its dealers in dealing with e-tailers, CCI took a different stand. In *Snapdeal v. Kaff Appliances*, Snapdeal had alleged that Kaff Appliances, a leading brand of kitchen appliances imposed a blanket ban on providing after sales warranties to customers who buy products online channels who may not be considered as authorized sellers. Per Snapdeal, such a ban was imposed without any justification for the same. Snapdeal thus alleged that the seller's conduct resulted in a total deprivation of consumer choice in violation of section 3(4) (d) of the Act. Highlighting various factors under section 19(3) of the Act, Snapdeal alleged that the agreements entered into between the Kaff Appliances and its dealers/distributors had an appreciable adverse effect on competition.¹⁵ This time, the Commission instead of permitting such practices as commercially prudent measures to check quality and protect its distribution channel, instead held that the act of Kaff Appliances in the nature of a unilateral policy involved coercion.

¹² M/s Jasper Infotech Private Limited (Snapdeal) vs M/s Kaff Appliances (India) Pvt. Ltd. (Case No. 61 of 2014) [Kaff Appliances Order]

¹³ Snapdeal Order, Para 19

¹⁴ *ibid*, Para 20

¹⁵ Kaff Appliances Order, Para 9.

This coercive conduct coupled with the fact that a number of distributors actually implemented the unilateral policy of the supplier, in practice, amounted to a tacit acquiescence by the other party or parties.¹⁶

Therefore, the Kaff appliances decision represents a paradigm shift in CCI's approach towards policies of restriction towards online sale and distribution. Not only does CCI's approach differ from its previous order in *Ashish Ahuja v. Snapdeal*, but it also depicts a bolder stand in comparison to other jurisdictions. For instance, in the EU, it is a recognized practice that a decision of the manufacturer which constitutes a unilateral conduct escapes the prohibition in Article 81(1) of the European Commission Treaty.¹⁷ This position has been affirmed by the highest court of appeal in the Volkswagen case, reversing the Commission's erroneous interpretation that the circulars in the form of unilateral policies of companies get covered within the meaning of Article 81.¹⁸

Another related issue in the e-commerce space is the maintenance of minimum resale price and the effort on part of companies to ensure a minimum resale price of their product to ensure price parity between online and offline seller, thereby preventing free riding by offline agents so as to protect the interest of dealers who maintain bricks and mortar stores. Even though this issue has arisen before the CCI in the context of e-commerce only in limited instances, it remains pivotal for future analysis. It has arisen as an industry wide issue that companies apart from issuing circulars to dealers or imposing conditions, e.g. requirement of NOCs to deal with online platforms, also wish to exercise the tool of resale price maintenance (RPM) to keep a check on online sales.

Three cases have arisen before the CCI which pertain to the issue of RPM. In *ESYS v. Intel Corporation & Ors.*,¹⁹ a case was instituted against Intel which was allegedly dictating the retail price of its products to the distributors. Here, the Commission held that monitoring of the downstream market's price by the Manufacturer of its own products (i.e. price at which the dealer is selling them) cannot by itself be said to be anti-competitive. Such monitoring neither creates entry barriers in the market nor leads to any market foreclosure. Therefore, as an implication, if faced with such charges, business entities may argue that monitoring exercises justify commercial prudence as such a mechanism helps the manufacturer to plan

¹⁶*ibid*, Para 13

¹⁷ AEG v. Commission, Bayer v. Commission, Ford v. Commission, as cited in *Volkswagen v. Commission*, Judgment of third court (third chamber), Case C-74/04 P, Para 13

¹⁸*ibid*, Para 54

¹⁹ Case No. 48 of 2011

and adjust capacity to satisfy end users' needs. It would be interesting to see how CCI's jurisprudence would evolve when similar RPM cases would be instituted in the e-commerce space.

In *M/s Shubham Sanitarywares v. Hindustan Sanitarywares & Industries (HSIL) Ltd. & Ors.*,²⁰ CCI has clarified that the practice of offering differential discounts to different consumers i.e. less discount for retail buyers and a higher discount for bulk buyers (such as institutions, builders, colonizers and persons of importance) may not be construed as a violation of Section 3(4) of the Act but maintaining the specific rate of discounts to different consumers as the policy of differential discounts which are forcibly implemented by the entity may amount to a violation under RPM subject to its appreciable adverse effects on the market.

However, in its third case of a claim pertaining to RPM, CCI prima facie concluded that the restrictions imposed by Hyundai on the maximum permissible discount that may be given by a dealer to the end-consumer, coupled with the practice of price monitoring by Hyundai wherein the dealers were penalized on account of any deviation amounted to a resale price maintenance in violation of Section 3.²¹

Therefore, under the framework of the Indian Act, RPM is neither per se legal nor illegal, but its validity has to be analyzed by a rule of reason approach in the light of its pro versus anti competitive effects. Hence, the issue of RPM in general and its application in the e-commerce sphere in specific is a grey area of law, and it would be interesting to observe how CCI's jurisprudence is evolved in this field. In days to come, this issue would be severely litigated as several companies are intending to institute RPM like measures in-order to keep a check on their online dealers.

ONLINE SALES & DISCOUNTS

Undeniably, the modern consumer is living in an era of big billion day sales.²² Such volume and deep discounts offered by online players has gained the wrath of online traders who complain that their shops are being reduced to mere show-rooms where consumers visit the shops, inquire about product details, seek for specifications and utility of the product/service,

²⁰ Case No. 99 of 2013

²¹ *M/s Fx Enterprise Solutions India Pvt. Ltd vs M/s Hyundai Motor India Limited*, (Case No. 36 of 2014), Para 24

²² *Undeterred Flipkart gears up for next Big Billion-Day sale; event to be many times bigger than the previous one*, THE ECONOMIC TIMES, January 31, 2015, available at: http://articles.economictimes.indiatimes.com/2015-01-31/news/58650592_1_big-billion-day-billion-day-sachin-bansal

but prefer to perform the actual sale/purchase of the product/services on the online platforms, which offer (anti) competitive cheaper prices. The traditional bricks and mortar traders therefore complaint of being reduced to the fringes of the market as they are unable to undercut prices to the same extent as their online counterparts who otherwise are neither burdened with bearing the infrastructure costs nor cost for maintenance and training of staff personnel.

In- fact cases have been instituted before the CCI against players including Flipkart, Snapdeal, Amazon, Jabong and Myntra for indulging in predatory pricing.²³ However, CCI has rejected such claims at a prima- facie level as none of these entities were found to be dominant in the retail market. It becomes interesting to note that the demarcation of relevant market becomes a pivotal issue here. For a claim of predatory pricing to succeed against the e-tailers, they must be found to be dominant in the market space in which they are operating. However, since CCI in its previous orders have recognized that online market is only a distribution channel rather than a relevant market in itself, the dominance of any e-tailer is reduced to a miniscule. The assessment of dominance is linked to CCI's refusal to demarcate online market as a distinct market of goods/service transactions. In this case, the e-tailers raised the plea that online retail is a sub-set of the organized retail market and since the organized retail itself constitutes a miniscule portion, about 8% approximately of the total retail market in India, the share of online retail is extremely less.²⁴ In response, CCI concluded that irrespective of whether e-portal market is considered as a separate relevant product market or as a sub-segment of the market for distribution, none of the e-tailers seem to be individually dominant. Further, there existed several players in the online retail market which offered similar facilities to their customers. Hence, the claim of abuse against such entities did not succeed.²⁵

However, a prima facie case of abuse of dominance, under the allegation of predatory pricing has been prima facie met against a related entity operating in the e-commerce space, i.e. one of the leading taxi aggregators in India. The present case of an online taxi aggregator differs from the case against e-tailers since the activities of a taxi service aggregator can be assessed tangibly in terms of real market owing to the unique nature of taxi service. The relevant market in this case was determined as the Radio Taxi services in the city of Bengaluru.

²³Flipkart Order

²⁴*ibid*, Para 10

²⁵*ibid*, Para 18

In, *M/s Fast Track Call Cab Private Limited v. ANI Technologies*,²⁶ a prima facie order was passed in respect of allegations raised against Ola for providing several incentives/ loyalty rebate offers, predatory discounts to its customers. The Commission noted that the conduct of the Opposite Party especially with regard to offering huge discounts to its customers and incentives to the drivers at the cost of bearing losses appears to be a strategy designed to exclude other players out of the relevant market which also resulted in a loss of business to the Informant. Therefore, the case marks a shift in Commission's attitude towards protection of the traditional industry, i.e. taxi services as against the novel concept of app based taxi services. Such issues also become interesting as it remains a challenge for the CCI to evolve and accept definite cost benchmarks to new industries, e.g. online taxi service aggregators. It is recognized that in network industries such as these, traditional cost models for predation analysis (Average Variable Cost) remain inappropriate and newer models, e.g. Average Avoidable Costs/Long Run Incremental Average Cost become more pertinent. Hence, the final orders in such cases would hold vital implications for the nature and functioning of e-commerce industries not just in the taxi services segment but also other segments such as hospitality (oyorooms) etc.

ADVERTISEMENT SCHEMES IN E-COMMERCE SPACE

Since e-commerce companies operate in the online sphere, their visibility, brand name and promotion in this space is pivotal to their growth. Competition law provides them a tool to regulate their visibility in the market space. In this context, it is important to note that several e-commerce companies²⁷ have been asked to intervene and provide their comments in the ongoing investigation of an abuse of dominance claim against Google, presently investigated by the Director General (DG), CCI. Google, one of the most popular search engines derives its maximum revenue from search advertising. The DG has concluded upon Google's dominance in the relevant market of -Web search|| and -search advertising|| markets with a market share of more than 85% in Web search in the period between 2009 and 2014.

Allegations pertaining to abuse of dominance arise as Google is said to be biased in favour of its own offerings (Google Maps, Google Places, Google+ social network that aimed to compete with Facebook) integrated into its search results. According to sources available in the public domain, the DG report has concluded Google's indulgence in practice of search

²⁶ Case No. 06 of 2015

²⁷ Microsoft, Yahoo, Rediff, Facebook, MakeMyTrip, TripAdvisor, Yatra, Cleartrip, Nokia's Here Maps (before it was sold to Microsoft), Flipkart, Times Internet, JustDial, Info Edge, Network18 along with more than 10 major ad agencies.

bias which in turn harms its competitors as well as users. On specific findings, DG concluded that Google is abusing its dominance by: (i) imposing unfair conditions on those it is selling services to (advertisers forced to effectively bid in ads against Google's homegrown services that have an unfair advantage); (ii) limiting or restricting technical or scientific development relating to goods or services to the prejudice of consumers (that is, if Google stopped other companies, such as rival online maps providers, from building up market share and consequently preventing other services from improving and growing to the detriment of consumer choice; (iii) prohibiting dominant companies from indulging in practices resulting in denial of market access in any manner (that is, if Google pushes one of its own services above another companies' in the search results, this could deny that company access to a large number of search engine users); (iv) prohibiting a company using its dominant position in one relevant market to enter into, or protect, other relevant markets (that is, for example, Google keeping out other online mapping providers by its effectively cross-selling or cross-promoting promotion of its own Google Maps services in its search results).²⁸

At this stage, the case is presently under investigation. If these charges are confirmed by the competition regulators, it would usher an era where even smaller e-commerce companies would gather strength to litigate against unfair acts of giants such as Google which operate in the online space.

CONCLUSION

Competition law intervention in e-commerce sphere serves various purposes. It facilitates the e-commerce companies to operate in an equal plane with traditional bricks and mortar companies and their dealers. Competition law provides enough room that novel and innovative companies are able to penetrate into the market and offer more choices to consumers and companies. At the same time, competition law provides enough safeguards for traditional dealers and companies intending to protect the interest of the traditional dealers against the eroding effects caused by e-commerce companies. Similarly, competition law provides checks and balance upon e-commerce companies preventing them to price unfairly, i.e. offer deep discounts which in turn are predatory. Besides, e-commerce also provides a strategic value to e-commerce companies who may proceed against unfairness in the online space perpetuated by giants such as Google.

²⁸ *Why did CCI write Google a bad report card?*, LIVE MINT, September 2, 2015 available at: <http://www.livemint.com/Companies/5D4c8f9kKB41IyL99Rfm4H/Why-did-CCI-write-Google-a-bad-report-card.html>

Therefore, the interface between e-commerce and competition law has emerged as one of the seminal issues and in days to come, would crucially shape the jurisprudence both of competition law and e-commerce regulation.