



Monthly Newsletter

# State of Antitrust

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### **CCI initiates probe against Flipkart and Amazon after conducting Market Study on E-Commerce; India**

Whether competition in an online platform gets affected when the operator of such platform prefers, sellers of goods and services, who are either affiliated or controlled by the operator itself? Well, this was one of the observations of the Competition Commission of India (*'Commission'/'CCI'*) in its report titled as *'Market Study on E-Commerce in India'* released on 08<sup>th</sup> January, 2020 (*'Report'*). The CCI kept the above aspect of the observation open in its report by stating that such situations may be determined on a case to case basis.

Later, on 13.01.2020, the CCI initiated a probe against two online platforms viz. Flipkart Internet Private Limited (*'Flipkart'*) and Amazon Seller Services Private Limited (*'Amazon'*) on being informed by the Delhi Vyapar Mahasangh (*'Informant'*) about alleged anti-competitive practices indulged into by them.

The *Informant* in the information made allegations pertaining to existence of vertical arrangements between *Flipkart* and *Amazon* with some of their preferred sellers. These vertical arrangements were in the form of deep discounts, preferential listing and exclusive tie ups with preferred sellers. These preferred sellers were alleged to be affiliated with or controlled by *Flipkart/Amazon* either directly or indirectly.

It was alleged that due to huge funding received from the investors, *Amazon* and *Flipkart* were able to cross-subsidize the price of the products of the preferred sellers and price them below cost on their platforms. *Amazon* and *Flipkart* also provided deep discounts to few preferred sellers, which adversely impacted non-preferred sellers, including members of the *Informant* as they could not compete on prices with preferred sellers on online platforms.

With respect to practice of preferential listing, *Flipkart* and *Amazon* used words like "Assured Seller" and "Fulfilled", respectively, on the products sold by these preferred sellers. This discrimination resulted in creation of search bias towards preferred sellers and helped them to appear on the first few pages of the search results.

Regarding exclusive tie-ups, it was alleged that *Flipkart* and *Amazon* have several tie-ups with private labels which get more preference in terms of sales. The products/services of private label/brands of *Flipkart* and *Amazon*, were routed through preferential sellers on their online platform at a discounted price. This *modus operandi* was employed by *Flipkart* across all categories, including smartphones.

The *Informant* also averred that *Amazon* and *Flipkart* have the ability to unilaterally terminate their agreements with non-preferred sellers without assigning any reasons, as a result, non-preferred sellers were left with no options but to comply with their mandates. Thus, relying on the above, the *Informant* submitted that *Flipkart* and *Amazon* are jointly dominant in the relevant market and have established an inherently anticompetitive model for e-commerce.

The Commission perused the information and refused to deliberate on the allegations of dominance as the same was not covered under the Competition Act, 2002 (*'Act'*).

For alleged vertical arrangements, the Commission looked into the model of e-commerce adopted by the *Flipkart* and *Amazon*, which was essentially a *'marketplace'* based model. The CCI noted that in such model, platforms and sellers operate at different stages of the supply chain. The CCI opined that such a model can be examined under section 3(4) of the Act which prohibits anti-competitive agreements amongst persons at different stages of production chain, distribution, etc.

Thereafter, the CCI examined the allegation of exclusive launch of smartphones and observed that there were few online sellers, selling these exclusively launched smartphones either through *Amazon* or *Flipkart* only.

Based on the evidence adduced by the *Informant*, the CCI held that, *prima facie*, it could be inferred that there was exclusive partnership between smartphone manufacturers and e-commerce platforms for exclusive launch of smartphone brands. Further, exclusive launch, coupled with discounting practices and preferential treatment, created an ecosystem leading to possibility of an Appreciable Adverse Effect on Competition (*'AAEC'*).

On the allegation of deep discounting, the CCI noted that emails were sent by *Flipkart* and *Amazon* to preferred sellers stating that a part of the discounts offered during the big sale events such as Big Billion Days and the Great Indian Festival, would be incurred by *Flipkart* and *Amazon* respectively.

The CCI also looked into the allegations of the preferential listing in conjunction with the above mentioned allegations and observed that competition on the platforms may get influenced in favour of the exclusive brands and sellers, through higher discounts and preferential listing.

Based on the above, the CCI deemed it necessary to get it investigated whether the alleged exclusive arrangements, deep-discounting and preferential listing by the *Flipkart* and *Amazon* were being used as an exclusionary tactic to foreclose competition and if such practices were resulting in an AAEC contravening the provisions of Section 3 (1) read with Section 3(4) of the Act.

Lastly, the CCI directed the Director General to cause an investigation into the matter.

**(Case No. 40 of 2019 and Market Study on E-Commerce in India: Key Findings and Observations published on 08.01.2020)**



## Heard at the BAR

Legal news from  
India and the world

**ICA initiates non-compliance proceedings against Facebook in Italy**  
Italian Competition Authority (*'ICA'*), has launched proceedings against Facebook (*'FB'*) for not complying with its decision dated 29.11.2018 (*'Previous Decision'*).

In Previous Decision, the ICA fined FB with €5 million for two reasons. Firstly, for not adequately informing consumers registering on FB about the collection and use of their personal data for commercial purposes by FB. Secondly, for hiding the remunerative aims underlying the supply of FB services which were advertised as free of charge.

The ICA in its Previous Decision opined that regardless of the lack of a monetary consideration for registering on FB, users' personal data acquire an economic value making it a commercial transaction.

Thus, ICA held that FB carried out an unfair commercial practice, inducing users to make a transactional decision they would have not otherwise made. Resultantly, ICA imposed a fine of €5 million and prohibited continuation of such practice and directed FB to publish an amending statement on the homepage of its website, the Facebook App and the personal page of each Italian registered user.

Though the FB removed its tag line i.e. *"it's free and always will be!"* from the home page but ICA is of the opinion that consumers willing to register on FB are still not adequately and immediately informed about the collection and use of their personal data for commercial purposes.

Further, it also appeared to ICA that FB did not publish the amending statement as was directed in the Previous Decision.

Thus, the ICA initiated the non-compliance proceedings against FB which could lead to ICA imposing a fine up to €5 million on FB.

*(Press Release 24.01.2020)*

**Another company in musical instrument sector fined £4.5 million for indulging in resale price maintenance; UK**

Months after the Competition and Market Authority (*'CMA'*) fined Casio Electronics Co. Ltd £ 3.7 million for indulging in resale price maintenance, another company viz. Fender Europe, a guitar manufacturer, has been fined with £4.5 million for pursuing a policy which aimed at restricting UK retailers from discounting the price of Fender's guitars sold online.

During the course of investigation, the CMA gathered evidence which revealed that Fender on occasions pressurised retailers to raise their online prices. Further, the CMA found that Fender required its guitars to be sold at or above a minimum price from 2013 till 2018.

Furthermore, the CMA discovered that certain Fender employees deliberately tried to cover up their actions by recording as little as possible in writing. But the investigation uncovered emails and texts from Fender's IT servers and mobile phones, which helped the CMA to prove the illegal behaviour.

The Fender admitted its illegal actions under the CMA's 'leniency' and 'settlement' procedures in return for a reduced fine.

The CMA noted that online sales of musical instruments have grown to around 40% of total sales, making it important that musicians have access to competitive prices online.

Therefore, when companies indulge in these kinds of illegal practices, known as resale price maintenance (*'RPM'*), it often leads to customers missing out on the best deals because they find all retailers selling guitars at a similar, rather fixed price.

As a result of Fender's illegal actions, the CMA imposed a fine of £4.5 million which is the largest imposed in the UK for RPM.

*(Press Release 22.01.2020)*

**FTC challenges consummated merger between dominant supplier and its closest competitor; USA**

The consummated acquisition of VieVu LLC by Axon Enterprise Inc.'s has been challenged by the Federal Trade Commission (*'FTC'*). According to the FTC, the acquisition reduced competition in an already concentrated market.

Before their merger, Axon and VieVu competed to sell body-worn camera systems to large metropolitan police departments.

The FTC in its complaint stated that competition between Axon and VieVu resulted in substantially lower prices for large metropolitan police departments. Axon and VieVu also competed vigorously on non-price aspects of body-worn camera systems.

The merger has resulted in elimination of direct and substantial competition in price and innovation between dominant supplier Axon and its closest competitor, VieVu.

Further, the merger removed VieVu as a bidder for new contracts and allowed Axon to increase price for products to be used by police officer.

The administrative trial in the complaint is scheduled to begin on May 19, 2020.

*(Press Release 03.01.2020)*

## CCI to investigate abuse of dominant position by Asian Paints; India

The Competition Commission of India (**‘CCI’/‘Commission’**) has ordered a probe against Asian Paints Limited (**‘Asian Paints’**) for pressurizing the dealers to not deal with JSW Paints Private Limited (**‘JSW Paints’**) and deny market access to JSW Paints by abusing its dominant position in the relevant market.

The JSW Paints filed information before the CCI and informed about the conduct of Asian Paints which aimed at preventing JSW Paints from establishing its presence in the relevant market. It was alleged that by indulging in anti-competitive practices, Asian Paints not only denied market access to a competing entity but also restricted the freedom of contract with dealers. Such practice not only lead to an effective and efficient competitor being driven out of the market but also limited choice to the consumers. The JSW Paints stated that the decorative paints market was dependent upon direct distributorship model. Without access to dealers, being an essential feature of this business, there was no scope for new or existing entity in the market to survive.

The JSW Paints alleged that Asian Paints threatened and pressurized various dealers in Karnataka, Telangana and Tamil Nadu from dealing with JSW Paints. Further, the dealers were made to face punitive action at the hands of Asian Paints, if they continued to deal with JSW Paints. It was also alleged that Asian Paints threatened the dealers to discontinue its supplies, and disallowed discretionary discounts, among others.

The Commission considered the information in its meeting held on 24.10.2019 and noted that JSW Paints was primarily aggrieved by denial of market access by Asian Paints, being in contravention of Section 4 of the Competition Act (**‘Act’**) and anti-competitive agreement between the Asian Paints and Dealers resulting in violation of Section 3(4) of the Act.

To analyse the violation of section 4 of the Act, the Commission delineated the *relevant product market* as “*market for manufacture and sale of decorative paints by the organised sector*” by segregating the paint industry into two segments *viz.* decorative paints and industrial paints. As per the analysis of the Commission, these two segments were not substitutable due to their distinct intended use and characteristics.

With respect to *relevant geographic market*, the Commission was of the view that conditions of competition in the paint sector are homogeneous across India. Hence, the *relevant geographic market* was defined as “*whole of India*”. Accordingly, the relevant market was delineated by the Commission as “*market for manufacture and sale of decorative paints by the organised sector in India*”.

Thereafter, the Commission determined whether Asian Paints held a dominant position or not, as alleged by the JSW Paints. For this purpose the Commission noted that there were top 4 operators in this industry namely, Asian Paints, Berger Paints, Kansai Nerolac, Akzo Nobel, which together occupied around 80% of the relevant market, with Asian Paints maintaining its highest market share consistently over the years. Based on above, the Commission opined that Asian Paints *prima-facie* appeared to enjoy a dominant position in the relevant market.

Lastly, the Commission analysed the allegations of the JSW Paints and noted that the alleged conduct of Asian Paints of threatening and pressurising dealers *prima-facie* indicated that Asian Paints attempted to prevent JSW Paints in establishing a presence in the relevant market. This conduct of Asian Paints denied access to necessary distribution channels and limited the availability of alternate products for consumers, thereby reducing the competition in the market. Further, by threatening to discontinue the supplies, Asian Paints imposed restrictions on dealers not to deal with JSW Paints. Observing the above facts, the Commission was of the *prima facie opinion* that investigation by the Director General is necessary to determine violation of Section 4(1) and 3(4) of the Act by Asian Paints.

(Case No. 36 of 2019)

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