



Monthly Newsletter

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Amazon not dominant in fashion products, says CCI; India

The alleged unfair and anti-competitive conduct of Amazon Seller Services Private Limited, Amazon Export Sales LLC (together referred to as 'Amazon') and Cloudtail India Private Limited ('OP-3') came under the scrutiny before the Competition Commission of India ('CCI') on the basis of the Information filed by Lifestyle Equities C.V. & Lifestyle Licensing B.V. ('Informants').

As per the Informants, the conduct of the Amazon caused an exclusionary effect on the Informants' overall online business operations in India. The Informants averred that in 2017, it came to their knowledge that Amazon and OP-3 (preferred seller and a group entity of Amazon) offered counterfeit/unlicensed/unauthorized products of the Informants at 'unfair, discriminatory and/or predatory prices'. Due to this, the online traffic from the website of the Informants (from 2019) diverted to the website of OP-1 (www.amazon.in) for the Informant's products.

It was alleged that such conduct of imposing unfair pricing upon the sale of goods was anti-competitive because the Informants could never match the pricing levels of the counterfeit/unlicensed/unauthorised products sold by Amazon.

The Informants further stated that any seller's access to customers on online platforms/websites was significantly dependent on the sellers' ranking on such platforms. Instead of acting as a neutral marketplace, Amazon leveraged its control on its platform in favour of own/preferred sellers/label, by giving them higher search ranking and positive customer review, to the disadvantage of other sellers. Further, such search ranking and customer review mechanism of Amazon was alleged to be opaque.

The Informants also submitted that Amazon offered deep discount, at its own cost on the products sold by its preferred sellers. As a result, the same brand/ product sold by an unrelated and/or other seller of Amazon was priced much higher than the price offered by Preferred Sellers such as OP-3, thus, foreclosing the competition in the relevant market. Lastly, the Informants alleged that the inter-se agreements between Amazon and OP-3, to sell counterfeit/unlicensed/unauthorised products of the Informants, were anti-competitive which created significant entry barriers, and foreclosed the market for other competitors and had a debilitating effect on competition in India. Based on this, the Informants alleged violation of Section 3 and 4 of the Act.

The Commission began with delineation of the relevant market to assess whether Amazon enjoyed a position of strength enabling it to operate independently of competitive forces. For this purpose, relevant market was delineated as '*market for services provided by online platforms for selling fashion merchandise in India*' by the Commission.

In the relevant market, the Commission noted that the online fashion segment consisted of many players which included large horizontals like Amazon and Flipkart and verticals like Myntra, Ajio, Koovs etc. The Commission took note of the Red Seer Report June 2019, which stated that the fashion 'marketplaces'/'verticals' collective share was estimated to be around 50% and that of the large horizontal/multiproduct marketplaces such as Amazon and Flipkart to be around 35%. Further, as per the information available in public domain, it appeared to the Commission that presently Flipkart and Amazon were close competitors with comparable market position and resources. In addition, there were other players like Paytm Mall, SnapDeal, Shopclues etc. providing intermediation services in the relevant market. On the basis of these observations, the Commission did not find Amazon to be holding a position of strength and hence, chose not to look at the abuse of dominance in absence of any dominance.

With regard to anti-competitive conduct such as exclusive arrangements between Amazon and Preferred Seller, the Commission noted that the contracts of Amazon with other brands such as Allen Solly, American crew, US Polo Association and Adidas etc. were not exclusive in nature. With respect to allegation of preferential treatment and deep discounting, the Commission noted that the same were based by the Informant on the observations of the Commission in the case of *Case No. 40 of 2019 i.e. Delhi Vyapar Mahasangh and Flipkart Internet Private Limited and ors.* Differentiating both cases, the Commission stated that the online market structures for smartphones and fashion products in India were different with fashion being more diverse and dispersed. Further, with respect to fashion products there were a number of verticals, fashion-only platforms which provided significant avenues for fashion brands and retailers to place their offerings before online consumers. Whereas, in case of smartphones, besides the brand-owned, single-brand websites, the only third party, multi-brand platforms available for smartphones brands and retailers to access online consumers were Amazon and Flipkart, with their collective share relatively much higher.

Based on the foregoing reasoning, the Commission was of the view that no case was made out against the Amazon and OP-3. Resultantly, Information was directed to be closed forthwith under Section 26(2) of the Act.



Heard at the BAR

Legal news from India and the world

The BRICS competition authorities to conduct research on the automobile markets

Since August 2019, the BRICS Competition Authorities have been conducting research of the competition issues in automobile markets within the existing automobile BRICS Working Group.

The research on the issue will provide a comparative analysis of the general characteristics of the automobile markets of the BRICS countries, as well as consider specific competition problems notable for the BRICS automobile markets as a whole and also separately, and present possible solutions of the identified problems.

A separate part of the Report will be devoted to the development of the institution of self-regulation of the automobile industry in the BRICS countries, taking into account the successful experience of introducing the Codes of Good Practices for car manufacturers in Russia and South Africa.

On the basis of this Report, the BRICS Competition Authorities will consider further possibility of developing Recommendations or Guides of the BRICS Competition Authorities for suppressing anticompetitive practices in the automobile sector and enhancing self-regulation of the automobile industry in the BRICS countries.

(Press Release 22nd September 2020)

The ACCC is also interested in understanding that how data is being used and shared in the app ecosystem, including the data available to Google and Apple as a result of their control on the major app stores.

(Press Release 8th September 2020)

JFTC approves commitment plans of Amazon Japan; Japan

In response to the notice issued by Japan Fair Trade Commission ('JFTC') to Amazon Japan GK ('Amazon Japan') it made an application for approval of the commitments before the JFTC.

The JFTC was suspicious that the activities of Amazon Japan may have violated Antimonopoly Act.

The JFTC, after considering the application, recognized that the commitment plan of Amazon Japan would conform to the requirements and thus, approved it.

(Press Release 10th September 2020)

Cartel detected by FAS in Coal Supply Market; Russia

The Federal Antimonopoly Service of the Russian Federation ('FAS') has detected a cartel among coal suppliers who entered into agreement to maintain prices at auction for the supply of coal to heat and power companies.

During the investigation, FAS conducted unscheduled inspections and examined the circumstances of purchases for the supply of coal in 2017-2018.

The contracts rigged by the cartel of coal supplier totals more than 1.5 billion rubles.

(Press Release 17th September 2020)

Competition agencies of 5 countries to coordinate on cross-border investigations; Australia

In an increasing globalised economies where large companies in digital sectors are operating internationally, competition agencies of 5 countries viz. US Department of Justice, US Federal Trade Commission, the UK Competition and Markets Authority, the New Zealand Commerce Commission, the Competition Bureau Canada and Australian Competition and Consumer Commission ('ACCC') have deemed it necessary to work together to ensure that the companies comply with competition and consumer laws.

In this direction, the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities ('MMAC'), was virtually signed on 02 September 2020.

Under MMAC, the competition agencies will share intelligence, case theories and investigation techniques to better coordinate investigation across international borders.

(Press Release 3rd September 2020)

Mobile applications market under ACCC's Scrutiny; Australia

The digital platforms branch of Australian Competition & Consumer Commission (ACCC) is conducting a five-year inquiry into markets for the supply of digital platform services in Australia.

The inquiry will focus in examining the experiences of Australian consumers, developers, suppliers and others in a new report scrutinising mobile app stores.

The issues which will be examined will include the use and sharing of data by apps, the extent of competition between Google and Apple's App Store.

For the said inquiry, consumers will be invited to share their experiences while buying and using apps through a short survey.

Investigation launched against Google, Apple & Dropbox for cloud computing services; Italy

Six investigations have been launched by the Italian Competition Authority against some of the main cloud computing services providers which included Google (for the Google Drive service), Apple (for the iCloud service) and Dropbox.

The investigation was triggered because of Google and Apple's unfair commercial practice and failure to indicate to the users, their activities regarding collection and use of the user data for commercial purposes when presenting the service.

The unfair practice also included possible undue influence on the consumers, who, in order to use the cloud storage service, were not in a position to give their free consent to the service providers for collection and use of their information for commercial purposes.

(Press Release 7th September 2020)

EC publishes findings of the evaluation of the Vertical Block Exemption Regulation; Europe

The European Commission ('EC') has summarised the findings of the evaluation of the Vertical Block Exemption Regulation ('VBER') together with the Vertical Guidelines.

The VBER exempts vertical agreements that meet certain conditions from the prohibition in Article 101(1) TFEU. The agreements between two or more undertakings operating at different levels of the production or distribution chain are known as Vertical Agreements.

Together with the VBER, the Commission also adopted the Guidelines on Vertical Restraints. These provide guidance on how to interpret and apply the VBER and how to assess vertical agreements falling outside the safe harbour of the VBER.

The aim of the EC behind evaluating VBER was to gather evidence on the functioning of the VBER, together with the Vertical Guidelines, in order to decide whether it should lapse, be renewed in its current form, or be revised.

During the evaluation phase of the review, the Commission collected evidence to understand how the rules have functioned since their adoption in 2010.

The evaluation has shown that the VBER and the Vertical Guidelines are still relevant, as they are useful tools that greatly facilitate the self-assessment of vertical agreements, and that help reduce compliance costs for businesses entering into such agreements.

The evaluation has shown that the market has changed significantly since the adoption of the VBER, especially the Vertical Guidelines, due to the growth of online sales and of new market players such as online platforms. These developments have led to a number of changes in distribution models, such as increased direct sales by suppliers and a greater use of selective distribution systems, which allowed suppliers a tighter control over resale conditions.

Similarly, new types of vertical restrictions, such as restrictions regarding sales through online marketplaces and restrictions on online advertising, as well as retail parity clauses, have become more widespread.

Based on the findings of the evaluation, the Commission will now launch an impact assessment to look into the policy options for a revision of the rules in order to address the issues identified during the evaluation.

(Press Release 8th September 2020)

KK Sharma Law Offices

An initiative of Kaushal Kumar Sharma, ex-IRS, former Director General & Head of Merger Control and Anti Trust Divisions, Competition Commission of India, former Commissioner of Income Tax



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