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Monthly Newsletter

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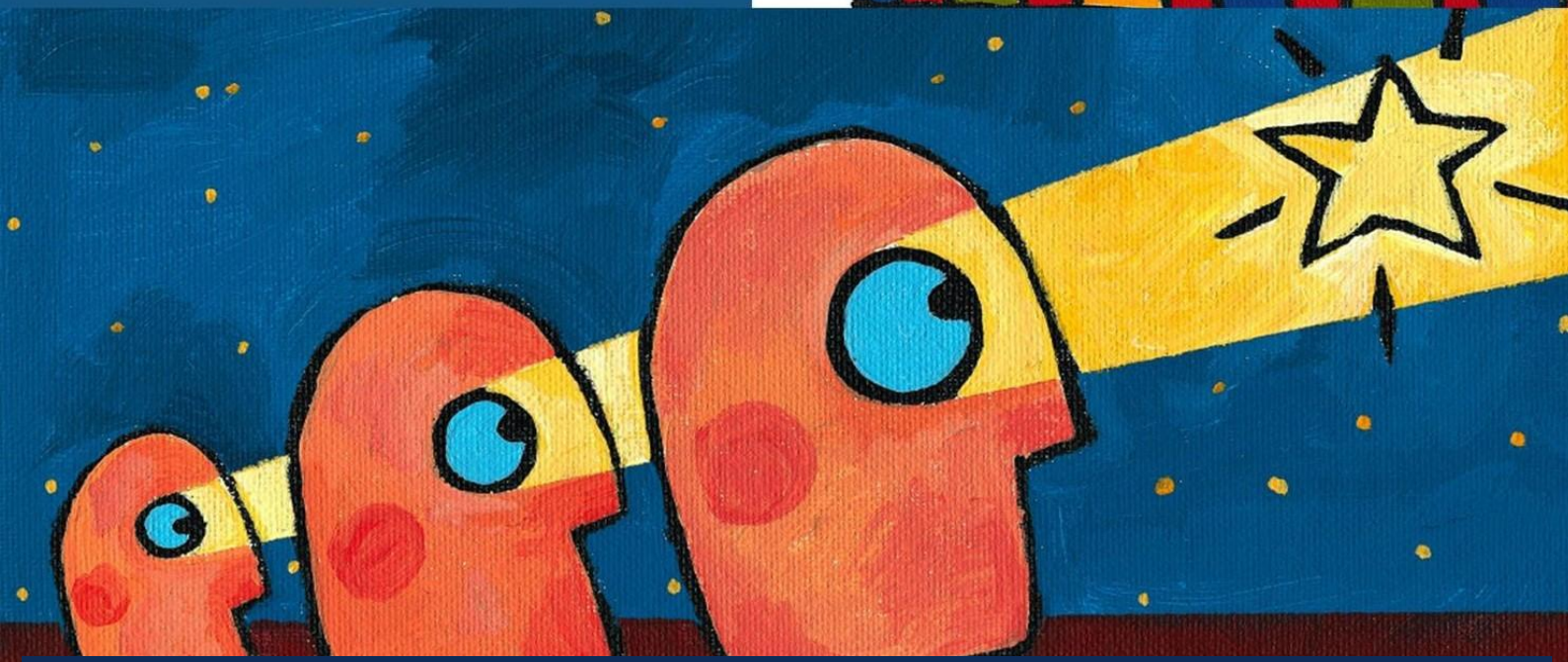

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CCI imposes a penalty of Rs. 200 Crores on Maruti

The Competition Commission of India (**'CCI'/ 'Commission'**) passed a final order on 23.08.2021 against Maruti Suzuki India Limited **('MSIL')** for indulging in anti-competitive conduct of Resale Price Maintenance **('RPM')** in the passenger vehicle segment by way of implementing Discount Control Policy **('DCP')** on its dealers and, accordingly, imposed a penalty of ₹200 crores on MSIL, besides passing a 'cease-and-desist' order.

On 17.11.2017, the CCI received an anonymous e-mail from a purported MSIL dealer, wherein it was alleged that MSIL's sales policy is in contravention of the provisions of the Competition Act, 2002 **('the Act')**. The allegations in the email were: (a) According to the DCP, dealers of MSIL in West-2 Region (Maharashtra State other than Mumbai & Goa) are not allowed to give discounts to customers beyond a prescribed limit by MSIL. (b) Any dealer, except those permitted, if found giving additional discount, were to be penalized by MSIL. (c) Dealers violating the DCP were notified via e-mail *"Mystery Shopping Audit Report"* from MSIL and asked to justify their actions. If not satisfied by the justification, a penalty was to be imposed by MSIL. (d) Similar DCPs were implemented by MSIL throughout India, specifically in the cities having more than 4-5 dealers.

After considering the aforesaid email, the CCI issued a notice to MSIL and asked for its comments. Thereafter, the CCI had a preliminary conference with MSIL on 22.05.2019 and decided to pass an appropriate order in the matter. On 04.07.2019 the CCI passed an order u/s 26(1) of the Act, forming opinion that there exists a *prima facie* case of contravention of the provisions of Section 3(4)(e) of the Act. The CCI directed the Director General **('DG')** to cause an investigation and submit a report in this matter.

The DG, while submitting its report, concluded that: (a) MSIL is operating in upstream market and the dealers are working in a downstream market. (b) In the upstream market, MSIL has the largest market share in FY 2018-19 i.e. 51.22%. It was further mentioned in the report that, since FY 2011-12, there has been a consistent increase in the market share of MSIL. (c) After the analysis of large number of emails exchanged between MSIL and its dealers from August 2012 to July 2019, it was evident that MSIL gave instructions to its dealers to not offer discount beyond a certain level to the customers without taking prior permission from MSIL. (d) It was found that MSIL also appointed a Mystery Shopping Agencies **('MSA')** to keep a check on the dealers. (e) Dealers found defying the DCP were to pay the penalty and/or MSIL would stop supply of premium models to the dealers.

Therefore, the DG concluded that MSIL indulged in the anti-competitive act of RPM through its DCP. The DCP is having an Appreciable Adverse Effect on Competition **('AAEC')** as it reduces the intra-brand & inter-brand competition that further leads to consumers paying higher prices.

The major arguments raised by MSIL against the DG report were: (a) No actual agreement regarding the DCP is submitted by the DG and the DG has placed reliance on verbal allegations. The existing Dealership Agreement **('DA')** does not consist of any such clause to restrict or limit the dealers from giving additional discounts. On the contrary, Clause 28.1 of the DA allows dealers of MSIL to provide discounts as they deem fit. (b) There is no actual benefit for MSIL to engage in such conduct as the direct effect of giving more discounts is on the dealer and MSIL remains largely unaffected. Therefore, lack of significant motive to engage in such anti-competitive conduct. (c) Without prejudice to the above, the alleged conduct of MSIL had not caused any AAEC.

Following were the observations made by the CCI regarding the above defences of MSIL: (a) The concept of *"agreement"* is different in competition law compared to that in the contract law and it includes all possible arrangements/agreements/understanding, not only in written form but also in tacit and informal form. Therefore, the argument regarding non-production of any agreement by DG is not justifiable. Furthermore, the existence of Clause 28.1 of the DA does not nullify the existence of the DCP as claimed by the MSIL. Reliance was placed upon an ocean of e-mail conversations between MSIL and its dealers, through which it can be concluded that there existed a DCP that discouraged the dealers from giving additional discounts, freebies, etc. to their consumers. (b) The motive i.e., *"mens rea"* does not find a place in the Act. Therefore, it does not matter whether MSIL cannot have any motive in controlling the RPM. It was further clarified for the sake of argument, that MSIL may have a motive to indulge in RPM, as it softens competition between the dealers. The effect of RPM on intra-brand competition leads to easier monitoring of the retail price of the competitors, thus, providing manufacturers with the opportunity of regulating their own margin without any resistance faced from the competitors. (c) The submission of MSIL not having any AAEC on the relevant market was also denied by the CCI as it was evident from the above-mentioned observations that the anti-competitive act of MSIL led to lessening of competition.

Therefore, the CCI concluded that MSIL entered into an anti-competitive agreement with its dealers for the imposition of DCP. Furthermore, it appointed MSA to monitor and enforce this DCP, resulting in AAEC, leading to contravention of provisions of Section 3(4)(e) read with Section 3(1) of the Act. The CCI imposed a penalty of 200 Crore Rupees on MSIL and directed it to 'cease & desist' from indulging in RPM directly and/or indirectly.

(Order on 23.08.2021 Suo Motu Case No. 01 of 2019)

Heard at the BAR

Legal news from India and the world

SC dismisses SLP; asks e-commerce giants to cooperate with CCI probe

Through its order dated 09.08.2021, the Supreme Court of India **('SC')** dismissed the special leave petitions **('SLPs')** of the e-commerce giants [Flipkart Internet Private Limited **('Flipkart')** and Amazon Seller Services Private Limited **('Amazon')**] against the order of Karnataka High Court **('KHC')**.

The division bench of KHC through its order dated 23.07.2021 asked both Amazon and Flipkart to cooperate with the investigation of the CCI in relation to alleged contravention of provisions of the Act *[detailed analysis of the KHC order has been covered in our previous newsletter of **August 2021; Volume 8 Issue 8**]*.

As the time to reply to the notice issued by the Office of DG was going to expire on 09.08.2021; a prayer for extension of the date was made by Senior Advocate A.M. Singhvi. The SC gave an extension of four weeks and emphasised on not giving any further extension while dismissing the petition.

[Order dated 09.08.2021]

The Korean antitrust watchdog fines e-commerce giant with 3.3 Billion Won

On 19.08.2021 the Korean Fair Trade Commission **('KFTC')** issued a correction order and penalty of 3.3 Billion Won (US $2.8 million) on Coupang Inc. **('COUPANG')** for its unfair business practices from early 2017 to September 2020. Coupang is a South Korean e-commerce company based in Seoul, South Korea, and incorporated in Delaware, United States.

In 2019, LG Household & Healthcare Ltd. **('LG')** approached the KFTC to investigate the unfair business practices by Coupang that led to suppliers facing massive losses. Through the investigation conducted by KFTC, it was concluded that Coupang was involved in several unfair business practices. These practices were as under:

(a) Demanding suppliers to raise prices of their products on other rival e-commerce platforms so as to be the first choice of customers.

(b) Under its *"lowest price matching policy"* the suppliers were given instructions to immediately decrease the price of the product if the same has been decreased on competing sites, or to increase the price of the product if the same has been increased on the competing sites.

(c) The suppliers were charged with marketing expenses of Coupang and certain sale incentives of suppliers were also taken by Coupang.

According to the KFTC, around 101 suppliers were negatively affected by the *"lowest pricing policy"*. Furthermore, these unfair practices led to 388 suppliers including LG facing a total loss of 5.7 Billion Won.

Coupang disagreed with the order of KFTC and is set to appeal to the High Court against it. ***(19.08.2021)***

CCI and JFTC conclude Memorandum on Cooperation

Section 18 of the Act gives authority to the CCI, for purpose of discharging its duties or performing its functions under this Act, to enter into any memorandum or arrangement, with the prior approval of the Central Government, with any agency of any foreign country. That being so, in the past the CCI has entered into memorandum of cooperation with different competition agencies of various countries. In the same sequence, the CCI and Japan Fair Trade Commission **('JFTC')** have come together to conclude Memorandum on Cooperation **('MoC')**.

The MoC stipulates the following:

(a) Notification: Both the authorities will notify each other with activities that may affect the interests of other competition authority.

(b) Exchange of Information: Both authorities will exchange information with each other. These information would relate to development of enforcements in different jurisdictions, experience in conducting investigations, steps taken to improve legal framework and development of research in the field of competition law etc.

(c) Technical Cooperation: Authorities can also work together and engage in activities enhancing technical cooperation.

(d) Enforcement Activities: The authorities, when involved in a matter that concerns both of them, would consider coordination of their enforcement activities.

(e) Communication: Periodic high level committee meetings will be held in addition to the discussion of issues of common interest.

(Press Release 06.08.2021)

CMA will be looking into pricing of Covid tests for travel

The Competition and Market Authority **('CMA')** is looking into the fees for Covid-19 tests required for international travel.

The Health Secretary, Sajid Javed, wrote to CMA to look into unfair and exploitative practices of about 400 plus players in this market.

In UK, the tests can cost from 20£ to 300£ average price being 75£.

Furthermore, the competition watchdog was asked to carry out *"rapid high level review"* of the market and assess what actions might be taken to ensure consumer welfare.

Emphasis needs to be placed on concentration of market power in the hands of a few, as there are more than 450 alternatives listed on the government portal, the supply of tests and processing is done by only a handful of labs, with seven handling about 75% of the market. Therefore, anti-competitive conduct of these few can have significant impact on the market. ***(08.08.2021)***

Digital Dominance; a concern for antitrust authorities

The rise in economic activities through online platforms and the relationship of multiple actors with these platforms led to various antitrust regulators broadening the scope of traditional definition of market place. The concept of Digital market place **('DMP')** has come to existence and it is an area where various antitrust regulators are constantly trying to create a transparent and fair market place. The change in approach of competition regulators around the world can be understood on the basis of their level of seriousness against the anti-competitive activities in the DMP.

A look at the recent separate views of CCI Chairman Ashok Kumar Gupta and Rod Sims Chair of the Australian Competition and Consumer Commission **('ACCC')**, shows certain similarities that give a peep into the intention of both the regulators when it comes to anti-competitive conduct in the DMP. Following are the similarities in their statements:

(a) *Control over consumer choice*: Mr. Rod Sims raised his concern regarding the prioritization of display of products on digital platform. According to him, certain platforms display their own products over third party products that might be of a better quality, thus leading to manipulation of consumer's choice and restricting competition. On the other hand, at an virtual event organized by Centre for the Digital Future, Mr. Gupta went on to point out that according to the recent e-commerce study by the CCI, cases where online platform acts as both the marketplace and a competitor, there is "*an incentive to leverage the control or the platform in favour of their preferred vendors of private label products to the disadvantage of other sellers or service providers with the platform"*. Therefore, leading to manipulation of consumer's choice and threatening the concept of free and fair market.

(b) *Single player or Duopoly*: Mr. Gupta noted that the DMP in India consists of single players or Duopolies commanding a significant market share. This leads to increase in threat of anti-competitive conduct by these few powerful enterprises. He substantiated his statement with the example of the recent cases against Amazon, Flipkart, Make My Trip and Google, where the CCI is looking into the anti-competitive conduct of these enterprises. Mr. Sims, in a similar manner, emphasized on dominance of Apple and Google in app store market place. Therefore, it is evident that both are of the view that the DMP consists of concentration of power in the hands of a few player.

While concluding, it is safe to state that both the CCI and ACCC, in their own way, are working towards increasing scrutiny of digital market players so as to secure the DPM. Mr. Sims in his speech also pointed out that conducting market studies is not enough and the competition authorities of different jurisdictions need to work in harmony with each other as these players have a global impact.

(Speech by Mr. Gupta dated 26.07.2021 and Mr. Sims dated 19.08.2021)

The MAVCOM has approved acquisition of Asiana Airlines by Korean Air

With the lack of a general merger control regime by the Malaysian Competition Commission in Malaysia, there are sectoral regulators assessing the proposed mergers with the lens of competition law. The Malaysian aviation sector regulator, Malaysian Aviation Commission **('MAVCOM')**, has the power under the Malaysian Aviation Commission Act, 2015 **('the Act')** to regulate economic matters relating to the aviation industry. Part IV of the Act consists of provisions regarding to matter of competition, thus including concepts such as merger and abuse of dominance.

Recently, on 19.03.21, the MAVCOM received a voluntary notification and application of an Anticipated Merger under section 55 of the Act. The application was submitted by Korean Air Lines Co., Ltd. **('KAL')** regarding the merger with Asiana Airlines, Inc. **('AL')**. The application of merger also consisted of the *"failing firm defence"*, as AL has been in financial distress for some time and the anticipated merger is the only way to survive in the market.

The MAVCOM, after assessing the notification, stated that, even though on certain specific routes the market share of the parties post-merger will be around 65%-75%, it does not per se indicate that it would allow the parties to cause significant detrimental effect on competition. Additionally, after perusing the annual reports, financial statements, restructuring plans, and documents relating to potential investors by AL, the MAVCOM is convinced that AL is facing several financial challenges and, therefore, is considered as a failing firm. Based on these observations the MAVCOM approved the acquisition of AL by KAL. This is also the first case in which the *"failing firm defence"* has been accepted in Malaysia while assessing a merger.

(Press release 17.08.2021)

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