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The Competition Commission of India initiates an investigation in relation to resale price maintenance in the e-commerce sector (Snapdeal)

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Sundar Ramanathan, e-Competitions | N° 73730, www.concurrences.com

The CCI has in 2014 initiated two investigations into the alleged imposition of minimum resale price maintenance (RPM). The first one was against Hyundai Motor India Ltd ('Hyundai Case') and I had written on the legal standard adopted by the Competition Commission of India to initiate investigations in the said case. Subsequently, the CCI directed the Director General (DG) to investigate on the use of RPM in the e-commerce platform. The present article continues the legal debate on the standard that has to be adopted for initiating investigation by the CCI.

The Snapdeal Case **(Jasper Infotech Pvt Ltd v KAFF Appliances (India) Pvt Ltd)** The CCI has directed the Director General to investigate into the allegations pertaining to minimum resale price maintenance imposed by KAFF Appliances (India) Pvt Ltd (**KAFF**) on an information filed by Jasper Infotech Pvt Ltd (**Jasper**) under Section 19 of the Competition Act, 2002 (**Act**).

Jasper owns and operates www.snapdeal.com (**snapdeal**) an online market place which provides a medium for buyers and sellers to meet and transact. It was alleged that KAFF being aggrieved by the sale of its products at discounted prices on snapdeal, displayed a caution notice on its website holding out that the products sold on snapdeal were counterfeit, infringing its trademark, deceiving the public by trading on the goodwill of KAFF and were also undercutting the prices of authorised dealers. Further, it was also alleged that KAFF mentioned in the notice that it will not honour the warranties of the products sold in its brand name through snapdeal.

KAFF then served a legal notice on Jasper. Jasper responded to the notice stating that it was only a market place and a facilitator amongst the buyers and traders. In retaliation Jasper served a legal notice on KAFF for violation of the provisions of the Act and subsequently filed a case under Section 19 of the Act. It was alleged that the KAFF was imposing a RPM and adduced an email exchange

sent by an official of KAFF to Jasper as evidence. In the email adduced as evidence, the official of KAFF had stated that KAFF will not allow the sales of its products on snapdeal if the Market Operating Price (**MOP**) is not maintained.

The CCI prima facie found the existence of an agreement under Section 3 of the Act even though it may appear to be a unilateral policy decision. The CCI *prima facie* held that 'an agreement can be inferred from the conduct considered to be coercive *when the level of coercion exerted to impose a unilateral policy, in combination with the number of distributors that are actually implementing the unilateral policy of the supplier would, in practice, point to tacit acquiescence by the other party* or parties'.

The CCI considered the email evidence from the official of the KAFF to determine the existence of a minimum RPM imposed and implemented. The email extracted by CCI mentioned that KAFF found that its products were being sold below the MOP and further informed JASPER that if the MOP was not maintained then KAFF would not allow the sale of their products either by authorised or unauthorised dealers or distributors. Further, in the legal notice issued to JASPER, KAFF had stated that the goods manufactured by it are sold at its exclusive chain of authorised retail outlets and at the listed prices only and any discounted scheme can be introduced only with the prior approval of KAFF. The CCI inferred, *prima facie*, that KAFF such an agreement / arrangement with the dealers under which the dealers were given a MOP hindered the ability of dealers / distributors to compete on the price of the product and, thus, the prescription of such a MOP and an insistence to follow a MOP was prima facie in contravention of Section 3 (4) (e) of the Act read with Section 3 (1).

On the issue of Appreciable Adverse Effect on Competition (**AAEC**), the CCI noticed that in the market for supply and distribution of kitchen appliances in India KAFF had a 28% market share and the restrictions imposed on dealers through the RPM, prima facie, *may not only harm the consumers* but is also *likely to have an adverse effect on competition in India*.

On the basis of the aforementioned, the CCI directed the Director General (DG) to investigate further into the matter and present a report thereupon.

Issues and Implications:

I had previously argued in the case of Hyundai that the CCI had reduced the standard for the imposition of the initiating an investigation under Section 26 (1). The test effectively equated the test for initiating investigation in horizontal agreements with that of vertical agreements. This was contrary to the scheme of Sections 3 (3) [which placed certain horizontal agreements are presumed to have an AAEC] and 3 (4) of the Act [which required the parties to prove that the vertical agreements had an AAEC]. I had written that in the case of vertical restraints like RPM, the statute mandates a prima facie AAEC to be determined before directing investigation by the DG.

In the Snapdeal Case, the CCI prima facie concluded that there was a RPM on the basis of the 28% market share of the enterprise holding that the agreement '***may not only harm the consumers but also are likely to have an adverse effect on competition in India***'. Although at a Section 26 (1) stage there is no need for a detailed analysis as the Supreme Court of India has held in the **SAIL Decision**, at the bare minimum there has to be a prima facie AAEC determined. The test that the CCI has adopted in this case is that the RPM '*may harm the consumers*' and '*is likely to have an*

adverse effect on competition'. This begs the question whether a prima facie AAEC has been determined (or even demonstrate a likelihood of AAEC) – Should there actually not be a prima facie consumer harm demonstrated (or likelihood demonstrated) or a prima face adverse effect on competition demonstrated (or likelihood of AAEC demonstrated) on the basis of the information and records. This has the effect of the CCI reversing the burden of proof of AAEC in the context of vertical agreements and placing the standard of proof on par with horizontal agreements for initiating investigations. The CCI has identified that there '*may*' be harm and that it is '*likely* to have an adverse effect' without prima facie determining the consumer harm or the adverse effect (or the likelihood of such harm or effect taking place in the market). RPM has been classified as a restraint under Section 3 (4) that does not automatically raise competition concerns unless the agreement causes or is likely to cause AAEC. Therefore, even the initiation of investigation has to be based on a prima facie AAEC (or the likelihood of AAEC). The CCI has to determine the 'prima facie existence of an AAEC' on the basis of the parameters identified under the Act in Section 19 (3) [creation of barriers to new entrants in the market, driving existing competitors out of the market, foreclosure of competition by hindering entry into the market, accrual of benefit to consumers, improvements in production or distribution of goods or provision of services and promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services]. The CCI had neither identified prima facie if any of the AAEC factors had been satisfied nor shown reasons to believe that there is a likelihood of AAEC in the market.

Interestingly in another decision decided by the CCI on April 23, 2015 pertaining to the exclusive arrangements manufacturers had for launch of their products on the e-commerce platforms such as Amazon, Flipkart, Snapdeal etc was challenged as being an exclusive arrangement in violation of Section 3 (4), it was held by the CCI (at the prima facie stage) that it would be necessary to establish the existence of an agreement and next inquire into the effects of the arrangement viz. AAEC factors as per Section 19 (3) of the Act. The CCI consider the factors under Section 19 (3) of the Act and held in that case that there was no prima facie AAEC and dismissed the information filed against the e-commerce platforms. This is the correct legal test that would have to be applied as the orders passed for directing investigation under Section 26 (1) are not appealable before the Competition Appellate Tribunal and the parties would have to go through the entire investigation process before the DG which could go for a year or two (or even more at times). However, the parties can challenge such orders before the High Court which can examine the legality of orders passed under Section 26 (1).

Another issue that this case raises is the threshold for 'appreciability' under AAEC. The CCI has identified that 28% market share is sufficient for there to be an 'appreciable' impact on the market. Therefore, even in cases where the party does not have more than 30% market share the CCI has decided to inquire into vertical agreements at a prima facie stage. It would also be interesting to note that there may be a number of products and competitors in a market such as this present case and whether a market share of 28% would be appropriate to determine prima facie appreciability.

Conclusion:

The present article continues the debate that was initiated in the earlier case note on the legal threshold for initiating investigations by the CCI. Whether the Courts and the higher forums would stick to this legal threshold for initiating investigations as it is only prima facie in nature will have to be seen as a large number of matters pending before the CCI are being challenged before different

High Courts on issues, amongst others, relating to legal standards to be adopted in Section 26 (1).

Sundar Ramanathan | Lakshmikumaran & Sridharan (New Delhi) | sundar.r@lakshmisri.com