

THE INTERACTION BETWEEN COMPETITION LAW & DIGITAL AND E-COMMERCE MARKETS IN INDIA

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I. INTRODUCTION: DEVELOPMENTS IN THE DIGITAL AND E-COMMERCE DOMAINS IN INDIA

The recent tiff between Amazon and Walmart-owned Flipkart on one hand and the Competition Commission of India (CCI) on the other, has been making headlines for the last couple of months. While the CCI directed the Director General (DG) to conduct a probe against the exclusive practices of these two popular e-retailers under Section 26(1) of the Competition Act, 2002 (as amended) (Act),¹ the Hon’ble High Court of Karnataka (Karnataka High Court) stayed the investigations.² First Amazon and then Flipkart

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¹ S 26(1) Order in *Delhi Vyapar Mahasangh v Flipkart Internet (P) Ltd* 2020 SCC OnLine CCI 3.

² Stay order of the Karnataka High Court, available at <<https://tech.economictimes.indiatimes.com/news/internet/karnataka-high-court-grants-stay-on-ccis-probe-for-eight-weeks/74136975>> accessed 12 May 2020.

approached the Karnataka High Court to stay the investigation by the DG on grounds that the CCI did not have sufficient evidence to form a *prima facie* case against them.³ In the backdrop of the rising popularity of the digital marketing sector and e-commerce platforms, it is yet to be seen how the CCI manages to regulate the behaviour of such companies above all the administrative and legislative hurdles existing in India.

It is a fact that both digital marketing and e-commerce markets have seen exponential growth in the recent past. The growth in this industry has been triggered by increasing internet and smartphone penetration. The Indian e-commerce sector's revenue is expected to jump from USD 39 billion in 2017 to USD 200 billion in 2026, growing at an annual rate of 51%, which is the highest in the world.⁴

Initially the e-commerce sector was looked at as an extension of the prevailing brick and mortar stores and as an efficient mode of distribution of the products of such stores and not as a separate 'online market'. The rise in the popularity of the e-commerce sector gradually increased the volume of business to business and business to consumer transactions. This increased the interaction and dependence of the distributors and vendors upon e-commerce platforms, further amounting to vertical restraints being imposed by such e-commerce platforms upon such distributors and vendors in the form of various kinds of exclusivity restrictions.⁵ An array of past decisions of the CCI in relation to the e-commerce sector dealt with vertical restraint cases like minimum "Resale Price Maintenance" (RPM) or fixed pricing policies and non-price restraints like exclusive distribution network or other kinds of exclusive agreements. However, post the order of the CCI in *Rubtub Solutions (P) Ltd. v. MakeMyTrip India (P) Ltd.*⁶ (the *MakeMyTrip* case), the realization that e-commerce platforms were distinct from regular markets pushed the CCI to take note of the other types of novel competition concerns like "Across Platforms Parity Agreements" (APPA), retail "Most Favoured Nation" (MFN) clauses, "geo-blocking" or "geo-filtering" and advertising restrictions, that were specific to e-commerce market-places.⁷

³ Available at <<https://thetechportal.com/2020/02/28/flipkart-cci-investigation-karnataka-high-court-stay/>> accessed 12 May 2020.

⁴ Available at <<https://www.ibef.org/industry/ecommerce.aspx>> accessed 12 May 2020.

⁵ Cyril Amarchand Mangaldas, 'Vertical Restraints in the Indian E-Commerce Sector: The New-Age Competition Issues', (*SCC Online Blog*, 2019) PL (Comp L) August 73, <<https://www.sconline.com/blog/post/2019/08/08/vertical-restraints-in-the-indian-e-commerce-sector-the-new-age-competition-issues/>> accessed 12 May 2020.

⁶ Case No. 1 of 2020, decided on 24-2-2020 (CCI).

⁷ *ibid.*

Further, in line with the international best practices, on 8 January 2020, the CCI released a report to identify impediments to competition due to the emergence of e-commerce markets in India and to ascertain the CCI's enforcement and advocacy priorities in light of the same (**E-commerce Report**).⁸ Such initiatives demonstrate that the CCI looks into the conduct of e-commerce players despite their unconventional and complex business models and regulates related competition law concerns. However, a pertinent question that remains to be answered here is whether the CCI is currently equipped to deal with such peculiar issues in such a fluid and fast-growing market like e-commerce in India. If yes, how will the CCI proceed in dealing with the competition law concerns raised by the e-commerce platforms?

In light of the above, *Part I* of this article deals with the present regulatory framework under the Act within the ambit of which anti-competitive practices of e-commerce platforms are currently being investigated by the CCI. *Part II* of the article provides a brief snapshot of how the CCI has dealt with the anti-competitive practices of e-commerce platforms in the past and how these decisions and observations gradually led to the realization that such platforms are unique and different from the existing offline or brick and mortar market-places. *Part III* of the article deals with the various kinds of anti-competitive practices (including the novel types of anti-competitive arrangements) that the e-commerce sector may be prone to due to its distinct business model and whether the present scope of the Act is sufficient to deal with such practices. *Part IV* throws some light upon the defenses that the CCI has considered while investigating into the practices of the e-commerce platforms and demonstrates why the CCI adopted a 'rule of reason' or a flexible approach while adjudicating such cases. *Part V* of the article deals with an important initiative undertaken by the CCI in the form of the E-commerce Report to understand the scope of such markets appropriately and be well-equipped to investigate any anti-competitive practices of such platforms. *Part VI* discusses how other jurisdictions are dealing with similar issues and the measures adopted by them. The conclusion highlights the major takeaway points of what the authors feel about the adequacy of the steps undertaken by the CCI in dealing with the anti-competitive practices of the e-commerce platforms and the way forward in this regard.

⁸ Competition Commission of India, *Market Study on E-Commerce in India: Key Findings and Observations* (released on 8 January 2020) <https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf> accessed 12 May 2020.

II. REGULATORY FRAMEWORK FOR DEALING WITH COMPETITION LAW CONCERNS IN THE E-COMMERCE SECTOR

A. Section 3(4) of the Act (Vertical restraints)

The CCI has the power to scrutinize any agreement pertaining to the e-commerce sector that leads to an “Appreciable Adverse Effect on Competition” (AAEC) under Section 3 of the Act, which lays down the framework for regulating anti-competitive agreements, including vertical restraints. Section 3(4) of the Act specifically deals with vertical restraints and states that:

“Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade-in goods or provision of services, including—

- (a) *tie-in arrangement;*
- (b) *exclusive supply agreement;*
- (c) *exclusive distribution agreement;*
- (d) *refusal to deal;*
- (e) *resale price maintenance...*”

will amount to a contravention of Section 3 of the Act if they cause an AAEC in India. However, realizing that Section 3(4) of the Act in its present state may not be sufficient in handling all complex arrangements in the digital and e-commerce space, the Ministry of Corporate Affairs (MCA), post its discussion with the Competition Law Review Committee (CLRC), made adjustments in the Draft Competition Amendment Bill, 2020 (Bill).⁹ This was done in the wake of the realization that all commercial arrangements may not fall within the ambit of Sections 3(3) and 3(4) of the Act and standalone application of Section 3(1) has been consistently debated to be insufficient for a comprehensive AAEC analysis that is required to hold an agreement in violation of the Act.¹⁰ Therefore, the MCA has proposed to widen the scope of Section 3(4) of the Act, to include “any other agreements”, in order to enable the CCI to examine any kind of commercial arrangement or understanding, irrespective of their structure or kind, if they lead to AAEC in India.

⁹ The MCA had invited public comments on the Bill <<http://feedapp.mca.gov.in//pdf/Draft-Competition-Amendment-Bill-2020.pdf>> accessed 12 May 2020.

¹⁰ The order of the Competition Appellate Tribunal in *Dr L.H. Hiranandani Hospital v CCI* 2015 SCC OnLine Comp AT 1166, [23], [31-33], [38-39].

The Bill proposed the amendment to Section 3(4) along with revision in the definition and scope of certain types of vertical agreements such as tie-in arrangements, exclusive supply arrangements and resale price maintenance, to accommodate novel vertical arrangements such as online selective distribution, online sales bans, minimum advertised prices (MAP), dual pricing, etc. However, it is yet to be seen how far the amendments proposed by the Bill come into force as part of a revised competition law legislation, replacing the present Act.

B. Section 4 (Abuse of dominance)

The CCI has also observed that the e-commerce players are capable of violation of Section 4 of the Act.¹¹ Section 4 prohibits an abuse of a dominant position by any enterprise¹² or group¹³ (“AOD”). A dominant position is defined in Explanation (a) to Section 4 of the Act to mean a position of strength, enjoyed by an enterprise in the relevant market, in India, which enables it to operate independently of the competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour. Therefore, establishing abuse of dominance of an enterprise or a group under the provisions of the Act is a three-stage process:

- (a) Defining the relevant market;
- (b) Determining dominance in the relevant market; and
- (c) Determining abusive conduct in the relevant market.

Dominance of an enterprise can only be established in the defined relevant markets. Therefore, determination of the relevant market is critical in AOD cases. Once the relevant market is defined, the next step is to determine dominance in the relevant market. In an AOD case, the CCI will evaluate whether the enterprise concerned can operate independently of the competitive forces prevailing in the relevant market. While determining dominance,

¹¹ MakeMyTrip case (n 6).

¹² The Explanation to Section 4 of the Act states: ‘*“dominant position” means a position of strength, enjoyed by an enterprise, in the relevant market, in India which enables it to—*
(a) *operate independently of competitive forces prevailing in the relevant market; or*
(b) *affect its competitors or consumers or the relevant market in its favour.*’

¹³ As per Explanation (b) to Section 5 of the Act, the term ‘group’ means ‘two or more enterprises which, directly or indirectly, are in a position to —
(a) exercise twenty-six per cent or more of the voting rights in the other enterprise; or
(b) appoint more than fifty per cent of the members of the board of directors in the other enterprise; or
(c) control the management or affairs of the other enterprise.’

the CCI is required to consider the factors listed in Section 19(4) of the Act.¹⁴ Although till date the CCI has not held any e-commerce platforms in violation of Section 4 of the Act, it is presently investigating various e-commerce platforms for possible AOD practices. Some of the allegations brought against e-commerce platforms under Section 4 of the Act have been discussed in Part III of this article.¹⁵

III. DELINEATION OF THE E-COMMERCE SECTOR AS A SEPARATE ‘RELEVANT MARKET’

The crucial questions that the CCI faced initially while dealing with some of the cases on vertical restraints in the e-commerce sector have primarily been on the appropriate market definition. Do online vertical agreements between e-commerce platforms and third-party businesses selling on such platforms qualify as distributorship agreements or as inter-mediation platform services agreements? The determination of this query was important for the CCI to enable AAEC analysis specific to the anti-competitive practices of the e-commerce platforms offering inter-mediation services, as they have been gaining significant market presence over the years in these markets.¹⁶ If e-commerce platforms are to be considered as just another mode of distribution of products and services for third party vendors, there are chances that the e-commerce platforms may escape from the CCI’s scanner due to their limited market presence in comparison to the overall market of online and offline market of goods and services. Although the CCI has observed the distinct characteristics of these e-commerce platforms in comparison to other offline

¹⁴ The factors listed in Section 19(4) are:

- (i) Market share of the enterprise;
- (ii) Size and resources of the enterprise;
- (iii) Size and importance of the competitors;
- (iv) Economic power of the enterprise, including commercial advantages over competitors;
- (v) Vertical integration of the enterprises or sale or service network of such enterprises;
- (vi) Dependence of consumers on the enterprise;
- (vii) Monopoly or dominant position whether acquired as a result of any statute or by virtue of being a government company or a public sector undertaking or otherwise;
- (viii) Entry barriers, including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
- (ix) Countervailing buying power;
- (x) Market structure and size of market;
- (xi) Social obligations and social costs;
- (xii) Relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an AAEC; and
- (xiii) Any other factor which the CCI may consider relevant for the inquiry.

¹⁵ MakeMyTrip case (n 6).

¹⁶ E-commerce Report (n 9).

or online third-party vendors recently, several questions pertaining to the same still remain unresolved; for instance, what are the relevant criteria to distinguish between the two? What about platforms that also compete with third party sellers on the platforms?

The CCI has held that although offline and online markets differ in terms of discounts and shopping experience, they are merely different channels of distribution of the same product and are not two different relevant markets. In *Ashish Ahuja v. Snapdeal*,¹⁷ (“**Snapdeal case**”) the CCI noted that consumers weigh available options in both online and offline markets before taking any decision and are likely to shift to either online or offline markets if the price in any one of these markets increases.

In *Mohit Manglani v. Flipkart India (P) Ltd.*,¹⁸ the CCI considered the unique features specific to the e-commerce sector, in that such platforms provide an opportunity to the consumers to compare prices as well as various characteristics of the products simultaneously. However, the CCI did not consider it necessary to delineate the relevant market as an ‘e-commerce’ market, due to the parties not being dominant in both the online and offline markets individually.

Despite the reluctance of the CCI to accept the e-commerce market as a separate relevant market initially, in certain recent judgments it has laid importance on considering the specific characteristics of the e-commerce sector as compared to the offline markets. Unlike the CCI’s observations in the Snapdeal case where it considered the e-commerce platform as another mode of distribution of the overall retail supply market, the CCI in *All India Online Vendors Assn. v. Flipkart India (P) Ltd.*,¹⁹ noted that there is a difference between an online retail store (that is an extension of the overall retail chain) and an online marketplace platform. Although from the end consumers’ perspective the distinction line between online and offline sellers is sometimes blurry, *yet* it cannot be denied that online marketplaces offer convenience and a platform to sellers and buyers to transact among themselves. For sellers, they save costs in terms of setting up of a store, sales staff, electricity and other maintenance charges, while the benefits afforded to buyers include the comfort of shopping from their homes thus saving time, commuting charges. Moreover, the CCI noted that the buyers can compare multiple goods at the same time. The CCI also noted that an increase in the

¹⁷ Case No. 17 of 2014.

¹⁸ 2015 SCC OnLine CCI 61.

¹⁹ 2018 SCC OnLine CCI 97.

number of buyers who visit online platforms leads to network effects,²⁰ an important phenomenon missing in online retail stores or offline markets.

An analysis of the above cases demonstrates that there has been a subtle shift in the relevant market analysis of the e-commerce platforms by the CCI, whereby although the CCI did not expressly delineate such markets as a separate relevant market it considered the distinct features and characteristics of such markets. This is a progressive step and is in line with the international antitrust frameworks (as discussed in Part VI of this paper). This realization will not help the CCI in dealing with the complex implications that such online platforms may have upon the economy, such as distortion of competition in any market, but will assist the CCI in formulating advanced economic tools to conduct AAEC analyses for such two-sided markets.

IV. THE COMPETITION LAW ISSUES DEALT BY THE CCI IN THE E-COMMERCE SECTOR

As mentioned above, the e-commerce sector is very prone to competition issues arising out of vertical restraints. Some of the most popular and conventional vertical restraints that the CCI has handled in this sector consist of RPM, selective distribution networks and exclusive distribution networks.

A. Minimum RPM

In *Jasper Infotech (P) Ltd. v. KAFF Appliances (India) (P) Ltd.*,²¹ Jasper, which owns and operates Snapdeal, alleged that Kaff, a manufacturer of chimneys and hobs sold on Snapdeal, was attempting to impose a “Minimum Operating Price” (MOP) on Snapdeal to ensure sales do not take place below a minimum price and had threatened to ban online sales if such prices were not maintained. This was the CCI’s first substantial order under Section 26(6) where it dealt with allegations of RPM, particularly minimum RPM, on online platforms. However, Kaff was not penalized as the CCI observed that the restrictions imposed on Snapdeal did not cause an AAEC in the market due to a large number of players present in the market of hobs and chimneys in India and which were competing with Kaff on Snapdeal.

²⁰ Network effects arise in the case of two-sided markets where users on each side of the market derive a positive effect from the addition of new users on the other side. Buyers and sellers on an online marketplace will logically be attracted to a platform that has a large number of users on the other side.

²¹ 2019 SCC OnLine CCI 2.

Similarly, in *Counfreedise v. Timex Group India Ltd.*,²² the CCI delved into the alleged anti-competitive conduct in the nature of RPM wherein it was alleged that the Timex Group was discriminating against the informant, i.e., Counfreedise, the distributor of Timex Group's wrist watches on e-commerce platforms vis-à-vis other e-commerce players like Cloudbail, XL Retail, etc. The major allegations pertained to the fact that the Timex Group restricted Counfreedise from offering discounts beyond a particular ceiling limit. It was observed by the CCI that, for RPM to be effective in form of discount control, it has to be imposed on all online retailers and not just the informant; it also stated that any agreement in the nature of RPM must meet the test of causing AAEC in India in order to be termed as anti-competitive. In the present case, the CCI did not find any violation based on RPM as Counfreedise dealt with the sale of wrist watches of various other companies and was not dependent solely upon the sale of Timex Group's products.

Based on the above cases, we can infer that the CCI has taken a flexible approach in relation to dealing with cases on vertical restraints like minimum RPM, given the effects-based approach in the above cases. Nevertheless, in *Jasper v. KAFF*, it has acknowledged the pernicious effects of minimum RPM that removes intra-brand competition and its treatment as a hardcore restriction in many antitrust jurisdictions, although it noted that in India such restrictions are to be analyzed through the screen of 'rule of reason'/effects-based approach on a case-by case basis. Given that the CCI has prominently dealt with the pro-competitive benefits of online vertical restraints while referring to how strictly RPM is sometimes treated in other jurisdictions, this may provide an indication that the CCI is still exploring the entire spectrum of antitrust regulation before settling for an appropriate framework to deal with such anti-competitive practices.

B. Other novel competition law concerns

i. Concerns under Section 3(4) of the Act

In *Delhi Vyapar Mahasangh v. Flipkart Internet (P) Ltd.*,²³ the CCI noted that both Amazon and Flipkart were following a marketplace-based model of e-commerce, and any vertical agreements between platforms and sellers could be examined under Section 3(4). In this regard, the CCI noted four alleged practices, namely, the exclusive launch of mobile phones, having 'preferred' sellers on the marketplaces, deep discounting, and preferential

²² 2018 SCC OnLine CCI 67.

²³ 2020 SCC OnLine CCI 3.

listing/promotion of private labels. The observations of the CCI for each one of these allegations are set out below:

- (a) **Exclusive launch of mobile phones:** The CCI observed that mobile phone manufacturers like One Plus, OPPO, and Samsung have exclusively launched several of their models on either Amazon or Flipkart. The CCI inferred *prima facie* that these mobile phone manufacturers partner with the e-commerce platforms and their brands are sold by the platforms' exclusive sellers.²⁴
- (b) **Deep discounting policy:** The CCI noted that certain communications were allegedly sent by Flipkart and Amazon to their sellers for incurring a part of the discounts offered during the big sale events like the Big Billion Days of Flipkart and the Great Indian Festival of Amazon. At the same time, it is alleged that preferred sellers at Amazon and Flipkart are in some way or the other connected to Amazon and Flipkart, respectively, through common investors, directors, shareholders etc. The CCI also perused the prices for different smartphone brands sold through Flipkart and Amazon, i.e. the original price and the discounted price. It was observed that certain smartphone brands/models are available at significantly discounted price on these platforms and are sold largely through the sellers identified by the informant as the 'preferred sellers'.²⁵
- (c) **Preferential Listing:** The CCI noted that the platforms may have been influenced in favor of the exclusive brands and sellers through higher discounts and preferential listing. The informant also alleged that both Amazon and Flipkart list their preferred sellers in the first few pages of the search results. For instance, the products sold by Cloudtail India and Appario Retail allegedly dominate the first few pages of search results whereas the products with the same ratings sold by non-preferred sellers are listed on later pages. Amazon and Flipkart also used the terms "assured" and "fulfilled" for the products of such preferred sellers.²⁶

Given the above allegations against Amazon and Flipkart, the CCI observed that exclusive launch coupled with preferential treatment to a few sellers and the discounting practices create an ecosystem that may lead to an AAEC in India. Thus, the CCI passed an order under Section 26(1) of the Act, directing the DG to probe an investigation against Amazon and

²⁴ *ibid* [23].

²⁵ *ibid* [24].

²⁶ *ibid* [25].

Flipkart. This case is one of the first major cases to provide some insight into the novel online vertical restraints such as deep discounting policy and preferential listing.

ii. Concerns under Section 4 of the Act

In the *MakeMyTrip case*, issues arose in terms of excluding Treebo and its partner hotels from listing on MMT's platform pursuant to the commercial arrangement between the latter and OYO, price parity restrictions on the MMT platform, and exclusivity conditions on Treebo. Treebo alleged that it agreed to accept the exclusivity agreements put forth by MMT as it incurred excessive losses due to the discontinuance of Treebo properties from MMT's platform (when, earlier, Treebo refused to accept the exclusive terms of MMT). Treebo had no option but to accept the conditions imposed by MMT. The exclusivity agreements were of the following two kinds:

- (a) **Price Parity Restriction:** MMT laid down a specific clause wherein it demanded that Treebo maintain price parity with regard to the prices charged by it on MMT and other online travel agencies; and
- (b) **Exclusivity Agreement (Exclusivity Restriction):** Treebo was not permitted to list a certain number of its hotels in major cities on the platforms of two of MMT's competitors, i.e. Booking.com (directly and indirectly) and Paytm (directly), 72 hours prior to check in.

The CCI took cognizance of the issues raised by Treebo in light of the **dominant positions of both MMT (approx. 63%) and OYO (approx.89%) in their respective markets**, and made the following observations under both Sections 3(4) and 4 of the Act in relation to the three major issues highlighted by Treebo as the complainant in this case:

- (a) *Firstly*, in relation to the issue of Treebo and its partner hotels being excluded from listing on MMT's platform through abrupt termination pursuant to the commercial arrangement between MMT and OYO, the CCI observed that the restrictive arrangement between OYO and MMT, both of whom have considerable presence in their respective market segments, may lead to refusal to deal which may have AAEC in India.
- (b) *Secondly*, in relation to the issue of imposition of price parity arrangements by MMT upon Treebo, the CCI observed that similar restrictions were analyzed by it in a recent case of *Federation of Hotel &*

*Restaurant Associations of India v. MakeMyTrip India (P) Ltd.*²⁷ (*FHRAI case*). The CCI observed that the price parity agreement provides that neither can Treebo provide a better rate to the competing online travel agencies nor can they provide the rooms to them unless those rooms are first made available on the platform of MMT. The CCI observed that such price parity arrangements were in the nature of APPAs, may result in removal of the incentive for platforms to compete on the commission they charge to hoteliers, may inflate the commissions and the final prices paid by consumers and may also prevent entry of new, low-cost platforms. On the basis of this, such parity restrictions were *prima facie* held to be anti-competitive and were directed to be investigated under Section 3(4) as well as Section 4 of the Act.

- (c) *Thirdly*, in relation to the imposition of an exclusivity condition by MMT on Treebo, the CCI observed that Treebo was not permitted to list its hotels situated in cities classified under Category A²⁸ on MMT's two competitors, i.e. Booking.com and Paytm, 72 hours (i.e. 3 days) prior to the check-in day. A similar restriction was imposed upon Treebo for a much longer period, i.e. 30 days, in case of hotels situated in Category B²⁹ cities. The aforesaid restriction *prima facie* appeared unfair, and hence exploitative, under Section 4(2)(a)(i) of the Act. This was because it denied the Treebo partner hotels an opportunity to list on other platforms/online travel agencies and to gain access to those platforms, especially Booking.com which was MMT's closest competitor during the busiest booking periods. Such a restriction also seems to be exclusionary as two online travel agencies were excluded from listing the Treebo chain of hotels, thus potentially leading to denial of market access for those online travel agencies with regard to those hotels branded by Treebo. Thus, apart from *prima facie* appearing to be in contravention of Section 4(2)(a)(i),³⁰ the

²⁷ 2019 SCC OnLine CCI 37.

²⁸ Category A hotels are hotels in 29 cities, namely Pune, Gurugram, Bengaluru, Manipal, Madurai, Trivandrum, Pushkar, Chandigarh, Mumbai, Coimbatore, Aurangabad, Lucknow, Mangalore, Hyderabad, Ooty, Chennai, Pondicherry, Kochi, Ahmedabad, Munnar, Kolkata, Vizag, Coorg, Indore, Guwahati, Kolhapur, Kodaikanal, Kovalam and Shimla.

²⁹ Category B are hotels in 25 cities, namely Delhi, Udaipur, Nagpur, Vijayawada, Bhopal, Jodhpur, Jaipur, Mysore, Goa, Dehradun, Ajmer, Nainital, Vadodara, Alleppey, Rishikesh, Haridwar, Amritsar, Nashik, Vagamon, Panchgani, Jamshedpur, Manali, Nellore, Noida and Bhubaneswar.

³⁰ Unfair and discriminatory condition in purchase or sale of goods or service.

restriction also seems to be *prima facie* in contravention of Section 4(2)(c)³¹ of the Act.

The CCI therefore, undertook a *prima facie* view of contravention against MMT for abuse of dominant position under Sections 4(2)(a)(i) and 4(2)(c) of the Act on account of all the three allegations analyzed above. Further, a case against MMT and OYO for entering into a vertical arrangement having an AAEC in the market was also made out under Section 3(4) read with Section 3(1) of the Act. Considering the similarity of facts and allegations, the CCI was of the view that the *MakeMyTrip case* may be clubbed with the *FHRAI case*, in terms of the proviso to Section 26(1) of the Act read with Regulation 27(1) of the Competition Commission of India (General) Regulations 2009 (**General Regulations**). The investigation of these cases is currently being undertaken by the DG.

V. OBJECTIVE JUSTIFICATIONS AND PRO-COMPETITIVE BENEFITS

The CCI has been increasingly focusing more on investigating competition issues relating to the e-commerce markets in India, in various instances, especially in relation to cases dealing with vertical restraints in the e-commerce sector. However, given that the CCI analyses vertical restraints based on an effects-based approach, it considers objective justifications and other pro-competitive benefits that such vertical restraints may give rise to as mitigating factors while carrying out the AAEC assessments in such cases.

In *Jasper v. KAFF*, the CCI accepted that, many a time, vertical agreements do protect the interests of the end consumer and are pro-competitive. Although restraints such as minimum RPM may adversely affect the price competition between retailers/distributors, vertical restraints nevertheless are a commercially viable option. That is, they could be desirable from the perspective of both manufacturers/retailers and consumers where they are justified in protecting the viability of businesses and offering good quality products and services to consumers. This is as against the intra-brand price competition between retailers/distributors which provides an incentive to free ride in the short-run and under-provision or complete eradication of useful services and goods in the long-run.

Free riding is the most common practice due to which online vertical restraints are sometimes considered desirable by manufacturers or retailers

³¹ Practices dealing with denial of market access.

and consumers when there is intra-brand price competition between different distribution channels. One retailer may free ride on the investment of another, typically possible where a manufacturer invests in the marketing and promotion at one retailer's premises which a competing manufacturer takes advantage of. This is where the need to apply vertical restraints comes in handy, in order to effectively safeguard the investments made by the stakeholders of a product, and may be considered as a reasonable commercial justification. However, the thin balance of the pro-competitive benefits of online vertical restraints as against the anti-competitive outcomes that such restrictions may have is where the CCI's obligation to regulate the online vertical restraints becomes necessary.

Other accepted justifications include protection of one's brand reputation and goodwill, quality control and authenticity certification, or protection from counterfeit/spurious products (an issue that is rampant in India's e-commerce ecosystem), etc. In relation to the counterfeiting of products, it is to be noted that resolving the issues of information asymmetries between buyers and sellers, where the end consumers have lesser information about products than their online sellers due to the inability of the consumer to physically inspect a product prior to purchase, can help restrict the adoption of online vertical restraints. The CCI must keep a close check upon the reasonable applicability of online vertical restraints in any market in comparison to the threat that they may pose. In order to understand the unique dimensions of the e-commerce sector and its interaction with practices such as vertical restraints, along with the other peripheral factors that have an impact upon functioning of this sector like network effects, the CCI undertook an intensive study of the market and published the E-commerce Report.

VI. E-COMMERCE REPORT

In *Jasper v. KAFF* as well as in the *MakeMyTrip case*, the CCI relied upon the international jurisprudence on online vertical restraints imposed by or on e-commerce platforms, including certain novel vertical restraints peculiar to the online market. These included MFN clauses, APPAs, non-price restrictive clauses, etc. Taking cognizance of the above issues relating to the digital marketing and the e-commerce sectors, the CCI released the E-commerce Report in order to throw some light on the novel types of vertical restraints and to provide sufficient guidance and reference points to the industry at large to help them understand what kinds of issues the CCI may deal with in the near future.

A. Background of the E-commerce Report

The E-commerce Report was initiated by the CCI in April 2019 and entails a combination of secondary research, questionnaire survey, focused group discussions, one-on-one meetings, a multi-stakeholder workshop and written submissions of stakeholders, covering the three broad categories of: (i) e-commerce in consumer goods (mobiles, lifestyle, electrical & electronic appliances and grocery); (ii) accommodation services; and (iii) food services. Around 16 online platforms, 164 business entities [including sellers (manufacturers and retailers) and service providers (hotels and restaurants)] and 7 payment system providers from across India participated in the study. In addition, 11 industry associations, representing different stakeholder groups, also participated.³²

B. Issues discussed in the E-commerce Report

Some of the key competition concerns identified by the study in the e-commerce sector are:³³

- (a) **Platform Neutrality:** The competition issue recognized herein is that e-commerce sites, when they serve as both a marketplace and a competitor on that marketplace, have the incentive to leverage their control over the platform in favour of their preferred vendors or private label products to the disadvantage of other sellers. The E-commerce Report states that the access that platforms have to both consumers and price data have enabled a strategic stronghold on the retail market with various platforms entering the market with their private labels. This provides greater access to such online platforms to manipulate the choices of the consumers and impose restrictions over the competitors of their own preferred sellers. The CCI has taken up this issue in a few of the significant decisions including *Jasper v. KAFF* as well as the recent *MakeMyTrip* case, where it is still investigating such practices. In hindsight, to deal with such practices, the CCI must regulate the unnecessary increase in transparency that is initiated by the online platforms and must develop proper economic tools to establish the harm that such two-sided platforms cause to the vendors and the end consumers.
- (b) **Platform to Business Contracts:** The report states that the imposition of arbitrary terms in contracts by big platforms creates a situation

³² Available at <<https://pib.gov.in/PressReleasePage.aspx?PRID=1598745>> accessed 12 May 2020.

³³ E-commerce Report (n 8).

where the business of a retailer is at the mercy of the big platform players and their unilateral revision of terms. This was also observed by the CCI in the *FHRAI case*, wherein it acknowledged the dominant position of the online travel agencies and initiated investigation into the abuse of dominance.

- (c) **Price Parity Clauses:** Price parity clauses, which require that retailers don't offer better prices on other marketplace platforms and/or on their own website, were identified as potentially distortive. This reduces inter-platform competition and encourages oligopolistic coordination between platforms to control the competitiveness of the market. Both APPAs and MFNs are parity arrangements. They may also apply to quantity or volumes which can restrict a supplier's ability to allocate inventory across a range of distribution channels in response to competition between platforms.³⁴ Parity agreements foreclose the market by (i) deterring entry of rival platforms as they make it harder for new entrants to attract suppliers to the new platforms; (ii) preventing an intermediary from selling directly; and (iii) enabling horizontal collusion in the downstream market leading to higher prices on consumers (like a "hub and spoke" cartel).
- (d) **Exclusive Agreements:** Exclusive agreements are along the lines of platform-bundling where a product will only be launched on a specific platform or where a platform would only list products of a certain brand in a category. Listing of only a single brand/service provider in a given product category on a major platform can make it difficult for rival brands/service providers to get their products before the consumers. On the other hand, exclusive agreements can also generate efficiencies and improve competition among the brands of different manufacturers or service providers. Thus, the CCI always adopts an effects-based approach to assess such agreements.
- (e) **Deep Discounts:** In a market where consumers have a tendency to flock towards discounts, the extremely discriminatory discount policies of platforms have been identified as an anti-competitive factor by the CCI. Forcing prices to be lower than costs have led to erosion of profitability while non-participation in discount policies has led to demotion in search rankings which is discriminatory in nature.

³⁴ Available at <https://centrocedec.files.wordpress.com/2015/07/special-project_online-vertical-restraints-2015.pdf> 66, accessed 12 May 2020.

C. Implications of the E-commerce study

The E-commerce Report discusses the issues that may, directly or indirectly, have a bearing on competition, or may hinder realisation of the full pro-competitive potential of e-commerce. The CCI is of the view that many of these issues would lend themselves to a case-by-case examination by the CCI under the relevant provisions of the Act. On the basis of the market study findings, the enforcement and advocacy priorities for the CCI in the e-commerce sector in India are as follows:

- (a) Ensuring competition on the merits to harness efficiencies for consumers;
- (b) Increasing transparency to create incentive for competition and to reduce information asymmetry; and
- (c) Fostering sustainable business relationships between all stakeholders.³⁵

Some of the major competition law concerns that may be deduced from the E-commerce Report are in relation to bargaining power imbalance and information asymmetry between e-commerce marketplace platforms and their business users. Thus, without violation of competition law, improving transparency in certain areas of the platforms' functioning can reduce information asymmetry and can have a positive influence on competition outcomes. In this regard, the CCI under its advocacy mandate encourages the e-commerce platforms to implement certain self-regulatory measures to put in place transparency measures such as:³⁶

- (a) **Search ranking:** E-commerce platforms may consider setting out up-front:-
 - A general description of the main search ranking parameters, drafted in plain and intelligible language and keep that description up to date;
 - A description of the main parameters where there is a possibility of influencing ranking against any direct or indirect remuneration paid by business users and of the effects of such remuneration on ranking; and
 - Any other relevant information not amounting to disclosure of algorithms or any such information that may enable or facilitate manipulation of search results by third parties.

³⁵ (n 28) 35.

³⁶ *ibid* 35-37.

- (b) **Collection, use and sharing of data:** Set out a clear and transparent policy on data that is collected on the platform, the use of such data by the platform and also the potential and actual sharing of such data with third parties or related entities.
- (c) **User review and rating mechanism:** Adequate transparency about user review and rating mechanisms is necessary for ensuring information symmetry, which is a prerequisite for fair competition. Adequate transparency to be maintained in publishing and sharing user reviews and ratings with the business users. Reviews for only verified purchases to be published and mechanisms to be devised to prevent fraudulent reviews/ratings.
- (d) **Revision in contract terms:** Notify the business users concerned of any proposed changes in terms and conditions. The proposed changes not to be implemented before the expiry of a notice period, which is reasonable and proportionate to the nature and extent of the envisaged changes and to their consequences for the business user concerned.
- (e) **Discount policy:** Bring out clear and transparent policies on discounts, including the basis of discount rates funded by platforms for different products/suppliers and the implications of participation/non-participation in discount schemes.

VII. INTERNATIONAL JURISPRUDENCE ON SIMILAR ISSUES

Internationally, inquiry and investigation into the practices of e-commerce platforms and digital markets has been the focus area for most of the competition law regulators around the world. In response to the Australian Competition and Consumer Commission inquiry into digital platforms, the Australian government has announced it will implement 23 recommendations from the report. The reforms are meant to address:

“the substantial market power that has arisen through the growth of digital platforms, their impact on competition in media and advertising markets and implications for news media businesses, advertisers and consumers”.³⁷

On the other hand, the German Bundeskartellamt terminated the abuse of dominance proceedings against online retail giant Amazon following

³⁷ Available at <<https://www.competitionlawinsight.com/competition-issues/digital-platforms-down-under--1.htm>> accessed 12 May 2020.

complaints from sellers using the platform as part of their e-commerce strategy, after Amazon agreed to change its business terms with its dealers.³⁸

Even in cases of merger control relating to e-commerce platforms, competition regulators across the world are now cautious. For instance, the UK's Competition and Markets Authority ("CMA") has referred Amazon's proposed investment in Deliveroo, the UK-based food delivery firm, for an in-depth investigation after raising "serious concerns" about the deal's potential impact on UK consumers. The CMA initially announced its decision on 11 December 2019 and gave the parties the opportunity to offer undertakings. When no such undertakings were offered, the CMA referred the deal for a phase two inquiry on 27 December 2019.³⁹

The European Commission (EC), being one of the most proactive competition law regulators in the world, has put specific regulations in place to combat the concerns raised by the e-commerce platforms. For instance, the EC's Geo-blocking Regulations of 2018 condemn the geo-blocking restrictions based on a consumer's nationality, place of residence or establishment as discriminatory according to the principles of the European Union. Geo-blocking refers to business practices whereby retailers and service providers prevent online shoppers from purchasing consumer goods or accessing digital content services because of the shopper's location or country of residence and is a unique vertical restraint which concerns cross-border online sales. Further, the EC adopted the final report on the e-commerce sector inquiry on 10 May 2017 and confirmed that the growth of e-commerce over the last decade has been responsible for increasing online price transparency and price competition and had a significant impact on companies' distribution strategies and consumer behaviour.⁴⁰

VIII. CONCLUDING REMARKS

The changing face of the global economy towards digitization has replaced the traditional business models with online markets. The online marketplaces being multi-sided platforms connect sellers, buyers and advertisers

³⁸ Available at <<http://competitionlawblog.kluwercompetitionlaw.com/2019/07/30/bundeskartellamt-ends-abuse-probe-after-amazon-agrees-to-changing-business-terms-for-dealers/>> accessed 12 May 2020.

³⁹ Available at <<https://www.gov.uk/cma-cases/amazon-deliveroo-merger-inquiry>> accessed 12 May 2020.

⁴⁰ *Report from the Commission to the Council and the European Parliament, Final Report on the E-Commerce Sector Inquiry* <https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf>, accessed 12 May 2020.

to facilitate transactions between them. Such platforms offer a multisided environment that internalizes transaction costs and takes advantage of the network effects across the different user groups.⁴¹ Such platforms have led to increased levels of price transparency in the market along with price competition, affecting the distribution and pricing strategies of both manufacturers and retailers. As a reaction to increased price transparency and price competition, manufacturers have sought greater control over distribution networks, with a view to better controlling price and quality. This translates into an increased presence of manufacturers at the retail level and increased recourse to agreements or concerted practices between manufacturers and retailers ('vertical restraints'), affecting competition among retailers selling the same brand ('intra-brand competition'). Such vertical restraints existing in online marketplaces like the e-commerce sector are just as innovative as the sector itself. These are by no measure traditional vertical restraints, with their distinct sets of effects and implications for competition regulation.

In light of the above, we believe that Section 3(4) read with Section 3(I) of the Act can squarely cover these anti-competitive practices when they are in the nature of anti-competitive agreements. When the competition concerns in the e-commerce sector are raised by any dominant entity's unilateral conduct, such conduct may be scrutinized under Section 4 of the Act by the CCI. However, it may require the aid of e-commerce sector-specific rules and regulations to enable the CCI to deal with the intricacies and peculiarities of the e-commerce sector, such as network effects, cross-border sales, use of algorithms, counterfeiting, etc. In this regard both the Bill and the E-commerce Report may be considered as important reference points to lay the foundations of a strong competition law enforcement regime for dealing with online platforms. Further, the CCI is proceeding in the right direction in adopting the rule of reason approach in dealing with the cases of online vertical restraints as it is essential for the regulator to balance the anti-competitive effects with the pro-competitive rationale or objective justification of the particular restrictions while adjudicating these cases. However, the future of how the CCI will deal with the growing complexities in the e-commerce sector depends upon the fate of cases like *MakeMyTrip* and *FHRAI* as well as upon the course that the Indian judiciary takes while adjudicating objections of big players like Amazon and Flipkart against the probes of the CCI.

⁴¹ With indirect network effects or cross-side network effects, the value of the service increases for one user group when a new user of a different user group joins the network/platform. In the context of e-commerce platforms, the more consumers are on the platform, the more valuable the platform is to sellers/service providers and vice versa.