

Delhi Vyapar Mahasangh vs Flipkart Internet Private Limited and Another (CCI)¹ & Amazon Seller Services Private Limited vs Competition Commission of India (Karnataka High Court)²

Through this quarterly publication, CUTS International intends to undertake an independent examination of relevant competition cases in India (on-going as well as decided). The objective is to provide a brief factual background of the facts of relevant cases, followed by an analysis of the predominant issues, therein. This publication will expectantly help readers to better comprehend the evolving jurisprudence of competition law in India.

The issues have been dealt with in a simplistic manner and important principles of competition law have been elucidated in box stories, keeping in mind the broad range of viewership cutting across sectors and domains. The purpose of this publication is to put forward a well-informed and unbiased perspective for the benefits of consumers as well as other relevant stakeholders. Additionally, it seeks to encourage further discourse on the underlying pertinent competition issues in India.

¹ <https://www.cci.gov.in/sites/default/files/40-of-2019.pdf>

² In this Edition, we are analysing two inter-related cases: first is the *prima facie* Order of the CCI directing investigation against Amazon Seller Services Private Limited and its affiliated entities (hereinafter collectively referred to as Amazon) and Flipkart Internet Private Limited and its affiliated entities (hereinafter collectively referred to as Flipkart); and second are two orders of interim stay on CCI's investigation by the Karnataka High Court in separate cases filed by Amazon and Flipkart. Given the scope of this dossier, the focus will mainly be on the competition issues highlighted by CCI in its Order while briefly touching upon the subsequent developments.

Background

The massive growth of online trade has become increasingly important over the last few years. The e-commerce firms are changing the paradigm and as a result of the competition, traditional traders and small brick and mortar businesses are coming online in one way or another.³

Furthermore, the Competition Commission of India (hereinafter CCI or the Commission) conducted 'Market Study on E-commerce in India'⁴ (the study). In the study, the Commission noted that platform neutrality,⁵ platform-business contract terms,⁶ price parity clauses,⁷ exclusive agreements⁸ and deep discounting were found to be major competition issues with e-commerce firms that were more often than not found to co-exist and one strengthened the occurrence of other(s).

Notably, the study concluded with some indicative self-regulatory measures to be taken by the e-commerce platforms.

In the present case, the initiation of an investigation into the e-commerce platforms by CCI may be seen as a surprise since no information was sought from the opposite parties (OPs) to their compliance with the self-regulatory measures set out in the study. The investigation seemed even more sudden because similar information has been filed before the CCI earlier and the Commission had turned down the action in such cases.

The present case came to the fore after the Commission received information from a union of micro, small and medium-sized enterprises (MSMEs) engaged in the trade of mobile phones and related accessories called Delhi Vyapar Mahasangh (DVM) against two e-commerce giants, Amazon and Flipkart, of engaging vertical agreements with preferred sellers causing foreclosure of competition. Based on that

³ <https://theaims.ac.in/resources/is-e-commerce-draining-the-traditional-retail-structure-in-india.html>

⁴ https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf

⁵ Platform neutrality refers to non-discriminatory treatment by the platform towards all sellers linked to it. A platform can adopt discriminatory approach towards onboard sellers when, for instance, it promotes its own products (private label) over other products or gives preferential treatment to few onboard sellers over others; in other words, the platform tends to create an uneven playing field for the discriminated sellers.

⁶ Imposition of unfair contract terms by virtue of being in a superior bargaining position.

⁷ A clause in the agreements with sellers on the e-commerce platforms that compels them to not sell a good or service at a price lower than the price on that specific platform.

⁸ Agreement between an e-commerce platform and a seller to either sell a good or service exclusively on that platform or to sell only one brand of a certain commodity on a platform.

information, the Commission ordered an investigation on January 13, 2020, into the practices of opposite parties (OPs) vide its Order under Section 26(1)⁹ of the Competition Act, 2002 (hereinafter the Act).

Subsequently, Amazon approached the High Court of Karnataka at Bengaluru praying a stay on the impugned CCI order. Amazon's petition hinged on two points: that the CCI had closed such matters with similar information on preferential agreements and deep discounting against its competitor Flipkart in the past; and that an investigation by the Enforcement Directorate (ED) under Foreign Exchange Management Act, (FEMA) 1999 and Foreign Direct Policy (FDI) Policy in e-Commerce (Press Note 2 of 2018) against Amazon and Flipkart is undergoing for alleged contravention of such laws and rules. On account of these facts, Amazon argued that the investigation by Director General (DG) as directed vide the January 13, CCI Order should stay.

Based on the above arguments, the High Court of Karnataka decided in favour of Amazon and granted an interim stay on DG's investigation vide its Order dated February 14, 2020. While recording reasons for the Order, the High Court of Karnataka stated that in pendency of the investigation by ED and the decisions of the Supreme Court in *CCI vs Bharti Airtel Limited*¹⁰ and *CCI vs Steel Authority of India*¹¹ cases, the investigation was ordered by the CCI prematurely without allowing Amazon to be heard. Following this decision, Flipkart also filed a writ petition¹² before the High Court of Karnataka praying similar action on the impugned CCI order considering the identical circumstances of the two cases. The petition was accepted and a stay was also put on the investigation against Flipkart.

⁹ Section 26 (1) of the Act states: On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter.

Provided that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

¹⁰ Civil Appeal No. 11843 of 2018 Supreme Court of India.

¹¹ Civil Appeal No. 7779 of 2010, Supreme Court of India.

¹² WP 4334 of 2020, High Court of Karnataka.

Issues & Findings

1. Before the CCI

The Commission noted three issues that were raised in the complaint by DVM:

- a. **Deep discounting:** Both Flipkart and Amazon were alleged to be engaging in deep discounting arrangements with some specific preferred sellers at the detriment of other sellers. Particularly, the preferred sellers on Flipkart/Amazon are the ones that have a closer relationship with the respective platforms. In Amazon's case, they use the same contact details as that of Amazon.

CCI took into account the emails furnished by DVM showing relevant communications between Flipkart and Amazon and their respective preferred sellers wherein the OPs have mentioned the point of offering huge discounts on the sale of particular mobile phone brands largely exclusive to its preferred sellers.

This is evident at the time of the mega shopping festivals on these platforms, such as 'Big Billion Days' of Flipkart and the 'Great Indian Festival' of Amazon. Given this background, the CCI noted that whether funding of discounts is an element of the exclusive tie-ups is a matter that merits investigation.

- b. **Preferential listing:** It was alleged in the information that the OPs use the words "Assured Seller" and "Fulfilled" to denote the products of their preferred sellers. Further, these products are kept higher up in the listing of goods when a consumer searches for any product(s).

The CCI stated that preferred listing along with deep discounting from specific sellers is likely to influence the competition in favour of those specific sellers. Given this, an in-depth investigation would be required to examine the operation of these vertical agreements and their impact on competition in the market.

- c. **Exclusive tie-ups and private labels:** Showing that the above two issues were interconnected and that it resulted in exclusive tie-ups by these agreements, DVM further alleged that these practices established the intent of

the OPs to offer preference to the specific private labels to the exclusion of other sellers.

While noting that the main issue was the exclusive launch of certain mobile phone brands on the OPs' platforms, CCI further observed that it compels both the offline retailers as well as the consumers to buy those phones either from the manufacturers' e-stores or the preferred sellers of those brands on OPs' platforms.

Given this, the CCI directed the Director-General to investigate the matter to find out whether the OPs are in contravention of Section 3(1) read with Section 3(4) of the Act (anti-competitive agreements).

2. Before the High Court of Karnataka

The interim stay was granted based on the following reasons:

- a. an investigation under FEMA, 1999 is ongoing;
- b. The CCI didn't hear OPs before ordering such investigation, as it had done in an earlier case involving AIOVA and Flipkart with similar issues; and
- c. DVM and the Confederation of All India Traders (CAIT) appeared to have joined hands while complaining against the OPs, whereas earlier CAIT has filed a writ petition in the Jodhpur High Court concerning violation of FDI rules by e-commerce entities.

Analysis

As we showed in our previous Analysis of Competition Cases Dossier,¹³ the CCI is demonstrating a visible shift in its approach towards the online markets and digital platforms. In the prior litigations before the Commission on similar issues,¹⁴ a light-touch regulatory approach was being followed for a multitude of factors. With the order to investigate MakeMyTrip-Oyo's agreements, and now this, the approach

¹³ https://cuts-ccier.org/pdf/Edition-15-Analysis_of_Competition_Cases_in_India.pdf

¹⁴ The issues of deep discounting and exclusive sale agreements are not new and have been brought before the Commission several times in the past. Our [last edition of the Analysis of Competition Cases Dossier](#) is also an example of the same as the case covered exclusive horizontal agreements in which case too the CCI has ordered investigation.

seems to be taking a turn towards the global antitrust narrative of curbing the market power of tech firms.¹⁵

It seems that the shift in approach is due to deeper insights that CCI obtained from its aforementioned market study on e-commerce in India. The Commission has dealt with similar cases in the past against both Flipkart and Amazon in 2015¹⁶ and 2018.¹⁷ However, the Commission did not find merit in similar allegations in these cases. Notably, the CCI held that “[I]t seems very unlikely that an exclusive arrangement between a manufacturer and an e-portal will create any entry barrier as most of the products ... (like mobile phones, computer accessories, books, etc.) to be sold through exclusive e-partners face competitive constraints” in the case from 2015 where both Amazon and Flipkart were parties to the case.¹⁸ Further, the 2018 case in which the information was filed against Flipkart, the Commission again held that Flipkart has sufficient competition in terms of other players like Amazon, Snapdeal or Paytm.

In the present case, however, the Commission noted that *“both the major platforms are stated to follow the same mechanics in terms of their exclusive tie-ups and preferential terms with brands/sellers, competition between the platforms prima facie does not play a role in mitigating the potential adverse effect on competition on the platforms”*.

One additional issue that the CCI did not spare many words for was the contention of the informant regarding collective abuse of dominance. The inclusion of collective abuse of dominance within the ambit of Section 4 of the Act has been a long-standing demand of CUTS International.¹⁹ However, since the provision has not been included in the Act, the Commission dismisses this argument every time it comes to a lack of statutory backing.

¹⁵ For instance, see <https://techcrunch.com/2019/08/20/state-attorneys-general-to-launch-antitrust-investigation-into-big-tech-companies-reports-say/>; <https://bruegel.org/wp-content/uploads/2016/10/Tech-Giants-The-Moligopoly-Hypothesis-and-Holitic-Competition-A-Primer-PETIT-20-10-16-1-1.pdf>; <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c>; https://www.ftc.gov/system/files/documents/public_statements/1433988/capitol_forum_remarks_bh.pdf; <https://www.newyorker.com/business/currency/how-elizabeth-warren-came-up-with-a-plan-to-break-up-big-tech>.

¹⁶ <https://www.cci.gov.in/sites/default/files/802014.pdf>

¹⁷ <https://www.cci.gov.in/sites/default/files/20-of-2018.pdf>

¹⁸ Paragraph 15, Mr. Mohit Manglani vs M/s Flipkart India Private Limited and Ors., Case No. 80 of 2014. *Supra* n.18.

¹⁹ For instance, see CUTS’ submissions to Competition Law Review Committee [here](#), CUTS’ comments on Draft Competition (Amendment) Bill, 2020 [here](#).

The distinguishable shift in approach is likely to create confusion for the e-commerce firms on the manner of managing their operation. Apart from the fact that the foregoing observation sounds more conclusive than a prima facie assessment, there are other flaws in this observation. Notably, the CCI did not adopt an aggressive stance earlier reasoning that the e-commerce ecosystem was still taking shape, and interventions in such markets need to be carefully crafted lest it stifles innovation.²⁰

Going back to the Commission's decision in 2018 in *All India Online Vendors Association vs Flipkart India Private Limited and another*,²¹ the Commission held a preliminary conference with the parties before launching the investigation and also invited Amazon "to comprehend the nuances of the online retail sector". However, that approach was simply missing from the current interim decision.

While it is understandable that the findings from the *Market Study* may have been an impelling factor in this decision, the due process that CCI follows ordinarily²² should perhaps have been maintained in the present case as well, especially considering that the submissions by Amazon and Flipkart before the Karnataka High Court showed evidence of influence from CAIT over the Informant,²³ which has been continuing its tirade against Amazon and Flipkart for quite some time now.²⁴

In the High Court of Karnataka, the counsel for CCI emphasised on the fact that this was merely a *prima facie* order and it does not mean anything conclusively,²⁵ and therefore the litigation before the Court was unwarranted. However, the CCI did miss out on several points that had to be addressed before directing investigation in this matter.

²⁰ See Case No. 20 of 2018

²¹ Case No. 20 of 2018, *Supra* n. 19.

²² A mandatory preliminary conference is not an obligatory responsibility of the CCI. However, the CCI conducts these conferences quite often in cases even to the extent of inviting other parties, as was done in the 2018 case. This also generates a new point of discussion as to whether the CCI should be mandatorily obliged to conduct a preliminary conference before ordering investigation into a matter, in order to give the parties a fairer chance of representation and also limiting the cost of investigation where it may be unnecessary.

²³ The Demand Draft submitted to CCI was drawn by CAIT

²⁴ This is visible from the frequent news reports which quote CAIT's anger against the e-commerce firms. For instance, see <https://www.medianama.com/2020/02/223-cait-letter-to-trump-ecommerce-fdi/>.

²⁵ The Commission clarifies this in its preliminary orders directing the DG to investigate a matter by stating that "[N]othing stated in this order shall tantamount to a final expression of opinion on the merits of the case and the DG shall conduct the investigation without being swayed in any manner whatsoever by the observations made therein".

First, in light of a plethora of judgements in the past that require the CCI to form a view with some reasons, such as the existence of a prima facie anticompetitive agreement and the associated appreciable adverse effect on competition, as a *sine qua non* before directing the investigation, that requirement was not fulfilled.²⁶

Second, the reason for not inviting the OPs for their response was an inexplicable decision that seems to have no justification, especially because prior similar cases have made such decisions only after engaging with the concerned parties. This issue gains particular importance also in light of the draft **Competition (Amendment) Bill, 2020** that gives discretion to the CCI to "*...not inquire into agreements referred to in section 3 or into the conduct of an enterprise or group under section 4, if the same or substantially the same facts and issues raised in the information or reference*".²⁷ Considering CCI's discriminatory approach in similarly placed cases such as this, such statutory authorisation becomes quite dubious.

Finally, since an investigation by the Directorate of Enforcement under FEMA, 1999 is underway, the case of the OPs to be given a chance of hearing was further strengthened. Although natures of the two investigations are very different as are the objectives of investigating the OPs, an examination of those circumstances may have been conducted at the time of the preliminary order.

While it is not in CCI's jurisdiction to decide anything to the Directorate of Enforcement, it may have succeeded if the CCI had recorded the investigation and recorded reasons as to why an inquiry of the OPs' conduct alleged in the information was necessary.

²⁶ Established in *Star India Private Limited vs CCI and Others* [Writ Petition No. 9175 Of 2018, Bombay High Court]. For other instances, see *Competition Commission of India vs. Steel Authority of India* [(2010) 10 SCC 744], *Cadila Healthcare Limited & Anr. vs. Competition Commission of India* [(2010) 10 SCC OnLine Del 11229], *Grasim Industries Ltd. vs. Competition Commission of India* [Writ Petition (C) No.7842 of 2017], *Google Inc. & Ors. vs. Competition Commission of India & Anr.* [LPA No.733 of 2014], *Telefonaktibolaget Ericsson vs. Competition Commission of India & Anr* [2016 SCC OnLine Del 1951].

²⁷ Section 26, Draft Competition Amendment Bill, 2020. Available at <http://feedapp.mca.gov.in/pdf/Draft-Competition-Amendment-Bill-2020.pdf>.

Conclusion

The present set of cases highlights the problem of inconsistency in the approach followed by the domestic regulators.²⁸ While the CCI had held in similar cases in the past after investigation that the e-commerce platforms were not at fault, the Commission did not even invite the OPs before initiating an investigation. In what appears to be a bid to stand shoulder to shoulder with its global counterparts in investigating tech firms, the CCI seems to have lapsed in the procedure to be followed before investigation.

Such approaches bring to question the provision in the Draft Competition (Amendment) Bill, 2020 which seeks to empower the CCI to not inquire into cases with the same or substantially the same facts. It is unclear whether the CCI is capable of dealing with that authority given its failure to be consistent in investigating cases.

Considering the precedents where jurisdictional conflicts have arisen concerning CCI, the matters have eventually ended up in the hands of the CCI in one form or another, this case is likely to meet the same fate sooner or later. The CCI would need to present reasons before the High Court of Karnataka for investigating with specific clauses in the agreements impugned by DVM. This case has spurred debate, in this author's opinion, to institutionalise mandatory consultation with the parties to a case before initiating an investigation.

This edition was prepared by Prakash Vaibhav, Research Associate (prv@cuts.org), CUTS International

© CUTS International 2020. "Analysis of Competition Cases in India" is published by CUTS Centre for Competition, Investment & Economic Regulation (CUTS CCIER), D-217, Bhaskar Marg, Bani Park, Jaipur 302 016, India. Ph: +91.141.228 2821, Fax: +91.141.228 2485, E-mail: c-cier@cuts.org, Web: www.cuts-ccier.org.

CUTS offices also at Kolkata, Chittorgarh and New Delhi (India); Lusaka (Zambia); Nairobi (Kenya); Accra (Ghana); Hanoi (Vietnam); Geneva (Switzerland); Washington DC (USA)

CUTS International is a not-for-profit organisation and the listing of paid news/articles is for informative and educative purposes only.

²⁸ CUTS International has been a vocal proponent for regulatory and has highlighted the needs for regulatory reforms in this respect in the past. For instance, see <https://www.oecd.org/gov/regulatory-policy/44925979.pdf>. This Background Paper for OECD highlights the importance of consistency in the actions of regulators.