

Mohit Manglani vs. M/S Flipkart India Pvt. Ltd. and Ors

Through this monthly publication, CUTS International intends to undertake independent examination of relevant competition cases in India (ongoing as well as new ones). 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 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 benefit consumers as well as other relevant stakeholders. Additionally, it seeks to encourage further discourse on the underlying pertinent competition issues in India.

Executive Summary

Despite several hiccups in the otherwise smooth growth trajectory of Indian e-commerce start-ups, some of which suffered from irrational cost structures and unsustainable business models, the overall success of this sector cannot be overlooked.¹

While the current world leaders in terms of size of market are China and the US, the Indian e-commerce market is the fastest-growing.² In 2009, the Indian e-commerce market was valued at US\$3.8bn and despite being negatively impacted by demonetisation the sector grew by 55.5 percent to US\$16bn in 2016, and is expected to reach US\$47.5bn by 2020.³

The e-commerce market has several segments; online retail being one of them. The not so recent trend of online retailing has gained momentum, due to expansion in terms of product base and geographical scope. In India, to an extent, it has successfully substituted traditional offline retail stores, making a wide variety of products and services accessible to larger masses across the country on a 'single click'.⁴

The working business model of an online retail platform is drastically different from traditional retail platforms. New business models include agreements operating at both horizontal and vertical levels, which enable the retail platform providers to facilitate transactions between manufacturers/suppliers and consumers.⁵

Further value addition lies in the fact that consumers get ready and cheap access to products at their doorsteps. Additional benefits include competitive pricing, comparable quality and improved access to new products.

However, with the increasing growth of online retail platforms, a plethora of regulatory and legal issues have arisen, including allegations of anti-competitive behaviour levied against online retail platforms. More often than not, these include concerns, such as anti-competitive agreements, predatory pricing and abuse of dominant position being raised by traditional retailers or consumers in general.

The availability of products at lower costs (for long durations), prevalence of regular discounts and the involvement of online market platforms in exclusive agreements might also raise concerns about the long-term sustainability of the underlying business models and the potential negative effects in the retail marketplace. Recent trends show that competition authorities have allowed recourse to such concerns, because of their impact on the market and the economy, as a whole.

Basing it on the current nodes, it was palpable that the Competition Commission of India (CCI) was made to address issues in respect to the working of e-commerce retail platforms

keeping in mind their distortionary impact on the market. Expectedly, allegations of unfair trade practices cropped up against Flipkart, SnapDeal, Jabong, Myntra and Amazon in the CCI.

The basic allegations against these aforementioned e-commerce retail platforms mainly revolved around the legitimacy of *exclusive agreements* entered by these online portals with the distributors and the issue of *abuse of dominance* by these e-commerce retail platforms.

Given the order passed in the lawsuit and the importance of e-commerce in today's world, this edition seeks to identify the underlying pertinent issues of the case law and aims to analyse them objectively.

Competition Commission of India's *Prima Facie* Opinion

Mohit Manglani filed a case against online e-commerce retailers, namely Flipkart India Private Limited, Jasper Infotech Private Limited, Xerion Retail Private Limited, Amazon Seller Services Private Limited, Vector E-Commerce Private Limited with the CCI under section 19(1)(a) of the Indian Competition Act, 2002. The allegations that were levied are as under:

1. It was alleged that these e-commerce websites had indulged in anti-competitive practices in by entering into *exclusive agreements* with sellers of goods/services; violating the provisions of Sections 3(1), 3(4) (b) & 3(4) (c).⁶
2. The informant also alleged that these e-commerce websites had abused their dominant position and contravened Section 4 of the Act. It was alleged that each e-portal had 100 percent market share for a product in which it was exclusively dealing and therefore leading to abuse of dominance. They further alleged that this domination is having an appreciable adverse effect on CCI.

In order to substantiate his claims, the informant provided the illustration of Chetan Bhagat's book 'Half Girlfriend' being exclusively available on Flipkart's website, thus alleging such *exclusive agreements* as anti-competitive and also having an 'appreciable adverse effect on Competition'.⁷ Quoting the same illustration, the informant also pointed out that presence of such exclusive agreements confers a dominant position to the e-commerce websites for the respective goods.

Legality or Illegality of *Exclusive Agreements*

The Competition Act of India does not confer *per se* illegality to *exclusive agreements*. To prove the illegality associated with *exclusive agreements* under Section 3 (3) there needs to be an appreciable adverse effect on competition (AAEC). In order to prove AAEC, CCI looks into factors laid down under Section 19(3) of the Act. In the current scenario, going by the factors laid under the desired provisions of the Act, the agreement entered between e-commerce retailers and distributors who did not have an AAEC.

The CCI considered arguments of both the parties and after analysing thoroughly gave the following opinion:

1. **The Commission concluded that the exclusive agreements did not lead to any appreciable adverse effect on competition.** The CCI highlighted that *it seems unlikely that an exclusive agreement between a manufacturer and an e-portal will create any entry barrier⁸ and that any of the existing players in the retail market are getting adversely affected.⁹* Complying with the same opinion, CCI opined that emergence of new e-portals entering into the market further enhances competition.

The Commission also brought to notice that online distribution channel by online portals provide an opportunity to the consumers to compare the prices as well as the pros and cons of the products. Thus, highlighting the utilities associated with such agreements for end consumers.

2. **The CCI stated that with online portals, every product cannot be taken as a relevant market in itself.¹⁰** Pertaining to allegations under Section 4 of the Act; the Commission opined that irrespective of considering online portals as a “separate relevant product market or as a sub segment of the market for distribution”,¹¹ it concluded that none of the online portals acted in abuse of their position. Laying stress on the same, the Commission clarified that none of the online portals seem to be *individually dominant*.¹²

Analysis

With the recent growth in internet users, easy availability of smart phones and the subsequent moves towards a digital economy; the e-commerce industry has witnessed exponential growth in India. Being one of the fastest developing sectors in the Indian economy; it is expected to grow at a compound annual growth rate (CGPR) of 52 percent by 2020.¹³ The Indian e-commerce sector includes a several segments like travel, financial services, real estate and other classifieds, online retail and various others.

Going by the statistics, though online retail comprises of less than 1 percent share of the overall retail market; it is that one segment which is shown a tremendous growth rate in India and is expected to jump from around US\$16bn in 2016 to just over US\$45bn in 2021.¹⁴

In addition, the expected CAGR is over 60 percent.¹⁵ With such exceptional growth of this sector and investors showing their interest in this same, it has caused disruption and incumbent retailers have raised several competition related concerns. Moreover, questions with regard to regulation of the e-commerce sector have been brought to light.

Keeping the current circumstances in mind, it was inevitable that certain issues were brought under the CCI against the online retail stores. In light of this, some of the pertinent issues in this case lead us to the following considerations:

1. Is there a need to consider differentiation between online and offline platforms?

Technological disruption is permeating all sectors and challenging foundational and traditional concepts of almost all regulations and laws, and Competition Law is no exception. The growing prominence of online platforms has substantially challenged the application of competition enforcement principles, the *relevant market* concept being one example.

The context of *relevant market* is one of the basic issues that need to be addressed before determining dominance and abuse. In the context of online e-commerce market one might argue that both offline and online products are part of the same market whereas other might pursue that both do not fall under the ambit of the same market. To address the issue the opinion of CCI remains a vital point of discussion.

The Indian Competition Act, 2002 specifically determines the scope to address the bounds which fall to address the concept of *relevant market*. This concept is the major basis of defining competition in any market. However in the current case, the CCI did not specifically address the issue of relevant markets *vis-à-vis* e-commerce. Rather, it kept the question as to whether e-portal markets might be treated as a separate relevant product market or as a mere sub segment of the market for distribution open-ended.¹⁶

However, the CCI has clearly pointed out that every product cannot constitute a *relevant market*, and clarified that raising an anti-trust issue based on a mere product is undesirable.¹⁷ To further clarify on what constitutes a relevant market, the CCI in the Snapdeal case stated that both offline and online retail markets are only different channels of distribution of the same product and do not constitute different relevant markets.¹⁸ Thus, for a market to be a *relevant market*, the market, as a whole (keeping all the suppliers and distributors together) needs to be looked into rather than using a particular product to address *relevant market*.

Based on the above analysis, the CCI also highlighted that the online e-retail market comprises only 1 percent of the whole retail market, which is rarely enough to even argue on the issue of *dominance*. Thus, CCI concluded that there was no dominance itself to argue for or against *Abuse of Dominant Position*.¹⁹

Notably, on one hand, the CCI has argued that online platforms and brick and mortar companies are distinct channels in the same relevant market²⁰ and on the other, it went on to state that "irrespective of whether we consider e-portal market as a separate relevant product market or as a sub-segment of the market for distribution, none of the Opposite Parties seems to be individually dominant".²¹ This means that there is still ambiguity as to the relevant market *vis-à-vis* online platforms and brick and mortar companies. In order to bring in certainty in enforcement, this has to be further clarified next time the Commission gets a time to adjudicate a similar matter, or through policy intervention.

Be that as it may, it raises broader questions *vis-à-vis* the inherent competence of economic laws and regulations (such as competition law) to address emerging issues and it is important for policymakers to revisit the same. The growing difference in business structures and rapid technological advancements makes it tough for authorities to apply laws which are not retrofitted to these changing market dynamics. Specifically under competition law, there is an increasing need to reconsider whether or not online and offline platforms need differentiated rules and laws.

2. Ascertaining the exclusivity in agreements

The next issue which was raised in regard to the working of the e-commerce retail stores was in relation to the online market entering in exclusive agreements with the distributors and suppliers of certain products. The complaints in this regard mainly revolved on the lines that certain products were exclusively available on certain online portals and were also not made available any place else including offline markets thus posing appreciable adverse effect on competition.

Going by the legislation the exclusive distribution agreements are anti-competitive when such arrangements result in appreciable adverse effect on competition in India. However, the legislation clearly points out that exclusivity itself is not anti-competitive unless the act leads to barrier to entry and exit in the market. The whole context of exclusive agreement has thus always been under scrutiny; as there is a very thin line that lies between it being justified and anti-competitive.

The issue of the exclusivity arose when online retail stores entered into specific contracts or agreements with suppliers which allowed a specific product to be available on a certain online portal; thus questioning the fairness in trade and also the validity of such agreements. This particular issue has to be looked at from both sides.

One side of the coin demonstrates the possible anti-competitive nature of such agreements. One of the main issues in this regard is the resultant effect that forecloses the market against other competitors. It also lays emphasis on product specific monopoly leading to manipulation in prices, the control of supply and demand and certain conditional inputs on the consumers making the buy-in restrictive and also unfair.²²

Whereas on the other side of the coin, the basic arguments that are posed in favour of these agreements are that the decision lies with the manufacturer to decide his scope of market. Furthermore, even CCI has clarified that such agreements do not impose any barrier to entry and do not have any appreciable adverse effect on competition.

Thus, in a situation where a particular product is only available on a single online retail platform, and cannot be procured from any other online retail encounters or at offline markets, the substitutability of that product is to be determined *vis-à-vis* other products that can be categorised in the same relevant product market.

In this particular case, however, CCI was mainly in sync with the arguments posed by the online retailers. It opined that the exclusive agreement between a manufacturer and an e-portal is hardly amounting to create any entry barrier. Further, it also opined that it seems that none of the existing players in the retail market seem to be adversely affected by such exclusive agreement, rather the entry of new e-portals portrays enhanced competition in the market.²³

In assessing the effects of exclusivity agreements, it is important to consider the impact on consumer choice and access. In this regard, although CCI has concluded that distribution channels by online portals actually provide opportunities to consumers to compare the prices,²⁴ it somehow misfits to fill in the gap of product monopoly as specified above.

Thus, there is a need to put the aspects of exclusive agreements under more scrutiny so as to ensure fairness in competition and also provide better market for end consumers.

Conclusion

E-commerce platforms have provided an alternative and efficient channel of distribution for products and are bound for more growth over the years to come. The recent growth of e-commerce retail platforms and cut-throat competition from new entrants is an illustration of the same. With this change in market trend across the globe, unconventional competition concerns in the online marketplace have arisen and will continue to do so in future.

In order to regulate the market efficiently and optimally, it is important for policymakers and enforcement agencies to understand the foundational differences in online platforms and brick and mortar companies. This requires an intricate analysis of the difference in business models so as to determine how the same should be categorised. Increased understanding will also minimise contradictions in enforcement actions and regulatory frameworks.

Hence, keeping in mind the ever-changing market landscape, it is important to tackle regulatory uncertainty and the lack of uniformity in enforcement of competition law by revisiting and carefully applying pertinent competition law principles.

- ¹ *E-commerce in India on the rise*, available at: <http://www.lexology.com/library/detail.aspx?g=cb409813-ed05-4bc9-bf5a-30c197eae468>, Accessed on April 28, 2017
- ² Athira A. Nair, *India growing fastest in e-commerce, says study*, available at: <https://yourstory.com/2017/02/e-commerce-forrester-research/>, Accessed on 28th April 2017
- ³ See "Demonetisation impact: Indian e-commerce growth projection cut to 55.5% for 2016,", available at: <http://www.livemint.com/Companies/M5n4anpBxl6Kio28Dg17dL/Demonetisation-impact-Indian-ecommerce-growth-projection-c.html> Mint (Dec. 7, 2016)
- ⁴ Geetanjali Sharma, "Competition Law & E- Commerce: Emerging Trends", available at: [http://www.iclr.in/assets/pdf/ICLR%20Volume%201%20\(First%20Article\).pdf](http://www.iclr.in/assets/pdf/ICLR%20Volume%201%20(First%20Article).pdf), Accessed on March 15, 2017, 14:20 IST
- ⁵ Mohit Manglani vs. M/S Flipkart India Pvt. Ltd. & Ors, Case 80 of 2014, available at: <http://www.cci.gov.in/sites/default/files/802014.pdf>
- ⁶ Supra 5
- ⁷ *ibid*
- ⁸ Supra 5, Para 16
- ⁹ Supra 5, Para 17
- ¹⁰ *Ibid*, Para 18
- ¹¹ *Ibid*
- ¹² *Ibid*
- ¹³ Dr. Ravikant Bhardwaj, "Competition Issues in E-Commerce Sector in India", 2016, 1st July, available at: <http://media.leidenuniv.nl/legacy/ravikant-bhardwaj.pdf>, Accessed on: March 10, 2017, 10:47 IST
- ¹⁴ <https://www.statista.com/topics/2454/e-commerce-in-india/>, Accessed on: March 15, 2017, 21:30 IST.
- ¹⁵ <http://www.mondaq.com/india/x/400076/Trade+Regulation+Practices/CCIs+Take+On+The+Indian+ECommerce+Market+Protect+Competition+Not>, Accessed on March 08, 2017, 12:30 IST
- ¹⁶ Geetanjali Sharma, "Competition Law & E- Commerce: Emerging Trends", available at: [http://www.iclr.in/assets/pdf/ICLR%20Volume%201%20\(First%20Article\).pdf](http://www.iclr.in/assets/pdf/ICLR%20Volume%201%20(First%20Article).pdf), Accessed on 15th March 2017, 14:20 IST
- ¹⁷ Supra Note 5, Para 18
- ¹⁸ M/S Jasper Infotech Pvt. Ltd. (Snapdeal) vs. M/s Kaff Appliances (India) Pvt. Ltd. & others, Competition Commission of India, Case No. 61 of 2014, available at: http://www.cci.gov.in/sites/default/files/612014_0.pdf
- ¹⁹ Supra 7, Para 10.
- ²⁰ Supra 18
- ²¹ Supra 5
- ²² Supra Note 12
- ²³ Supra Note 6
- ²⁴ *ibid*

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