
Intergovernmental Group of Experts on Competition Law and Policy

18th SESSION

10-12 July 2019

Room XVII, Palais des Nations, Geneva

Thursday - 11 July, 2019

Emerging issues before CCI relating to Digital Economy

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I. Introduction

India just like the rest of the world is going through an age of relentless disruptions caused by technology and innovation. Technology markets are characterised by a high pace of rapid change when compared to other industries, and have frequently displayed potential for massive disruption. This dynamic nature of the technology industry makes the job of the Competition Commission of India (CCI) unenviable. We have been witness to the emergence of a new class of economy – the “digital economy”. Largely because of the diffusion of (high speed) Internet access, there has been a proliferation of enterprises that provide services and products through a digital medium.

The e-commerce sector in India has witnessed frenetic activity over the last 5 years. This growth has largely been driven by the expanding access to Internet, which apart from being an important medium of communication and expression, has also become the primary source of sustenance for many businesses. Considering that mobile phone ownership figures and Internet penetration are still at sub-optimal levels, there is tremendous scope for the e-commerce sector in India to continue its rapid growth. This is notwithstanding the issues that exist with respect to taxation, logistics and payments.

The e-commerce companies that operate platforms together the e-commerce aggregators have acted as intermediaries and in doing so, have acted as a link between the various medium and small enterprises from deep within the Indian hinterland. These intermediaries have accordingly, generated employment opportunities and in the process allowed a whole generation of merchants to connect with hitherto unattainable or unreachable buyers. It had been pointed out earlier as well that ‘long-tail’ economic transactions which are not possible to conduct within the realm of brick and mortar stores are now feasible and can take place on scale large enough to justify investing in such items.¹ This also has a concomitant impact on the diversity of choices available to the consumer.

¹OECD Policy Roundtable – Vertical Restraint on Online Sales, 2013. <http://www.oecd.org/competition/VerticalRestrainsForOnlineSales2013.pdf>

II. Horizontal Agreements

The CCI has not yet come across any instance of collusion in the e-commerce sector, although it is cognizant of the potential for collusion that exists. This may happen in the following manner:

Hub and spoke arrangements: This happens when a dominant supplier enters into various bilateral vertical agreements with various distributors to impose the same terms across all such vertical agreements, thereby effectively indulging in price fixing. However, the question here is whether these vertical agreements should be seen independently and therefore, analysed under the rule of reason, or whether the fact that the various distributors acceded to such terms stipulated by the supplier, amounts to collusion and there is price fixing under Section 3(3)(a) of the Act?

The issue of hub and spoke was alleged in *Snapdeal vs. Kaff Appliances* (Case No. 61 of 2014) wherein the Opposite Party put out a notice that its goods sold on the Informant's marketplace were spurious and further, that the Opposite Party would not honour the warranties on the products sold through such marketplace. The Informant alleged that the issuance of such a notice amounted to, *inter alia*, a hub and spoke arrangement. However, the CCI decided to direct the DG to commence and investigation based on a violation of Section 3(4)(e) of the Act alone (relating to resale price maintenance) and therefore, the issue of hub and spoke conspiracy was not examined in detail.

Further, the issue of hub and spoke arrangements was also alleged in *FX Enterprise vs. Hyundai Motor India Limited* (Case No. 36 and 82 of 2014), but here too, the CCI found Hyundai only guilty of infringing the provision relating to resale price maintenance and did not examine the hub and spoke arrangement in detail.

The CCI is however, aware that even if firms that are distributors do not directly communicate with each other, the fact that they use the supplier as an intermediary or backchannel medium to communicate should not exculpate them from any liability.

Algorithm driven collusion: In the recent case of *Samir Agrawal vs. ANI Technologies/Uber* (Case No. 37 of 2018) the allegation was that due to algorithmic pricing, riders are not able to negotiate fares with individual drivers for rides matched through App nor drivers are able to

offer any discounts. Thus, the algorithm takes away the freedom of the riders and drivers to choose the other side on the basis of price competition and both have to accept the price set by the algorithm. This was alleged in the context of a hub-and-spoke arrangement as well. It was alleged that the OPs, i.e. Ola/Uber, act as 'Hub' where 'spokes' (competing drivers) collude on prices. The CCI, however, dismissed the allegations by observing that *"for a cartel to operate as a hub and spoke, there needs to be a conspiracy to fix prices, which requires existence of collusion in the first place. In the present case, the drivers may have acceded to the algorithmically determined prices by the platform (Ola/Uber), this cannot be said to be amounting to collusion between the drivers. In the case of ride-sourcing and ride-sharing services, a hub-and-spoke cartel would require an agreement between all drivers to set prices through the platform, or an agreement for the platform to coordinate prices between them. There does not appear to be any such agreement between drivers inter-se to delegate this pricing power to the platform/Cab Aggregators."*

Algorithm driven monitoring: Sophisticated price tracking software has made it easy for some firms to collect data on prices charged by other competitors and monitor any deviation from the price set by a cartel of firms to punish the 'deviant' firm. Again, while the use of software itself isn't anti-competitive, the fact that it enables a price fixing conspiracy is something that the CCI is on the lookout for. The CCI has not reviewed any cases in this regard, thus far.

III. Vertical Agreements

Regarding vertical agreements, the CCI has had an opportunity to them in a few cases. In *Ashish Ahuja vs Snapdeal* (Case No. 17 of 2014), the Informant alleged that Sandisk and Snapdeal had entered into an agreement to prevent the Informant from selling certain products of Sandisk, and that such an arrangement violated Section 3 of the Act as the conduct of the Opposite Parties intended to force the Informant to become an authorized dealer of Sandisk. No specific provision of Section 3 was alleged to have been infringed. The CCI held that *"the insistence by SanDisk that the storage devices sold through the online portals should be bought from its authorised distributors by itself cannot be considered as abusive as it is within its rights to protect the sanctity of its distribution channel."*

In *Mohit Manglani vs. Flipkart India Pvt. Ltd. And Ors.* (Case No. 80 of 2014), the CCI had to review allegations of the Informant that all the arraigned e-portals and e-commerce websites

and product sellers enter into 'exclusive agreements' to sell to the exclusion of physical outlets. The CCI held that such agreements have to be evaluated on the touchstone of the factors listed under Section 19(3) of the Act, and it is unlikely that exclusive agreements between a manufacturer and an e-portal will create any entry barriers since the market seems to be growing with the uninhibited entry of new e-portals. Regarding allegations of abusive conduct, the CCI dismissed the allegation of the Informant that each exclusive product sold by each e-portal cannot be taken as a relevant market in itself.

Most recently, in *Snapdeal vs. Kaff Appliances* (Case No. 61 of 2014), the CCI ordered an inquiry into the practice of resale price maintenance that appeared to have been conducted by the Kaff Appliances with respect to the sale of its kitchen appliances. It should be noted that there was no agreement between the Kaff Appliances and Informant. Rather, there was a notice / email from the Kaff Appliances to the Informant, warning the Informant that if the market operating price of the kitchen appliances is not maintained then the Kaff Appliances will not allow the sale of its products on the marketplace. The CCI exonerated Kaff Appliances of all charges since Kaff Appliances submitted that it had never hindered the sale of its products on online portals and the email, Caution Notice and Legal Notice were not followed by any concrete action on its part and hence, there was no impact on the online sale of Kaff Appliances' products, much less on the online portal of Snapdeal. The CCI also added that "*a right of the manufacturer to choose the most efficient distribution channel ought not to be interfered with, unless the said choice leads to anti-competitive effects.*"

IV. Abuse of Dominance

In cases involving multisided markets, the CCI has defined the relevant market on a case-to-case basis. In *Matrimony.com Limited Vs. Google LLC & Others* (Case Nos. 07 & 30 of 2012), two relevant markets were defined for both sides of the platform, i.e. online searchers and online search advertisers. The CCI took into account that online platforms that provide search services were intermediaries that acted as an interface between search users and advertisers. The two sides of the market complement each other and they are interdependent. Further, online general web search services and search advertising would not constitute the same relevant product market on account of wide variations in the mechanism for generation and display of results and also the clicking behaviour. Also, these services serve distinct goals and

are perceived differently by the various categories of users, namely, publishers (websites) and internet users entering search queries. It was also noted that these services constitute complementary services from the point of view of websites striving for eyeballs. Accordingly, the CCI determined the relevant markets as:

(a) Market for Online General Web Search Services in India

(b) Market for Online Search Advertising Services in India

The CCI also rejected the contention of Google that the search services offered by it are free and hence there is no purchase or sale of goods or services. It was noted in the Order that it is not unusual for one-side in a multi-sided market to receive services subsidised by customers on the other side of the market. This, however, is not suggestive of the fact that users are not providing any consideration for availing these products and services as they are providing personal data as well as “eyeballs” to the search engine as a consideration. The CCI noted that rise of new business models based on collection and processing of Big Data is currently shaping the world and with the development of data mining and machine learning, businesses are able to offer innovative, high-quality and customised products and services at low or even zero prices, with great gains for consumers. Further, it can be used to target advertising better. Moreover, the data can be turned into any number of revenue generating artificial-intelligence (AI) based innovations. However, the benefits of providing Big Data comes at a cost to the consumers as they face a loss of control over their data and are exposed to intrusive advertising and behavioural discrimination. Thus, there exists a commercial relationship and the conduct of the participants in such commercial relationships can be examined within the four corners of the Act.

In *All India Online Vendors Association vs. Flipkart* (Case No. 20 of 2018), the allegation was that Flipkart, an online marketplace was indulging in predatory pricing and therefore, abusing its dominant position. There was a noticeable change in CCI’s earlier position (where it regarded online market and offline markets as different channels of distribution of the same market) when it deemed the relevant market as “*services provided by online marketplace platforms*”. However, despite that, the CCI found no contravention of the Act as Flipkart was not found to be dominant in the relevant market.

“No doubt, to the end consumers, the distinction line between online and offline sellers is sometimes blurry, yet it cannot be denied that online marketplaces offer convenience for sellers as well as the buyers. For the sellers, they save costs in terms of setting up of a store, sales staff, electricity and other maintenance charges. The benefits afforded to buyers includes comfort of shopping from their homes thus saving time, commuting charges and at the same time they can compare multiple goods. Be that as it may, nothing significant turns upon such convergence on the outcome of this case as even if the market is confined to online space, the present market construct, as detailed later, would not indicate any player with such a market power so as to confer a dominant position upon it.”

V. The Way Forward

The Government of India, CCI and other related agencies are trying to build a consensus on controversial issues of data-localisation and cross-border data flows in the wake of increasing demands for consumer privacy. The government is trying to strike a fine balance between innovation backed by data, development by allowing for data flows beyond borders and ensure consumer privacy at the same time. Meanwhile, the CCI has also had the opportunity to deal with cases involving privacy issues. The CCI appears to have taken an approach that recognizes the potency of an opt-out policy. For instance, in *Vinod Kumar Gupta vs. WhatsApp* (Case No. 99 of 2016), it was alleged that *WhatsApp* was abusing its dominant position by introducing privacy policies that compelled its users to share their account details and other information with *Facebook*. However, the arraigned party submitted that as long as an ‘opt-out’ option was provided, there was no abuse committed, even though the ‘opt-out’ option expired within 30 days of the introduction of updated terms of service and privacy policy. The CCI refused to look into the privacy issue in this case since a similar case that dealt with *WhatsApp* sharing its subscriber data with *Facebook* was *sub-judice* at the Supreme Court, but it should be noted that the CCI didn’t outright dismiss the submission of the parties as well.

In an unrelated development, on 31st July 2017, the Government of India constituted a Committee of Experts under the Chairmanship of Justice B.N. Srikrishna to '*deliberate on a data protection framework for India*'.² Pursuant to the deliberations carried out thereto, a White Paper on a data protection framework for India was released on 27th November 2017, to the general public for their comments.³ Subsequent to the feedback received, the Committee of Experts published a draft Personal Data Protection Bill, 2018⁴ (**Draft Bill**) along with a Report on its deliberations titled, "*A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians*" (**Committee Report**).⁵ The Draft Bill and the Committee Report will in all likelihood be strenuously reviewed by the Parliament in order to maintain a fine balance between innovation backed by data and consumer privacy.

²*Vide* Office Memorandum No. 3(6)/2017-CLES issued by the Ministry of Electronics and Information Technology.

³http://meity.gov.in/writereaddata/files/white_paper_on_data_protection_in_india_171127_final_v2.pdf

⁴http://www.meity.gov.in/writereaddata/files/Personal_Data_Protection_Bill%2C2018_0.pdf

⁵http://www.meity.gov.in/writereaddata/files/Data_Protection_Committee_Report-comp.pdf