



CCI orders investigation against Amazon and Flipkart for its exclusive agreements, deep discounting and preferential listing of labels

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Background:

On January 13, 2020, the Competition Commission of India (CCI) ordered an investigation into the alleged contravention of the provisions of the Competition Act, 2002 (Act) by Amazon Seller Services Pvt. Ltd. (Amazon) and Flipkart Internet Services Pvt. Ltd. (Flipkart). The CCI's order follows its [market study](#) on e-commerce in India, wherein interestingly, it had suggested *self-regulation* by e-commerce platforms (platforms) in India.

Allegations before the CCI and CCI's assessment:

A society comprising of Micro, Small and Medium Enterprises (MSME) traders dealing in smartphones and related accessories approached the CCI with a complaint against Amazon and Flipkart alleging contravention of Section 3(4) read with Section 3(1) and joint dominance under Section 4(2) read with Section 4(1) of the Act.

The allegations involved issues relating to: (a) exclusive launch of mobile phones, (b) preferred sellers, (c) deep discounting, and (d) preferential listing/promotion of private labels.

CCI's preliminary assessment on applicable provisions of the Act:

- ✓ Section 3(1) read with Section 3(4) of the Competition Act, 2002 (Act) regulates vertical agreements. The CCI noted that Flipkart and Amazon are e-commerce entities following a marketplace based model of e-commerce. They essentially provide online intermediation services to sellers on one side and consumers on the other. These platforms/marketplaces and the sellers selling on these platforms operate at different stages of the vertical/supply chain. Thus, any agreement between the platforms and sellers selling through these platforms can be examined under Section 3(4) of the Act.
- * Section 4 of the Act regulates abuse of dominant position. In an [earlier](#) order, the CCI dismissed allegations against Flipkart noting that it is not dominant in the relevant market. In the present case, on an allegation of joint dominance by Amazon and Flipkart, the CCI noted that joint/collective dominance is not contemplated under the Act. Hence, an assessment by the CCI cannot be undertaken with respect to Section 4 of the Act.

The CCI noted that the allegations are interconnected and warrant a holistic investigation to examine - (a) how the vertical agreements operate; (b) what are the key provisions of such agreements; and (c) what effect do they have on competition. The CCI's assessment of the issues involved in the complaint is provided below.

- (a) **Exclusive launch of mobile phones:** Based on information available on record, media reports and advertisements by the platforms about exclusive launches, the CCI noted that Amazon and Flipkart indulged in exclusive launch of mobile phones on their respective platforms. The CCI noted that in 2018, Amazon exclusively launched 45 mobile phones while Flipkart exclusively launched 67 mobile phones.
- (b) **Preferred sellers:** It was alleged that Amazon and Flipkart have their own set of preferred sellers and that these preferred sellers have nexus with the e-commerce platforms either by way of direct or indirect ownership or some understanding. Based on this allegation, corroborated with the exclusive launch of mobile phone, as discussed above, the CCI noted that exclusive launch coupled with preferential treatment to a few sellers and the platform's discounting practices may *prima facie* lead to an appreciable adverse effect on competition.
- (c) **Deep discounting:** The CCI was provided with certain emails allegedly sent by Flipkart and Amazon to their sellers stating that they will be required to incur 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. Additionally, the CCI perused the prices for different smartphone brands sold through Flipkart and Amazon, i.e., original price and discounted price. The CCI observed that certain smartphone brands/models are available at significantly discounted price on these platforms and are sold largely through the "preferred sellers". Accordingly, the CCI directed investigation into whether funding of discounts is an element of the exclusive tie-ups between the platforms and the sellers.

(d) **Preferential listing/promotion of private labels:** In context of the above, CCI noted that competition on the platforms may get influenced in favor of the exclusive brands and sellers, through higher discounts and preferential listing.

Based on the above, the CCI *prima facie* found Amazon and Flipkart to be in contravention of Section 3(1) read with Section 3(4) of the Act. The CCI directed the DG to investigate the following aspects:

- Exclusive arrangements between smartphone/mobile phone brands and platforms/preferred sellers selling exclusively on either of the platforms coupled with the allegation of linkages between these preferred sellers and the platforms.
- Whether the alleged exclusive arrangements, deep-discounting and preferential listing Amazon and Flipkart are being used as an exclusionary tactic to foreclose competition and are resulting in an appreciable adverse effect on competition in contravention of Section 3 (1) read with Section 3(4) of the Act.

The CCI noted that the allegations in the information were interconnected and warranted a holistic investigation of examining the vertical agreements in operation and their effect on competition. Further, it was noted that since both Amazon and Flipkart appeared to follow the same strategy with respect to exclusive tie ups and preferential terms with brands/sellers, competition between the platforms *prima facie* did not play a role in mitigating the potential adverse effect on competition on the platforms.

ELP Comment:

The investigation ordered by the CCI against Amazon and Flipkart is particularly interesting given that, previously, on two separate occasions (in [2015](#) and [2018](#)), the CCI dismissed similar allegations against the two market platforms. In the 2015 case, where an information was filed against various e-commerce platforms including Amazon and Flipkart, the CCI noted that an exclusive agreement between a manufacturer and a platform is unlikely to create any entry barrier as most of the products (e.g. mobile phones, tablets, books etc.) sold on such platforms face competitive constraints. Even in 2018, the CCI found Flipkart to be competitively constrained by Amazon and other players in the market.

However, in the present case, the CCI notes that both Amazon and Flipkart follow the same practices, therefore, competition between the platforms *prima facie* does not play a role in mitigating the potential adverse effect on competition by the platforms.

From a reading of this Order of the CCI, it appears that the CCI did not hold a preliminary conference before ordering investigation under Section 26(1) of the Act. While the Act and the Regulations do not provide for a mandatory preliminary hearing, the CCI as a matter of practice provides parties with such an opportunity in most of the cases. It is likely that the data and findings of the research undertaken for the CCI's market study of the Indian e-commerce sector could have influenced the CCI's decision to order a more detailed investigation into these issues.

The order also resonates another recent decision of the CCI to investigate MMT and OYO in the market of online hotel booking services. While the CCI had previously dismissed allegations of abuse of dominance against OYO citing reasons such as nascency of the market, in the MMT-OYO case, the CCI decided to direct an investigation into the agreement between OYO and MMT-Go specifically on the issues of exclusion of competitors and the effect of such exclusion on competition in the market. One of the issues being investigated in the MMT-OYO case relates to allegations of predatory pricing/deep discounting by charging below average room rate, charging of exorbitant commissions from hotels, restrictions of room and price parity imposed by MMT-Go *etc.*

It is evident that these issues have been raised before the CCI time and again and are also being raised across other jurisdictions. The developments in these cases will be closely monitored since the outcome is likely to shed light on the CCI's approach towards similar practices in the online marketplace businesses.

The order of the CCI is available [here](#).

We trust you will find this an interesting read. For any queries or comments on this update, please feel free to contact us at insights@elp-in.com.

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