



CCI recommends online platforms to adopt certain self-regulatory measures based on its market study on e-commerce in India

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Background:

On January 08, 2020, the Competition Commission of India (CCI) published its report on a market study on e-commerce in India (**the Report**) that was underway since early 2019. The study covered three broad categories of e-commerce i.e. consumer goods, accommodation services and food services. The CCI identified “bargaining power imbalance” and “information asymmetry” between e-commerce marketplace platforms (**platforms**) and their business users as the core issues and suggested certain self-regulatory measures for platforms with a view to increase transparency.

In its Report, the CCI identified five issues in the e-commerce sector (discussed below) that, according to it, are likely to pose concerns under the Competition Act, 2002 (**Act**). The CCI however clarified that an assessment of these issues will be subject to a case-by-case determination.

Issues and CCI's Assessment:

- a. **Platform neutrality:** The CCI's concern about platform neutrality stems from the dual role of platforms as a marketplace and a competitor on that marketplace. According to the CCI, this dual role has the potential to incentivize platforms to leverage their control over the marketplace in favour of their own/preferred vendors or private label products. According to the CCI, the introduction of private labels and cloud kitchens coupled with the ability of platforms to manipulate search ranking may affect the ability of business users to effectively compete with the vertically integrated or preferred entities.
 - **CCI's assessment:** On platform neutrality, the CCI has advocated for a case-by-case determination of *inter alia* the nature of the market in which the platforms operate; the market power of the platform; and any pro-competitive rationale justifying the platform's conduct in the market.
- b. **Platform-to-business contract terms:** The CCI's concern regarding contract terms emanates from the potential unfair imposition of such terms by platforms on business users due to their superior bargaining power. The CCI noted instances of unilateral determination or revision of terms of engagement by platforms often prejudicial to the interest of business users. The CCI also noted that the possibility of multi-homing by businesses does not appear to act as a competitive constraint since all major platforms have similar practices. The CCI took note of certain practices of the food ordering and delivery platforms such as - (a) mandatory bundling of delivery service with listing service i.e., requiring restaurants who want to list on a platform to also register for the platform's delivery services; and (b) data masking i.e., data on orders placed by customers not being shared by platforms with restaurants.
 - **CCI's assessment:** The CCI can intervene on a case-by-case basis in matters where unfair conditions or price is/are imposed through contractual provisions, by an enterprise that is dominant in the relevant market under section 4 of the Competition Act, 2002 (**'Act'**). According to the CCI, an assessment can also be undertaken by the CCI under section 3(4) of the Act where terms in a contract may directly or indirectly lead to exclusionary effects on competition while also being exploitative/unfair to the business users.
- c. **Platform price parity clauses:** A platform price parity clause is imposed to guarantee the lowest price on the platform. Such clauses can be 'wide' or 'narrow'. 'Narrow' clauses apply to prices shown on the seller's own website while 'wide' clauses cover prices shown on the seller's own website as well as prices shown on other platforms. The CCI's study found that online travel agencies and food delivery platforms in India typically use 'wide' price parity clauses. The CCI noted that parity clauses can potentially lead to higher commission rates and discourage entry of new players in the market. On the other hand, according to the CCI, these clauses can also generate efficiencies and can be justified on account of protection of investment incentives by preventing free riding.
 - **CCI's assessment:** An analysis of the effects of parity clauses, according to the CCI, is fact-specific - taking into account *inter alia* how plausible the free riding concern is, and to what extent it would affect the investment incentive for platforms to outweigh the direct loss to price competition caused by a price parity restriction.

According to the CCI, parity clauses can be examined in a rule of reason framework, under Section 3(4) of the Act. The factors under Section 19(3) have the scope of examining the anti-competitive as well as the pro-competitive rationale behind the clauses. If the platform imposing the parity clauses is dominant, the imposition can be examined under Section 4 of the Act.

d. **Exclusive agreements:** The CCI found two kinds of exclusive agreements to exist in online platforms viz., (i) agreements under which a certain product offering is launched exclusively on a single online platform; and (ii) agreements which make a platform list only one brand in a certain product category. Based on the instances of exclusive agreements which the study revealed, the CCI noted that the concerns regarding exclusive agreements are pronounced when there is insufficient competition in the platform market or in the markets where the sellers or service providers compete.

- **CCI's assessment:** According to the CCI, while exclusive agreements are not *per se* anti-competitive, they can raise potential competition concerns when used as an exclusionary tactic to foreclose rivals or impede entry. Recognizing the pro-competitive benefits of exclusive agreements, the CCI stated that it can, on a case-by-case basis, examine the exclusive agreements under Section 3(4) of the Act in a rule of reason framework. When one of the parties to the agreement is a dominant enterprise, the CCI mentioned that the same can be analyzed under Section 4 of the Act, on a case-by-case basis.

e. **Deep discounting:** The CCI in its Report identifies three major concerns regarding discounts offered by/on platforms viz., (i) discounts that vary across goods/service providers and are thus discriminatory; (ii) discounts that are imposed by platforms in exercise of their superior bargaining power which can adversely affect the business models of the goods/service providers; and (iii) discounts which push prices to below-cost levels in certain product categories and impair the ability of offline small retailers to compete in the market, particularly in the mobile and electrical appliances segment.

- **CCI's assessment:** According to the CCI, a competitive assessment of discounts will be a fact-intensive exercise done on a case-by-case basis *inter alia* involving an evaluation of the market power of the enterprise offering the discount, the nature, intent/rationale behind offering such discount and the effect on competition in the market. Specifically, the CCI stated that it will look at the following aspects:
 - For discriminatory discounts, the CCI will analyze whether higher discounts are being offered to incentivize exclusive contracts and to curb multi-homing by service providers.
 - In a rule of reason framework, under Section 3(4) of the Act, the CCI can assess whether the disparity in discounts offered is being used as a mechanism to induce exclusivity and whether the same leads to an appreciable adverse effect on competition.
 - In case of a dominant platform, the CCI will examine the issue of discriminatory discounts and unfair imposition under Section 4(2) of the Act.

Self-regulatory measures suggested by the CCI:

Based on the concerns identified above, the CCI in its Report has emphasized on greater transparency in business dealings of platforms and accordingly, suggested the following self-regulatory measures for the platforms:

Search ranking:

- Set out the general description of search ranking parameters, drafted in plain and intelligible language keeping the description up to date without disclosure of algorithms or any such information that may enable the manipulation of search rankings by a third party.
- Set out the possibilities of ranking being influenced by any direct or indirect remuneration and a description of such possibilities and the effect of such remuneration.

Collection and Sharing of data:

- Set out clear and transparent policy regarding the data collected on the platform, use of the data as well as the potential and actual sharing of such data with third parties or related entities.

User review and rating mechanism:

- Maintain adequate transparency over user review and rating mechanisms necessary for ensuring information asymmetry.
- Maintain adequate transparency in publishing and sharing user reviews.
- Publish only the reviews from verified purchasers and to devise mechanisms to prevent fraudulent reviews/ratings.

Revision in contract terms

- Notify business users concerned of any proposed changes in terms and conditions without implementing changes before the expiry of a notice period, which is reasonable and proportionate to the nature, extent and consequences of the envisaged changes for the business user concerned.

Discount policy:

- Bring out a clear and transparent policy on discounts which includes, *inter alia*, the basis for the discount rates funded by the platforms for different products or suppliers and the implications of participation/non-participation in the discount schemes.

Key takeaways:

- One of the objectives of the CCI's study was to identify its advocacy priorities. Accordingly, based on the study, the CCI has identified the following advocacy priorities:
 - ensuring competition on the merits to harness efficiencies for consumers;
 - promoting transparency to create incentive for competition and to reduce information asymmetry; and
 - fostering sustainable business relationships between all stakeholders.
- The CCI also stated that any potentially anti-competitive unilateral conduct of platforms or platforms' vertical arrangements with sellers/service providers will receive enforcement attention. Interestingly, the CCI on 13 January 2020, has initiated an [investigation](#) into the business practices of Amazon and Flipkart. The issues in this case include: (i) deep discounting, (ii) exclusive arrangements with smartphone/mobile phone brands; and (iii) preferential listing.
- The CCI has not taken any presumptive position on any of the five issues identified in its Report and has emphasized on a fact-specific determination in each case. This approach is particularly noteworthy in context of pricing issues given the Draft Consumer Protection (e-Commerce) [Rules](#), 2019 under the Consumer Protection Act, 2019 which *prohibit* an e-commerce entity from directly or indirectly influencing the price of the goods or services.
- To address the core issues of "bargaining power imbalance" and "information asymmetry", the CCI has emphasized on greater transparency by the platforms while dealing with business users and the need for negotiations with business users on *inter alia* discounts, commissions, penalties and conflict resolution.

The Report, as published by 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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