KHAITAN & CO
Advocates since 1911

NEWSLETTER

ERGO

Analysing developments impacting business

COMPETITION LAW

10 April 2019

1. *Jasper Infotech Private Limited (Snapdeal) v KAFF Appliances (India) Private Limited (Case No 61 of 2014)*

The Competition Commission of India (CCI) closed a case involving allegations of Resale Price Maintenance (RPM) against Kaff Appliances (India) Private Limited (Kaff). The allegations arose from information filed by Jasper Infotech Private Limited which alleged RPM restrictions on its online marketplace website "www.snapdeal.com" (Snapdeal). Snapdeal averred that it had displayed products of Kaff, namely chimneys and hobs, at discounted prices on its website. Aggrieved by the discounted pricing, Kaff uploaded a "caution notice" on its own website stating that Snapdeal sold its products without authorization; and that Kaff would not honour warranties on products purchased through Snapdeal.

Upon investigation, the Director General (DG) found that Kaff did not implement RPM in its distribution network. On the contrary, the distributors denied that Kaff dictated prices, and even confirmed that they sold discounted products online. The CCI also agreed with the DG's findings. In relation to the caution notice, the CCI opined that the tenor of the communications/reactions of Kaff with/to Snapdeal indicated their genuine concern regarding the sale of counterfeit goods. The CCI emphasized that the right of a manufacturer to choose the most efficient distribution channel should not be interfered with unless it leads to anti-competitive effects. Accordingly, the CCI did not find Kaff's conduct in contravention of the Competition Act 2002 (Act).

Another interesting aspect of this decision was the context in which it accommodated online market places within the traditional vertical supply and distribution chain, given that the marketplace is seen as a facilitator between buyers and sellers. The CCI noted that while online platforms are peculiar in nature and cannot be compared to a conventional buyer–seller relationship, the test for determining whether a firm can be considered a part of the supply chain should be to see whether it contributes value to the product or service, or any active service to the end customer in availing the product or service involved. This noting is significant considering the global consensus regarding the examination of digital markets more closely within the broad contours applied to traditional sectors while testing the theories of harm.

Click Here to access the order.

2. *In Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India (Suo Motu Case No 03 of 2017)*

Panasonic Corporation, Japan, along with Panasonic Energy India Co. Limited (Panasonic India) (collectively, Panasonic) filed a leniency application disclosing an "ancillary cartel" with Godrej & Boyce Manufacturing Co. Limited (Godrej) in the market for the institutional sale of dry cell batteries (DCBs). Godrej sells DCBs sourced from Panasonic India under its own brand name. Panasonic India stated that since there was a cartel between various DCB manufacturers (Primary Cartel), the price changes in DCB were known to Panasonic India which passed on this information to Godrej. Godrej eventually sold DCBs at such agreed prices under its own brand.

Imposition of the prices decided by the Primary Cartel on Godrej was facilitated by a Product Supply Agreement (PSA) entered between Panasonic India and Godrej. The PSA imposed an obligation on both parties not to take steps detrimental to each other's market interest by maintaining price parity.

Godrej contended that its relationship with Panasonic India was a "buyer-supplier relationship". Therefore, the agreement entered into between them was a vertical agreement, and not a horizontal agreement. However, the CCI rejected this contention on the ground that from the consumers' point of view, the rebranded DCBs sold by Godrej competed directly with the DCBs sold by Panasonic. The CCI ultimately held Panasonic India and Godrej liable for cartelisation.

However, the CCI granted Panasonic India a 100% (hundred per cent) reduction in penalty in lieu of the leniency application. Regarding Godrej, the CCI factored in its insignificant market share and its constrained ability to negotiate with Panasonic India; and accordingly imposed a penalty of 4% (four per cent) of its turnover for each year of continuance of the cartel.

Click Here to access the order.

3. *Mr. Vijay Gopal v Inox Leisure Limited and Hindustan Coca-Cola Beverages Private Limited (Case No 29 of 2018)*

The CCI closed a case at the *prima facie* stage against Inox Leisure Limited (Inox) and Hindustan Coca-Cola Beverages Private Limited (HCCB) on allegations of an anti-competitive exclusive supply and distribution agreement for the sale of water and beverages within multiplexes of Inox.

The CCI observed that the agreement was not exclusionary as it did not prevent Inox from purchasing products of other suppliers since the agreement was entered into for a short duration of 3 (three) years; and the parties could easily terminate the agreement upon giving 60 (sixty) days' notice. Further, the agreement was incapable of adversely affecting competition owing to HCCB's lack of market power in the market of sale of beverages to multiplexes. The allegation of a tie-in arrangement (i.e., forcing the consumer to purchase beverages along with the tickets), was also unsubstantiated as the purchase of beverages was not a pre-requisite to watch a film at the multiplexes of Inox. Accordingly, no investigation was initiated against Inox and/or HCCB.

The Khaitan & Co Competition/Antitrust Team represented Inox before the CCI.

Click Here to access the order.

4. *Hindustan Unilever Limited and GlaxoSmithKline Consumer Healthcare Limited (Combination Registration No C-2018/12/625)*

The CCI approved the amalgamation of GlaxoSmithKline Consumer Healthcare Limited (GSKCH) into Hindustan Unilever Limited (HUL).

The parties identified overlaps in two broad categories, namely: (i) instant noodles (noodle-based products sold by GSKCH under "Foodles" brand and by HUL under "Knorr" brand); and (ii) breakfast cereals (oats sold by GSKCH and certain millet-based breakfast mixes sold by HUL). However, the CCI left the delineation of the relevant market open as the combination was not likely to adversely impact competition in any of the possible relevant markets owing to the parties' insignificant presence in the relevant product segments.

The CCI assessed the impact of a non-exclusive consignment selling agency arrangement (CSA Agreement) to be entered into between HUL and entities of the GlaxoSmithKline group (GSK Entities) upon completion of the combination. The CSA Agreement would enable HUL to distribute and sell certain over the counter and oral healthcare products of the GSK Entities in India, Bhutan and Nepal for a period of 5 (five) years. The CCI observed an insignificant overlap between the products of HUL and those proposed to be distributed and sold by HUL pursuant to the CSA Agreement. In view of the limited overlap, and the non-exclusive nature of the CSA Agreement, the CCI held that the transaction was not likely to have an appreciable adverse effect on competition (AAEC) and the transaction was thereby given an unconditional approval.

Click Here to access the order.

5. *Visa International Service Association and IndiaIdeas.com Limited (Combination Registration No C-2018/12/620)*

The CCI approved the acquisition of approximately 13.12% (thirteen point one two per cent) of the equity share capital of IndiaIdeas.com Limited (IndiaIdeas) by Visa International Service Association (Visa International) belonging to the Visa Group.

The CCI observed that Visa International and IndiaIdeas are primarily engaged in the provision of services which facilitate digital payments. Specifically, Visa International operates payment gateways to connect card networks and IndiaIdeas operates payment aggregators to connect users to banks or issuers of prepaid instruments.

The CCI found that payment aggregators, such as IndiaIdeas, cannot choose the payment gateway that will be used for processing the transaction. Further, any exclusivity arrangement between IndiaIdeas and Visa International would prompt customers to switch to competitors of IndiaIdeas, as the competitors would allow for the use of a wider range of payment gateway services. Moreover, payment gateways, such as Visa International, rely on a greater number of transacting customers to generate revenue. Therefore, they must remain compatible with a greater variety of payment aggregators to operate effectively. In view of the commercial unviability, lack of incentive for IndiaIdeas and Visa International to enter into exclusivity arrangements, and lack of an AAEC, the combination was approved.

Click Here to access the order.

6. *Jio Futuristic Digital Holdings Private Limited, Jio Digital Distribution Holdings Private Limited and Jio Television Distribution Holdings Private Limited, and Den Networks Limited (Combination Registration No C- 2018/10/609); and*

***Jio Content Distribution Holdings Private Limited, Jio Internet Distribution Holdings Private Limited and Jio Cable and Broadband Holdings Private Limited and Hathway Cable and Datacom Limited* (Combination Registration No C-2018/10/610)**

The CCI passed a common order approving the acquisition of 65.69% (sixty five point six nine per cent) shareholding in Den Networks Limited (Den) and 51.34% (fifty one point three four per cent) shareholding in Hathway Cable and Datacom Limited (Hathway) by entities belonging to the Reliance Industries Limited Group (RIL Entities). The RIL Entities are, amongst other things, engaged in the wholesale supply of television channels to distribution companies, retail supply of Audio Video (AV) content, and provision of Wireless Broadband Internet Services (Wireless BIS). Den and Hathway are two multi-system operators.

The competition assessment was carried out in three business categories, namely, (i) broadcasting and distribution; (ii) Wired Broadband Internet Services (Wired BIS); and (iii) advertising airtime.

In the first overlap category of broadcasting and distribution, the CCI assessed the existence of:

- horizontal overlaps between Den and Hathway in the market for aggregation and distribution of broadcast TV channels to homes through Cable TV and DTH services in India;
- horizontal overlaps between Den and the RIL Entities for retail supply of AV content in India through over-the-top applications;
- the vertical overlap with the RIL Entities which supplied TV channels to Den and Hathway for distribution to end consumers; and
- the vertical overlap owing to the RIL Entities' practice of licensing AV content and linear feeds of its TV channels to Den and Hathway for broadcast.

The CCI noted that the upstream (wholesale supply of TV channels in India) and downstream (distribution of TV channels to homes in India) markets were characterised by significant competitors; and the downstream market was closely regulated by the Telecom Regulatory Authority of India (TRAI), who imposed a "must carry" obligation on broadcasters to ensure the distribution of TV channels of other content providers. Therefore, no AAEC concerns were noted.

In the second overlap category, the CCI examined the overlap between Den and Hathway in the market for provision of Wired-BIS in India. The CCI noted that due to the presence of regulators such as TRAI and the Department of Telecommunications, and the insignificant market share of the parties of 5-10% (five to ten per cent), there would be no AAEC after the combination.

Similar observations were made by the CCI for market overlaps in the third business category, the market for supply of advertising airtime on TV channels.

Separately, the RIL Entities offered voluntary commitments to address concerns of technical re-alignment by ensuring that the consumers do not bear costs for technical re-alignment of equipment of existing subscribers of Den and Hathway. Further, in the event such re-alignment was required, the RIL Entities would bear the cost of the same. In view of the absence of competition related concerns and the aforementioned commitments, the CCI approved the transaction.

Click Here to access the order.

7. ***Reprographic India v Competition Commission of India and Others (Competition Appeal (AT) No 09 of 2019)***

The National Company Law Appellate Tribunal (NCLAT) upheld an order of the CCI which had refused to initiate investigation against Hitachi Systems Micro Private Limited (Hitachi) and IL&FS Technologies Limited (ILFS) (collectively, Respondents). The appeal was filed by Reprographic India (Reprographic), an ancillary entity to Bharat Heavy Electricals Limited (BHEL) which manufactures folding and finishing systems and distributes information technology products and services. It was averred that the Respondents had rigged a tender by BHEL for the supply, installation and maintenance of personal computers, and other computer peripherals. Reprographic alleged that Hitachi was awarded the contract at a very high price, and ILFS had enabled this by quoting an even higher price (supportive bid) during the tender. Reprographic further contended that there was no justification for Hitachi to quote products at a higher price. The CCI did not find merit in these allegations as there was no evidence of a meeting of minds, and the final price at which the contract was awarded fell within the internal estimates of BHEL.

During its assessment, the NCLAT confirmed the view of the CCI that low participation in a tender could have been the result of stringent tender conditions. Therefore, it was not indicative of concerted action. In view of the lack of evidence, it held that the appeal lacked merit and accordingly, dismissed the appeal.

Click Here to access the order.

- *Competition Team | Khaitan & Co*

For any queries please contact: editors@khaitanco.com

Mumbai
One Indiabulls Centre, 13th Floor
Tower 1 841, Senapati Bapat Marg
Mumbai 400 013, India

T: +91 22 6636 5000
E: mumbai@khaitanco.com

New Delhi
Ashoka Estate, 12th Floor
24 Barakhamba Road
New Delhi 110 001, India

T: +91 11 4151 5454
E: delhi@khaitanco.com

Bengaluru
Simal, 2nd Floor
7/1, Ulsoor Road
Bengaluru 560 042, India

T: +91 80 4339 7000
E: bengaluru@khaitanco.com

Kolkata
Emerald House
1 B Old Post Office Street
Kolkata 700 001, India

T: +91 33 2248 7000
E: kolkata@khaitanco.com