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The Competition Commission of India initiates investigation in relation to resale price maintenance (Enterprise Solutions India / Hyundai Motor India)

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Resale Price Maintenance (RPM) – this word resonates a fascinating and interesting subject for antitrust lawyers the world over for the sheer manner of its application and the way it applies in each fact situation - has once again reached the shores of India and raked up the attention of the Competition Commission of India (**CCI**) [1]. The CCI has taken up two investigations in relation to RPM in the e-commerce sector and in the automobile sector along with other issues such as exclusivity and tie-in etc. Like in other jurisdictions, in India too, Vertical agreements are considered to have pro-competitive effects and, therefore, have to be tested on the rule of reason. This raises the question under what circumstances investigations can be initiated and what is the legal threshold under which the CCI will review vertical agreements. This article analyzes the approach of the CCI in the first of the two cases where the CCI has decided to refer the vertical agreements for further investigation. The second would be analyzed in another separate case note.

The *Hyundai Case* (Fx Enterprise Solutions India Pvt Ltd v Hyundai Motor India Ltd)

The case was filed by Fx Enterprise Solutions India Pvt Ltd (**FX**) an authorised dealer of the Hyundai Motor India Ltd (**HMIL**) which is involved in the business of manufacture, sale and servicing of 'Hyundai' cars, its accessories, spare parts etc in India. It was alleged by FX that HMIL imposed a maximum permissible discount that may be given by a dealer to the end-consumer. It was alleged that the permissible discount level was followed by the dealers through a Discount Control Mechanism (DCM). It was alleged that a strict monitoring mechanism was put in place to check the discounts put in place by HMIL and the employees of HMIL avoided the use of their official email address to coordinate the DCM. It was also alleged that HMIL encouraged the dealers to report instances of discounting below the recommended range and a penalty sheet was circulated every month where penalty was levied on all those dealers who discounted below the recommended range.

It was also alleged that HMIL tied the purchase of desired cars by the dealer with the high price and un-wanted cars and at another level tied the sale of complementary products such as CNG kit, engine oil, printing services and insurance policy with the sale of the vehicle. Finally it was alleged that the dealers had to take the prior approval of HMIL before becoming dealers of other OEMs and prohibited the dealers to source spare parts from any source other than its approved vendors.

The CCI found *prima facie* that the prohibition placed on the dealers to source spare parts was prima facie in the nature of an exclusive supply agreement in violation of Section 3. Further, the CCI found *prima facie* that by not allowing the authorised dealers to deal in competing brands of automobile without prior approval was prima facie resulting in an exclusive distribution agreement in violation of Section 3.

The CCI also found prima facie that the averments on the restrictions imposed by HMIL on the maximum permissible discount that may be given by a dealer to the end-consumer amounted to resale price maintenance prima facie in violation of Section 3.

Issues and Implications:

Legal Test for initiating investigation into RPM

Under Section 26 (1) of the Act, the first step for the CCI inquiring into an anti-competitive agreement or an abuse of dominant position is to determine the existence of a *prima facie case.* Thereafter, the CCI directs the DG to investigate further into the matter and file a report with his findings. After reviewing the findings of the DG, the CCI grants an opportunity for parties to lead evidence and appear before it to present its case and decide the outcome of the case. Previously under the MRTP regime (the predecessor regime), the DG could investigate *suo moto* into contraventions relating to restrictive trade practices. However, the statutory scheme under Section 26 (1) mandates the need for the CCI to form a prima facie case before it can proceed further in the matter. Therefore, it is necessary to determine a prima facie case before the matter can move to the next stage.

The Hon'ble Supreme Court of India (**SC**) in the case of **CCI v Steel Authority of India and another** (2010) 10 SCC 744 held that the function performed by the CCI under Section 26 (1) is not adjudicatory but administrative in nature. However, it further held that even while determining a prima facie case the CCI need not be provide detailed reasons but should nevertheless be supported by some reasoning which expresses its mind in no uncertain terms that there is a prima facie case. It was held that the reasoning should be recorded on the basis of records, including the information filed by parties under Section 19 and with reference to the provisions of the Act. Therefore, the law requires the CCI in definitive terms (though not detailed) to provide reasons for a prima facie case determination under Section 26 (1).

In India agreements that have an Appreciable Adverse Effect on Competition (AAEC) are void. For the test of AAEC, the Act presumes certain horizontal agreements (e.g. price fixation, bid rigging, sharing markets etc – the CCI has held that these are not per se violation but are rebuttable presumptions) to have an AAEC and thus passes the burden on the party which has entered into the horizontal agreement to prove that the agreement does not result in AAEC. In the case of vertical agreements, the burden is on the party alleging the AAEC to prove that the agreement has an AAEC.

Therefore, unlike in the case of horizontal agreements that are considered per se to have an AAEC, in the case of vertical agreements they will have to be proved to have an AAEC.

This principle would apply even in cases where the CCI has to determine that a prima facie case exists. Hence, the onus would be on the parties alleging the AAEC and for the CCI to hold that there is a prima facie AAEC in the context of a vertical agreement.

Interestingly in the Hyundai case there was no prima facie evaluation of the AAEC. The CCI merely ruled that the RPM was in practice and as a result prima facie concluded that there is an AAEC. This in effect places the legal standard for a vertical agreement on par with that of a horizontal agreement. In the Hyundai case, the CCI does not even consider the market share of the HMIL (to understand the impact on the market) but has gone on to treat the mere existence of a RPM (and other vertical restraints) as per se having an AAEC. AAEC has to be demonstrated prima facie in terms of the parameters provided under Section 19 (3) [viz. creation of barriers to new entrants in the market, driving existing competitors out of the market, foreclosure of competition by hindering entry into the market etc] on the basis of records. It may also become easy for parties to surpass the prima facie challenge for vertical agreements on the basis of the reasoning given by the CCI. This has the effect of reducing the threshold for a prima facie case.

This legal standard is incorrect as there has been no prima facie evaluation of the parameters under Section 19 (3). There was no examination, leave alone prima facie examination of the AAEC. It would be interesting to see how this survives legal scrutiny at the higher forums.

Interestingly, the CCI has dismissed at a prima facie stage a case which did not have a prima facie AAEC. In the case of *Shubham Sanitarywares v Hindustan Sanitarywares & Industries Ltd and others*, (Case No. 99/2013 decided on Feb 05, 2014) the CCI held that the practice of offering differential discounts to different consumers i.e. less discount for retail buyers and a higher discount for bulk buyers (such as institutions, builders, colonizers and persons of importance) may not be construed as a violation of Section 3(4) of the Act but maintaining the specific rate of discounts to different consumers as the policy of differential discounts which are forcibly implemented by the OP-1 on their dealers may be construed as an anticompetitive agreement, ***subject to the practice causing an AAEC in markets in India***. Further, the CCI held **that the discount policy in that case did not seem to have any AAEC** and dismissed the case. Therefore, the past practice of the CCI also requires an examination of a prima facie AAEC.

Legal Threshold for an Agreement

The CCI has prima facie determined in the Snapdeal case that 'an agreement can be inferred from the conduct considered to be coercive *when the level of coercion exerted to impose a unilateral policy, in combination with the number of distributors that are actually implementing the unilateral policy of the supplier would, in practice, point to tacit acquiescence by the other party* or parties'. Whether this threshold can be applied in the case of Hyundai case also will need to be examined. It will have to be seen whether it was a unilateral decision that was imposed by HMIL or was it a unilateral policy that was actually implemented by the other parties too. It would be interesting to note this in the context of the dealers continuing with discounting below the recommended prices despite the fact that there is a penalty imposed. The question that would have to be answered is whether this is a unilateral action or an agreement?

Econometric Analysis for RPM

Other interesting issue that the CCI will have to examine after a detailed investigation is how the CCI would apply econometric analysis? Will the CCI give importance to brand position and inter-brand competition as opposed to reduced competition amongst dealers? How will the CCI apply the accrual of benefits to consumers' parameter under Section 19 (3) while evaluating AAEC – will mere absence of price competition amongst dealers be considered as a bane?

While the CCI has previously held in the *Intel Case* that monitoring of downstream prices of one's own product is not illegal, it will be interesting to see the extent of the use of economic tools and analysis by the CCI in these investigations as also the understanding of the market before ruling on the legality of the practices.

Conclusion

The aforementioned cases raise few very interesting questions as discussed above on the review of RPM under the Competition Act and also the thresholds that the CCI has set for inquiring into vertical agreements. It will be interesting to see whether the CCI uses the same path for future investigations as also their approach and outlook to vertical agreements.

[1] Although the CCI has considered it a few times in the past including in the case of Intel Case No. 48/2011 decided by CCI on Jan 16, 2014; Hindustan Sanitarywares and Industries Ltd, Case No. 99/2013 decided on Feb 05, 2014, the CCI has at around the same time initiated 2 investigation on RPM and taken it up for further investigations.

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