

# Kluwer Competition Law Blog

## Adoption of rule of reason in Resale Price Maintenance under the Indian competition law: Rule of reason

Abir Roy (Lakshmikumaran & Sridharan, India) · Saturday, January 16th, 2016

One of the most important issues which are being investigated by the CCI is the treatment of vertical agreements. In one of my earlier posts (<http://kluwercompetitionlawblog.com/2015/06/28/competition-commission-of-india-initiates-investigation-in-relation-to-resale-price-maintenance-impact-on-business-operations/>), it was shown how the CCI is referring certain cases for further investigation, the outcome of which will certainly change the landscape in which business is run in India.

Most of the companies have detailed agreements/arrangements with its channel partners (dealers, distributors, suppliers etc). Some of such arrangements have clauses with respect to exclusivity (i.e. channel partner will only work for the company and not any other competitor in upstream market or vice versa), resale price maintenance (the enforcement of minimum or recommended retail prices by suppliers) and “Most Favoured Treatment” clauses (also known as English clauses i.e. clauses under which a seller agrees to provide a product or a service to buyer at a price no higher than the price it provides to any other buyer). It is apposite to note that RPM and other vertical restraints under Section 3 (4) of the Act are not per se anti-competitive but the onus would lie upon the parties and CCI to demonstrate that the RPM has an AAEC. The CCI in the Snapdeal case (facts dealt in my earlier post) had not identified prima facie AAEC but instead opined that RPM ‘may’ have an impact on consumers and is ‘likely’ to have an AAEC. While this order did not identify any threshold, the CCI in the prima facie order in the Snap deal case (discussed above) noted that KFF appliances had a market share of 28% and the practice of RPM adopted by KAFF may have an adverse effect on competition in India.

Having said that, RPM has various pro-competitive benefits and this is the reason why RPM is not considered ‘per se’ anti-competitive under the statutory scheme provided under the Act. In fact, very close to passing the prima facie order in the Snapdeal case, the CCI in a decision (Shri Ghanshyam Das Vij Vs. M/s Bajaj Corp. Ltd. & Others, Case no. 68/2013) (hereinafter referred to as the Bajaj case) seems to have adopted the de minimis test. It was held by the CCI that the statutory scheme provides that the vertical restraints, including RPM, will be void only if it can be shown that such agreement causes or is likely to cause an AAEC in India on the basis of factors mentioned under Section 19(3) of the Act. The factors mentioned under Section 19(3) of the Act include creation of barriers, foreclosure of competition, driving existing competitors out of the market, accrual of benefits to consumers, improvement in production or distribution of goods or services and promotion of technical, scientific and economic development. In fact, the CCI has even acknowledged in this decision that vertical arrangements can be justified on certain grounds

like protection from free riding, efficient management of sales of products, economic efficiency, etc. It may be noted that in this case, CCI adopted the de minimis principle for analyzing vertical restraints without identifying any arithmetic threshold for applicability of the de minimis principle. The CCI qualified the de minimis principle on the touchstone on insignificant effect on the market as opposed to an objective criterion of a threshold of market shares.

The CCI also explicitly stated that no enterprise is obliged to supply its products to any distributor/supplier, subject of course to its market power. In the Bajaj case, the CCI noted that there is a presence of many competitors in the market and any vertical agreement thereof in an extremely competitive market will not cause any competition law concerns. While the Bajaj case has not provided any arithmetic threshold, this case has infused a tremendous legal certainty, post the Snapdeal case, on the manner in which the CCI will analyze cases of vertical restraints.

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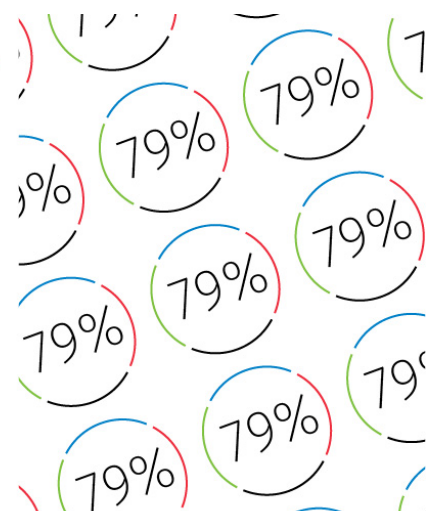
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