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

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 English clauses in clauses under which a seller agrees to provide a product at a lower or higher or at the same price a buyer offers 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 Snapdeal case (discussed above) noted that RPM appliances had a market share of 30% and the practice of RPM adopted by RPM may have an adverse impact on competition.

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 Mahesh Chavan Vs. M/s Bajaj Corp. Ltd. & Others, Case no. 37/2013) 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, in view of the fact that the said vertical restraint has resulted in harm to consumers. The court held that the statutory scheme provided 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 or maintenance 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, 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 promotion of free ridership, enhanced efficiency and consumer welfare on the basis of Section 19(3) of the Act. The CCI also stipulated that no enterprise is obliged to supply its products to any obligee but must, subject of course to its market power in the requisite area, offer it in a way which is likely to cause the CCI to accept the case. The CCI in the Bajaj case (similarly to the Snapdeal case) noted that there is presence of many competitors in the market and any vertical agreement thereof is not inherently detrimental to competition. The CCI in the Bajaj case has infused tremendous legal certainty, post the Snapdeal case, on the manner in which the CCI will analyze cases of vertical restraint.