

Kluwer Competition Law Blog

The CCI moves ahead with time: RPM need not complete traditional threshold of resale

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Introduction

The Competition Commission of India (CCI) recently rendered a decision in the matter of *Jasper Infotech v. KAFF Appliances*[1], wherein it found that KAFF Appliances' conduct did not cause Resale Price Maintenance (RPM), and thus did not infringe the Competition Act. However, in the course of this decision, the CCI recognized that online marketplaces, despite not being directly involved in the 'resale' of the product, form a part of the distribution chain and thus can cause RPM. Over the course of this blog, we shall briefly delve into the history of RPM adjudication in India, and how this decision is a small but significant change in treatment of both the provision as well as digital markets at large.

History of RPM adjudication in India

Vertical agreements imposing RPM are an infringement of the Competition Act under Section 3(4)(e) of the Competition Act, 2002. The requisites of the offence are that (i) the sale of goods to the buyer is preconditioned on the fact that the resale of goods by the buyer shall be on the prices stipulated by the seller, and (ii) the buyer should not be allowed to charge a lower price on the resale than the one stipulated[2]. Thus, only minimum RPM is disallowed, a manufacturer may impose a maximum price beyond which the buyer/re-seller may be disallowed to sell. Further, offences under Section 3(4) require that such conduct cause appreciable adverse effect on competition.

Till date, the CCI has looked into various cases of RPM, and come to a variety of conclusions. In *ESYS Information Technologies v Intel Corporation*[3], the first case which substantively dealt with a matter involving the offence, the allegation persisted to circulation of list of suggested prices by the manufacturer. The manufacturer also carried out monitoring of prices in the downstream market. However, it left the discretion on final pricing to the distributors. The CCI held that suggesting prices to the distributors and monitoring prices in the downstream market would not constitute a violation of the Act. Further, in *Shubham Sanitarywares v HSIL Limited*[4],

requirement for routing of proposals through the defendant (in this case manufacturer) for providing discounts was held to be valid, since it did not constitute an absolute restriction on discounting. In *Ghanshyam Dass Vij v Bajaj Corporation Limited*[5], the defendant was responsible for deciding the dealer's margin for the product (almond hair oil), along with providing a list of suggested prices. However, on perusal of DG's analysis, the CCI came to a conclusion that there was no adverse effect on competition since there were a large number of competitors in the identified product market, and the defendant did not operate from a position of strength. It is also necessary that any discount control mechanism, which restricts provision of discounts, must be enforced uniformly across board and not merely on a single player[6].

From the observations of the CCI, it can be inferred that any appreciable adverse effect requires certain amount of market strength and share. Thus, on various instances, players who have indulged in practice of resale price maintenance have often escaped clutches of regulation owing to the fact that they did not have significant market share[7].

RPM in automobiles and other motor vehicles

However, the first adjudication with respect to RPM which resulted in an infringement being found was the decision in *FX Enterprise v Hyundai Motor India Limited*[8]. Hyundai, the defendant, were accused of imposing a discount control mechanism on dealers. Hyundai rebutted the charges on the ground that the mechanism had been imposed to keep a check on the financial health of the dealers, which may be compromised due to over-discounting. Hyundai also appointed "mystery shopping agencies" to monitor the discounts being provided, and in the event of any contravention, penalized the infringing dealer. The Commission defined the upstream market as one for all passenger cars, and the downstream market for dealership and distributorship of Hyundai Cars (since most dealerships in India cater to a single brand). The CCI further held that imposition of minimum RPM, in the present scenario, would lead to intra-brand competition being affected and result in higher prices for consumers at large. This could also lead to softening of competition from other brands, since they would be assured of the prices being enforced by Hyundai and thus choose to compete at minimal advantage, without any advantage being accrued to the consumer. The decision however was overturned by the National Company Law Appellate Tribunal (NCLAT), the appellate body for competition cases in India, on the count that no independent appreciation of evidence had been carried out by the CCI[9]. Similar investigations have also been initiated against Honda Motorcycles[10] and Maruti Suzuki[11].

RPM does not require 'resale' anymore

In *Jasper Infotech*, Snapdeal, an online marketplace alleged that the defendant, who was involved in manufacturing and selling kitchen chimneys and hobs, had threatened

it with a caution notice if the suggested market operating prices were not maintained. After extended investigation over the course of five years, the Director General in its report stated that there was no imposition or enforcement of RPM over the distributors, especially since the market itself was extremely competitive and any such price would be rendered unsustainable for the sheer force of the competition. However, the DG also noted that since the informant had only been an online market platform, any allegation of RPM would be unsustainable on the count that the platform was not a 'purchaser' of the product, to have re-sold the same. It would not be a part of the supply chain since it did not provide any material function worth of being included in it. The observation of 'resale' being fundamental for RPM was also made by CCI itself in *Samir Agarwal v ANI Technologies*, which held that since there was no sale of goods/services by Uber or Ola to the drivers, which could then be re-sold to the consumer[12].

The CCI, while largely upholding the determinations of DG and finding no contravention of Section 3(4)(e), differed significantly on the issue of RPM being applicable on online market places. The Commission held that owing to development of digital and online market places, the conventional idea of supply chain and resale have been revolutionised. The online platforms provide value to the supply chain in various ways, through logistics, marketing and providing a platform for the seller and buyer to communicate and complete the transaction. Any entity or firm which simply adds value to the supply chain should be considered to be a part of the value chain and it is not necessary that the ownership of product passes on each stage of such a chain. It stated that the definition within the Act is inclusive, and the idea of 'resale' need not be strictly interpreted in the conventional sense of a brick-and-mortar store. Lastly, online and offline marketplaces should be considered as merely two different modes of distribution of a product, rather than two different products altogether[13].

Conclusion: What this decision means for time ahead?

The decision can be considered to be relevant for an important reason: this is a decision dealing with the digital medium which recognizes different aspects of trading which traditional competition legislation cannot. The first, *Matrimony.com v Google LLC*[14] recognized that provision of data itself from users to obtain services even with zero cost constitutes a commercial relationship. Similarly, *Jasper Infotech* recognizes that digital markets have re-structured the conventional business relationships, such that the idea of 'resale price maintenance' may actually take place without the act of 'resale' itself. These instances clearly indicate that there could be instances wherein such legislations fall short of actually monitoring the harm caused, if they were to somehow escape being moulded into the ideas that the Competition Act enunciates on. While the Act may be called inclusive, it still may face situations wherein guided by an erroneous interpretation, may lead to results which annihilates the objectives with which the legislation had been crafted. The challenges are certainly not limited to India itself, as even fairly experienced competition authorities such as the EU are dealing with an increasing number of matters related to such issues. But, India needs to chalk its own course in how to deal with these challenges, lest it not sink the infant competition regime that exists in the country. Recently, it

was reported that the CCI is carrying out surveys involving e-commerce players and hoteliers[15]. This may be the first step in a long road to understanding how to regulate the newer markets and make changes, if need be, in the legislation.

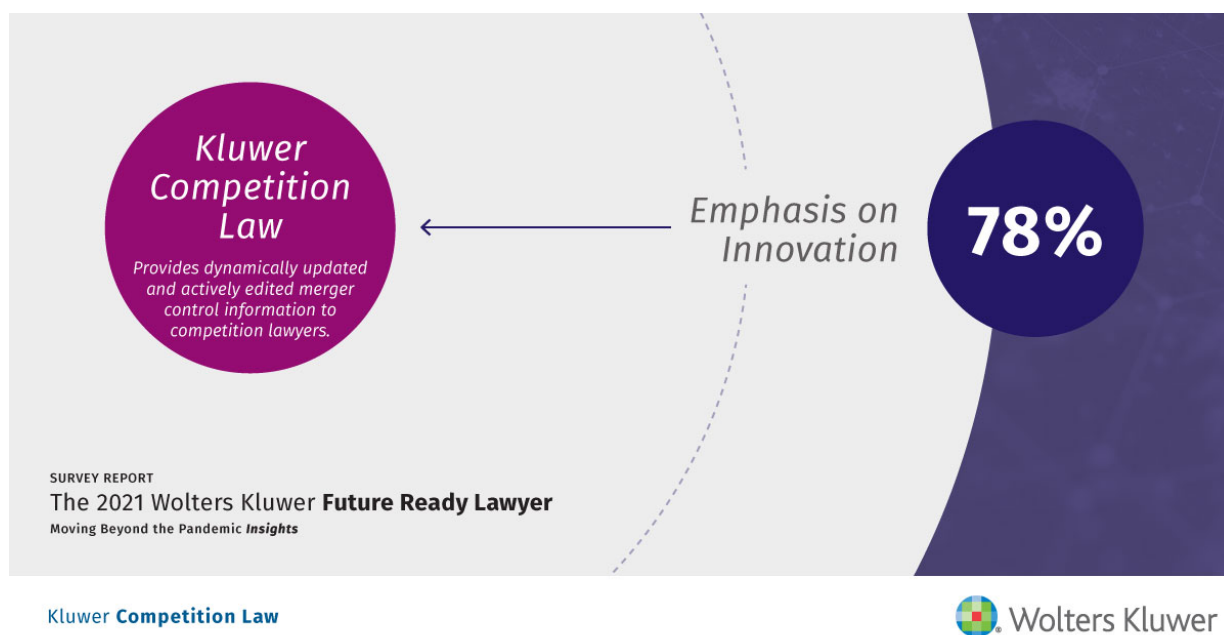
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- [1] *Jasper Infotech v KAFF Appliances* 2019 SCCOnline CCI 2.
- [2] SM Dugar, *Guide to Competition Law* (6th edn, LexisNexis 2016) 351.
- [3] *ESYS Information Technologies v Intel Corporation* 2014 CompLR 126 (CCI).
- [4] *Shubham Sanitarywares v HSIL Limited* 2014 CompLR 58 (CCI).
- [5] *Ghanshyam Dass Vij v Bajaj Corporation Limited* 2015 SCCOnline CCI 174.
- [6] *M/s Counfreeside v Timex Group India Ltd* 2018 SCCOnline CCI 67.
- [7] *Prime Mag Subscription Services Pvt Ltd v Wiley India Pvt Ltd* 2016 SCCOnline CCI 32.
- [8] *FX Enterprise v Hyundai Motor India Limited* 2017 SCCOnline CCI 26.
- [9] *Hyundai Motor India Ltd v Competition Commission of India* 2018 SCCOnline NCLAT 513.
- [10] *Vishal Pande v Honda Motorcycle and Scooter India Pvt Ltd* 2018 SCCOnline CCI 15.
- [11] 'Maruti under Competition Commission Lens' *The Hindu Business Line* (New Delhi, 21 May 2019) <
<https://www.thehindubusinessline.com/companies/cci-probes-allegations-of-anti-competitive-conduct-by-maruti-sources/article27194353.ece> >
- [12] *Samir Agarwal v ANI Technologies* 2018 SCCOnline 86.
- [13] See also, *Deepak Verma v Clues Network Online Pvt. Ltd.*, 2016 SCCOnline CCI 42.
- [14] *Matrimony.com v. Google LLC* 2018 SCCOnline CCI 1.
- [15] 'CCI evaluation e-commerce sector; invites sellers and hoteliers for consultation' *Moneycontrol* (27 May 2019) <
<https://www.moneycontrol.com/news/business/startup/cci-evaluating-e-commerce-sector-invites-sellers-and-hoteliers-for-consultation-4027851.html>>

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