

Competition Commission of India orders probe against Intel for abuse of dominant position to protect parallel importers from its discriminatory warranty policy

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Adrika Bisen (Gujarat National Law University)

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On 9th August 2019, the Competition Commission of India directed the Director General to carry out investigations against Intel Corporation for allegedly violating Section 3 and 4 of the Indian Competition Act, 2002 (the '**Act**').^[1]

The case in hand was filed by Matrix Info Systems Pvt. Ltd. (the '**Informant**') under Section 19(1)(a) of the Act against Intel Corporation (**OP-1**) and Intel Technology India Pvt. Ltd. (**OP-2**) (hereinafter referred to as '**Intel**'). The Informant deals in importing, wholesaling, distributing and supplying a number of IT products in India. OP-1 is a multinational company engaged in activities like designing, manufacturing and distribution of a variety of IT components, peripherals, and computer systems, electronic devices relating to communication and computing including Micro-processors. OP-2 is an Indian subsidiary of OP-1.

Initially, the Informant used to import Micro-processors which came with a worldwide manufacturer's warranty from manufactures like Intel or from distributors in different countries. In the past few years, Intel started entering into exclusive agreements with a few sellers and distributors in India and other countries and recognised them as 'authorised sellers' who in turn sold its products to consumers with a country-specific manufacturer's warranty instead of a worldwide one.

The Commission observed that the micro-processor was considered to be a distinct product not substitutable with any other product after relying on two cases involving Intel, *ESYS Information Technologies v. Intel Corporation*^[2] and *Velankani Electronics Private Limited v. Intel Corporation*.^[3] For the purpose of Section 19(3), the Commission also found the market for the sale of Boxed Micro-processors for Desktops and Laptop Personal Computers ('PCs') in India as the relevant market as the end-products being dealt by informant are Desktops and Laptops.

The Commission formed a *prima facie* opinion that Intel abused its dominant position in the market of Boxed Micro-processors. As observed before 2016, Intel used to provide manufacturer's warranty for its Boxed Micro-processors within India even if they were imported. However, w.e.f. 25th April 2016, Intel revised its country-specific warranty policy for India and now the new policy stated that Intel would only entertain warranty requests for the Boxed Micro-processors if they were bought by an authorised seller like OP-2 within India and excluded warranty requests if such Micro-processors were imported even though from an authorised seller in the foreign country. The Commission *prima facie* held that the said policy is discriminatory and unfair in nature and is done with an ulterior motive to secure the market for its authorised seller market. Such a discriminatory practice eliminates, limits and restricts effective competition from the market and also deprives consumer of choice striking at the mandate of Section 4(2) and 3(4) of the Act.

It is important to note that the '**Network effects**' are a common phenomenon in many high-tech markets where a particular customer cannot readily switch to a substitute if it is not compatible with the current standard. Innovation arises at both the 'architectural' (standard) level and the 'modular' level (the sub-systems which comprises a standard), and raises questions, *inter alia*, about standard setting and access to set standards.^[4]

The Commission relied on the judgment given by Hon'ble Supreme Court of India in *CCI v. Fast Way Transmission*,^[5] and noted that even though the Informant was not a direct competitor of Intel, by abusing its dominant position in the relevant market, it imposed such barriers through a strategic action of changing warranty conditions only for Indian distributors leading to denial of market access to the Informant. Additionally, the 'exclusive agreements' entered between OP-2 and Intel giving them the exclusive right to sell in India is violative of Section 3(4)(c).

Furthermore, the consumers cannot readily switch to a substitute as a result of the 'exclusive agreement' of the Intel. Consumers are forced to buy from authorised sellers of Intel to enjoy warranty services within India. This excludes parallel importers like the informant due to non-availability of after-sales warranty services. Intel being dominant in the market of Micro-processors changed their warranty policy so as to exclude equally efficient competitors from the market, strengthen their market position and be in a position to sell the processors at their whims and fancies. The change in policy has an appreciable adverse effect on competition as defined in Section 19(3).

The Commission rejected Intel's argument that the consumers are not deprived of 'warranty' of imported Micro-processors in India but denied warranty 'service' within India and that even after the change in warranty policy, the Informant continued to import which shows that there was no adverse effect on competition. With regards to this concern, the Commission was of the *prima facie* view that the imports by one competitor like the informant cannot be the sole criteria to absolve them of the allegation of adversely affecting the competition and such a policy will lead to denial of market access to parallel importers like informant violating Section 4(2)(c).

The Commission differentiated the present case from the cases of *Ashish Ahuja v. Snapdeal.com*^[6] and *Kapil Wadhwa v. Samsung Electronics Co. Ltd.*,^[7] on the grounds that in the *Snapdeal* case, the provision for warranty service was universally applied and not determined on the grounds whether the product was purchased from an authorised seller within India or abroad. Similarly, in the *Samsung* case, the refusal to warranty service was valid as the manufacturer himself did not provide for any kind of warranty.

The justification of 'legitimate business behaviour' or 'competition on merits' was also raised by Intel with regards to the change in its country-specific warranty for India. The policy change has been implemented to protect its own legitimate commercial interests as many of the parallel unauthorised importers/sellers/distributors in India have indulged in under invoicing and selling of old and outdated Micro-processors.

More importantly, economic welfare cannot be restricted to pure price concerns. In the words of **Robert H. Lande**, consumers want many things from the economy, including optimal levels of quality, variety, and safety. It can be argued that the policy change by Intel is done to secure its own innovation and to protect the consumers from old and salvaged parts disguised as new products.

'Competition on merits' is a widely accepted justification to abuse of dominant position. The European Union has recognised this principle which says that a dominant firm can justify its conduct not because it has no alternatives, but because it has sound business reasons for its conduct. Such reasoning also appears in *United Brands*, which suggests that a dominant firm has—in principle—a relatively wide margin on what type of activity it engages to protect its commercial interests.^[8] Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.^[9]

The plea of 'legitimate business behaviour' has been appreciated by US and EU in many cases, India should also make sure that where 'dominance' is in question there should be careful balancing of interests of both the parties, i.e. the dominant undertaking and its potential competitors before any abuse is said to be found. The CCI in the present case has spelled out a *prima facie* opinion against the company, however, it will be interesting to note how the investigations of Director General take shape.

[1] Case No. 05 of 2019, Competition Commission of India, August 2019.

[2] 2014 ComplR 126 (CCI).

[3] Case No. 16 of 2018, Competition Commission of India, November 2018.

[4] Glader, M. *Innovation Markets and Competition Analysis: EU Competition Law and US Antitrust Law*. Cheltenham, UK: Edward Elgar Publishing.

[5] (2018) 4 SCC 316.

[6] Case No. 17 of 2014, Competition Commission of India, May 2014.

[7] 194 (2012) DLT 23.

[8] Case 27/76, *United Brands v Commission*, (1978) ECR 207, at 189.

[9] Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, (2012) 4 CMLR 23.