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Competition Commission of India develops jurisprudence on Resale Price Maintenance

Tanaya Sethi · Monday, June 26th, 2017

After almost a decade of active enforcement, the Competition Commission of India (CCI) on June 14, 2017 came out with its first ever decision finding an enterprise to be indulging in Resale Price Maintenance (RPM).[1] The allegations of RPM were made against Hyundai Motor India Limited (HMIL). HMIL is the Indian subsidiary of a South Korean multinational automotive manufacturer, Hyundai Motor Company.

The case against HMIL was brought before the Commission by car dealers, namely Fx Enterprise Solutions India Pvt. Ltd. and St. Antony's Cars Pvt. Ltd. The details of the allegations made against HMIL are recounted below:

1. *Exclusive Dealership Arrangements:*
   It was alleged that HMIL entered into exclusive dealership arrangements with its dealers to the extent that:
   - dealers were bound to procure spare parts, accessories and all other requirements, either directly from HMIL or through vendors approved by HMIL; and
   - dealers were required to obtain prior consent of HMIL before taking up dealerships of another brand.
2. *Discount Control Mechanism:*
   It was alleged that HMIL imposed a "Discount Control Mechanism" which monitored the maximum permissible discount levels that a dealer could provide for selling passenger cars manufactured by HMIL. The dealers were not authorised to give discounts above the recommended range.
3. *Hub and Spoke Arrangements:*
   HMIL allegedly perpetuated bilateral vertical agreements between the supplier and dealers and horizontal agreements amongst dealers themselves by virtue of being a common supplier. It was alleged that by acting as a hub (common supplier) between spokes (dealers), HMIL was responsible for price collusion amongst competitors through a series of "hub – and – spoke" arrangements.
4. *Tie-in Arrangement:*
   Finally, it was alleged that HMIL had control over the sources of supply and it therefore tied the purchase of desired cars to the sale of high-priced and unwanted cars to its dealers. HMIL also allegedly designated sources of supply for complementary goods for dealers which resulted in a

> "tie-in" arrangement. The complementary goods in the instant case were lubricants, CNG kits and car insurance.

Upon a perusal of the submissions made by both parties, the Commission found HMIL's Discount Control Mechanism to be in contravention of the provision on RPM under the [Indian] Competition Act. The Discount Control Mechanism, maintained the resale price of Hyundai cars, which did not result in any consumer benefits. The Commission held that *"undoubtedly, once RPM is enforced, it leads to reduced intra-brand competition and overall higher prices for consumers."*

However, the Commission found no contravention by HMIL on the allegation of the exclusive dealership arrangement or refusal to deal. It was held that the mere requirement of prior consent does not amount to foreclosure. Moreover, the CCI found no evidence to demonstrate that HMIL restricted its dealers from acquiring dealerships of competing manufacturers.

The Commission did not comment on the hub and spoke arrangement. As for the tie-in arrangements, the Commission agreed with HMIL's arguments that there exists an objective justification and legitimate business interest for cancellation of warranty upon use of non-CEV[2] CNG kits and non-recommended oils/ lubricants as HMIL would be bearing the cost of the warranty. In case of car insurance services, the Commission held that since it was not mandatory for consumers to select car insurance from the list of insurance services suggested by HMIL there was no tie-in arrangement.

In light of the above, the CCI imposed a penalty of INR 87 crore (approximately USD 13.5 million) on HMIL. The Commission in an earlier case[3] also penalised HMIL for anti-competitive conduct and abuse of its dominant position in the automotive aftermarket (automobile case). Between then and now, a lot has changed.
The Supreme Court of India issued a ruling to fix the quantum of penalty proportionately based on the relevant turnover instead of the overall turnover of the enterprise found to have infringed the Competition Act.

Following the orders of the Apex Court, the CCI in HMIL's case got the opportunity to calculate penalty based on relevant turnover for the first time since the Supreme Court gave its verdict. Considering that the CCI had already imposed a penalty of 2% on HMIL's average turnover over the last three financial years in the automobile case, in this case the quantum of penalty was fixed at 0.3% of the relevant turnover.

The CCI took cognizance of the fact that HMIL had been penalised earlier in the automobile case, however, the Commission's order does not clearly state if this was taken as an aggravating factor to arrive at proportionate penalty. The mitigating factors duly considered by the Commission were proportionality, no supra-normal profits and the implementation of a competition law compliance programme.

The CCI on its path of ensuring compliance has been taking a proactive approach by not only recognising a functioning competition law compliance programme as a mitigating factor but also taking into account the general practices prevalent in every sector while being circumspect of the legitimate interests and business justifications associated with them.

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This entry was posted on Monday, June 26th, 2017 at 12:00 pm and is filed under India, Resale price maintenance
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