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Analysing developments impacting business

AMAZON - FLIPKART SAGA: APEX COURT GREEN LIGHTS ANTITRUST PROBE

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On 9 August 2021, the Hon'ble Supreme Court of India (*Supreme Court*) allowed the Competition Commission of India (*CCI*) to proceed with its investigation into alleged anti-competitive practices by Amazon Seller Services Private Limited (*Amazon*) and Flipkart Internet Private Limited (*Flipkart*) (collectively "*OPs*").

Litigation History

1. CCI

On 24 October 2019, the Delhi Vyapar Mahasangh filed an information, alleging violations under the vertical restraints and abuse of dominance provisions (i.e. Section 3(4) and Section 4, respectively) of the Competition Act, 2002 (*Act*) by the OPs by engaging in practices such as deep discounting, exclusive tie-ups, preferential listing, and promotion of private labels.¹ The CCI while rejecting arguments on joint dominance by the OPs under Section 4 of the Act, sustained a *prima facie* case under Section 3(4) of the Act by preliminarily upholding market power attributable to each of the OPs individually. Some of the significant aspects central to the CCI decision were existence of the exclusive arrangements between smartphone manufacturers and the OPs as well as preferential listing and treatment afforded to select entities and instances of deep discounting. The CCI *prima facie* observed that these practices could have an exclusionary effect on the competition.

2. Appellate Courts

On 14 February 2020, pursuant to the OPs challenging the CCI's order before the Karnataka High Court (*High Court*), the High Court passed an interim order staying the CCI's investigation on account of (i) there not being any material on record for the CCI to have *prima facie* concluded that there appeared to be an exclusive agreement between the smartphone manufacturers and the OPs; and (ii) the Enforcement Directorate (*ED*)'s ongoing investigation into the conduct of the OPs under the Foreign Exchange Management Act, 1999. The OPs contended that the above-mentioned reasons precluded the CCI from investigating the matter until the ED concludes the investigation, which was accepted by the High Court. The High Court also noted that Amazon was not served notice by the CCI to put forth its case through a preliminary conference.²

However, on 11 June 2021, the interim stay order was vacated by the Karnataka High Court on the grounds that (i) a Section 26(1) order is simply an administrative order

¹ Case No. 40 of 2019, Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited & Anr., available [here](#).
² The interim order (W.P. 3363/2020) dated 14 February 2020 is available [here](#).

(and not a quasi-judicial order) and therefore, the CCI is not mandated to issue a notice to the OPs or to provide an opportunity for a hearing or record detailed reasons for passing such an order as long as it records some reasons to form a *prima facie* opinion; and (ii) the ED is not a sectoral regulator for e-commerce, and consequently, in the absence of any sectoral regulator, the CCI's investigation is permissible (*Single Bench Order*).³

Through an order dated 23 July 2021, the division bench of the High Court confirmed the Single Bench Order and dismissed an appeal filed by the OPs noting that (i) the CCI's investigation into the matter did not amount to an interference, and that the CCI's notice was as per the procedure stipulated in the Act; and (ii) the OPs did not want to be investigated by the CCI as per the Act, even though the investigation would offer them an opportunity to lead evidence that exonerates them (*Division Bench Order*).⁴ The Division Bench Order also noted that the OPs were attempting to circumvent the CCI's investigation through the writ courts, which is characteristic of a larger issue plaguing the CCI's enforcement - OPs pursuant to receiving unfavourable orders at the *prima facie* stage, immediately rush to trigger the writ jurisdiction of constitutional courts in order to quash the CCI's investigation.

The OPs once again appealed the Division Bench Order before the Hon'ble Supreme Court. By way of an order dated 9 August 2021, the Hon'ble Supreme Court dismissed the appeal noting that there were no reasons to interfere with the decisions passed by the High Court.⁵

Comment

The decision of the Hon'ble Supreme Court reaffirms the position adopted by it in its landmark ruling *CCI v. SAIL (SAIL Judgement)* which set out clear jurisprudence on the nature of a *prima facie* order of the CCI. The Supreme Court in the SAIL Judgement had unequivocally expressed that a *prima facie* order is merely a *direction* to cause an investigation into the matter and to that extent, is an administrative direction to its own investigation arm which does not determine any right or obligation of the parties to the *lis*. That said, this decision also goes on to clarify that in the absence of a sectoral regulator, the CCI's jurisdiction is not precluded at least at the *prima facie* stage which implies that the CCI is now free to probe the stakeholders in the e-commerce space.

All in all, while the litigation saga on the procedural aspects of the case has concluded, the substantive probe is only just starting!

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³ Amazon Seller Services Private Limited v. CCI, W.P. No. 3363 of 2020 clubbed with Flipkart Internet Private Limited v. CCI, W.P. No. 4334 of 2020, available [here](#).

⁴ Flipkart Internet Private Limited v CCI, W.A. No. 562 of 2021 clubbed with Amazon Seller Services Private Limited v. CCI, W.A. No. 563 of 2021, available [here](#).

⁵ Flipkart Internet Private Limited v. CCI, SLP (C) No. 11518 and 11615 of 2021, available [here](#).