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EXCLUSIVE ARRANGEMENTS IN E-COMMERCE BUSINESS- VIEWS OF COMPETITION COMMISSION

The case against the ORPs

Recently, many allegations have been levied on e-commerce sellers/ online retailers namely, Flipkart, Amazon, Snapdeal, Jabong, etc. for breaching the provisions of the Competition Act, 2002 ("Act") which includes predatory pricing, exclusive arrangements to sell or distribute and abuse of dominant position in the market. In the case of Mohit Mangalani ("Informant") and Flipkart, Amazon, Jasper Infotech, Xerion Pvt. Ltd, Vector E-commerce Pvt. Ltd.-Online Retail Players ("ORPs), the Informant alleged that the ORPs have been indulging in anti-competitive practices in the nature of "exclusive" agreements with sellers of goods/services and this is done to the exclusion of the other ORPs and all other channels of physical sale. The Informant to supplement this allegation offered the example of author Chetan Bhagat's book titled 'Half Girlfriend' published by Rupa Publication which was available only on Flipkart. This according to the Informant enabled Flipkart to control the supply and create a false scarcity of the said book in the market which leads to foreclosure of supply to the physical markets, thus causing an adverse appreciable effect on competition (AAEC).

The second allegation by the informant was that because of such exclusive arrangements, the ORPs acquired 100% dominance in the market for those goods which were sold exclusively on their portals, which enabled them to manipulate prices and impose other terms and conditions detrimental to the interest of the consumers.

However, the above allegations were dealt by the ORPs in detail. The ORPs took the defense that the relevant market in question cannot be construed as product specific for each exclusive product, per se, since the relevant market for a product would also include its substitutes/ alternatives. Also, India's organized retail market constitutes for a small percentage of the Indian retail market and since online retail was a subset of the organized retail market, its market share is not significant enough to constitute a dominant position.
In the aforesaid case the analysis of the CCI order can be broken down into two aspects:

- Exclusive arrangements with the producers

News 10 @ a glance

FDI further liberalized

The Government of India through Ministry of Commerce & Industry issued a press note on 10th November 2015, reviewing its consolidated Foreign Direct Investment Policy Circular of 2015. Keeping in mind the commitments and to further accelerate the entire investment environment and to attract foreign direct investment (FDI) in the country, the Government has further liberalized 15 (fifteen) major sectors, including key sectors such as construction development, civil aviation, defense, mining, broadcasting and agriculture.

SC on Takeover Offer Price

Two provisions of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, were interpreted and elucidated by the Apex court in A.R. Dahiya v. SEBI judgment dated 26 November, 2015. Firstly, Reg. 3(i) which exempts "transfer of shares from state level financial institutions to co-promoter(s) of the company pursuant to an agreement between such financial institution and such co-promoters" and secondly, Reg.2 Clause (1) Sub-clause (b) which defines 'acquisition'. The Apex Court

- The determination of the relevant market and the abuse of dominance in the relevant market.

The Exclusive Arrangements

Section 3 of the Competition Act does not per se prohibit exclusive arrangements between producers and sellers, it only prohibits them when they cause or there is an apprehension of AAEC in the market. There are certain agreements which are so dominant or abusive that they are considered to be anti-competitive even without going into the details of the matter. These agreements are mentioned under S. 3(3) and in such agreements it is presumed that there is an AAEC in the market. These agreements are mentioned below:

- Directly or indirectly determine purchase or sales prices
- Limits or controls production, supply, markets, technical development, investment or provision of services
- Shares the market or source of production or provision of services by way of allocation of geographical area of market or type of goods or services, or number of customers in the market or any other similar way
- Directly or indirectly results in bid rigging or collusive bidding

It is apparent that the above agreements between the producers and the sellers would per se be anti-competitive in nature.

In the case under reference, the Competition Commission of India ("CCI") observed thatexclusive agreements between the producers and the ORPs would not fall under the aegis of such horizontally and blatantly anti-competitive agreements. S.3(4) of the Act further states that any such agreements which do not fall under S.3(3) would have to be judged under the factors present in S.19(3) which would determine whether they are anti-competitive in nature or not by ensuring that an AAEC is present or there is a apprehension that such agreements might result in AAEC.

S.19(3) lists down factors which need to be looked at in every agreement to determine whether it can cause an AAEC in the market. The two most important factors for this analysis are as follows:

<u>1. Creation of barriers to new entrants in the markets</u>

The agreements between the producers and the sellers should be such that they make it extremely difficult for new firms to enter into the market. This, as observed by CCI, is not true in the case of exclusive agreement between the ORPs and the producers sincethere are alternative of the product available in the market (such as a book of same genre written by Indian author apart from Chetan Bhagat's 'Half Girlfriend') for which exclusivity rights are contained in such agreements and the producers/manufacturers are also permitted under such agreements to sell the products on their own portals and therefore it does not hinder entry of new firms into the market.

<u>2. Accrual of benefits to the consumer</u>

The CCI in the case of "Ashish Ahuja vs. Snapdeal" has implicitly stated that such online services provide great benefits to the consumer like reduced prices, the consumers are able to compare and product specifications and prices and see the benefits and disadvantages of various products which they can compare online. The ORPs also provide for home delivery which greatly adds to the convenience of the customers. Such features, in the opinion of CCI, has in fact, increased the competition in the Indian market.

Considering the exclusive agreements between the ORPs and the producers under the factors mentioned under S.19 (3) does not give out the impression that these agreements cause any AAEC in the market whatsoever.

Determining the Relevant Market

The second issue that the CCI determined was the existence of the relevant market.

held that "an exempted transaction must still be taken into account for the purpose of determination of the minimum offer price". The Court also held that "even the existence of an agreement between the acquirer (and PACs) and any other party during the subsistence of an offer would be considered towards the offer price, whether or not that agreement was indeed performance" thereby offering a clarity with regard to the sanctity of offer.

FDI by companies owned by NRI allowed

The government has extended the benefits enjoyed by individual Non Resident Indians (NRI) investors to companies, trusts and other incorporated entities owned by NRIs as part of the liberalized FDI norms**.** Giving more flexibility to NRIs to decide the structure of their investments in the country, the government said investment by companies, trusts, partnerships owned and controlled by NRIs on non-repatriation basis will now be treated as domestic investment.

100% FDI in LLPs

100% FDI is now permitted under automatic route in Limited Liability Partnerships (LLPs) operating in sectors/ activities where 100% FDI is allowed under automatic route, and there are no FDI-linked performance conditions. Further, the terms 'ownership' and 'control' with reference to LLPs have been defined. Department of Industrial Policy and Promotion (DIPP) is expected to share the details in this regard separately. LLPs having foreign investment will be permitted to make downstream investment in another company or LLP in sectors in which 100% FDI is allowed under the automatic route, and there are no FDI-linked performance conditions.

No Trademark claims on holy books

The Supreme Court in the recent case of *Lal Babu Priyadarshi vs Amritpal Singh* while dealing with the subject of registration of names of

In order to adjudge whether an enterprise is actually dominant, it needs to be proved that the enterprise is dominant in the relevant market. The Act defines relevant market as "relevant market means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets"

Thus relevant market is further sub-divided into relevant product market and relevant geographic market.

The relevant product market would constitute of all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or their service, their prices and their intended use.

The relevant geographic market would constitute of the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.

The Informant in this case contended that the ORPs on account of such exclusive agreements had 100% dominance in the market for those goods which were sold exclusively on their portals and the relevant market in such a case has to be defined in context of a particular product in question and the dominance should also be seen accordingly. The ORPs contended that each of the products themselves cannot be construed as relevant product market. The relevant market needs to be delineated on the basis of products considered to be substitutable or interchangeable with each of these products. The products which exercise a sufficient price restraint on these products would form part of a relevant market.

The ORPs further contended that online and offline retail do not constitute separate relevant markets as they are merely different channels of distribution which are substitutable and forms part of the whole retail market of India.

It is pertinent that this issue was dealt by the CCI in the case "Ashish Ahuja vs. Snapdeal" wherein it was held that e-commerce portals and brick and mortar retail outlets formulate part of the same retail market. It was stated in the afore-mentioned order that the online and the brick and mortar outlets are different channels of distribution of the same products and thus not two different relevant markets. The CCI in this case took the same view that since products available at online retail markets and at any brick or mortar outlet shall be the same, from the point of view of the consumer, the two act as separate channels of the same relevant market and not separate relevant markets altogether and are therefore substitutable to each other.

Conclusion

The E-commerce business in India, being at its infant stage, has convinced the CCI to allow the exclusive arrangements entered into by them. However, looking into the growth of the e-commerce business, it is most likely that the ORPs will acquire majority of retail market and there would be a requirement to consider online retail market as a separate retail market. In such an event, the major players of e-commerce will be watched minutely by the CCI and the exclusive arrangements entered by them might attract stringent scrutiny.

Review of the Guidelines on Joint Lender Forum & Corrective Action Plan

The guidelines for Joint Lender Forum was introduced on 26th February, 2014 by Reserve Bank of India ("**JLF Guidelines**") as a mechanism to address the issue of increased non- performing assets and distressed loans under the framework for Revitalizing Distressed Assets. Accordingly a new notification was introduced by the Reserve Bank of India ("**RBI**") on 24th September, 2015 ("**Notification**") with few modifications and clarifications. This article discusses the modifications and

holy books as trademarks, observed that the names of such holy books and scriptures (like Ramayana or Quran) cannot be registered as trademarks for selling goods and services.

New cess on taxable services applicable in India with effect from 15th November 2015

A new "Swachh Bharat" ("Clean India") Cess at the rate of 0.5% has been imposed on all taxable services in India. This is in addition to service tax at the rate of 14% which is currently in force.
The funds collected through the imposition of this cess will be used by the government for hygiene and cleanliness initiatives including building awareness about good hygiene practices and constructing toilets across India.

Compensation given to purchasers for delayed construction project, under the Consumer Protection Act

A leading real estate developer Unitech Ltd. ("Unitech") was recently in the news for failing to deliver timely possession of flats in its Gurgaon-based project 'Vistas' (the "Project"), following which the buyers filed complaints with the National Consumer Disputes Redressal Commission, New Delhi (the "Commission"). The decision by the Commission is in favour of the buyers, ordering possession to be given to them in a timely manner and awarding them compensation for the delay and inconvenience caused to them.

Parliament passes Negotiable Instruments (Amendment) Bill, 2015

Pursuant to the Lok Sabha passing the Negotiable Instrument (Amendment) Bill, 2015 ("Bill") in the month of August, 2015, the same has now also been passed by the Rajya Sabha. The Bill provides for filing of cheque bounce cases at the place where a cheque is presented for clearance and not the place of issue. The said amendment removes the legal bottlenecks concerning the jurisdictional issues

clarifications introduced by this Notification on the existing the JLF Guidelines.

Structure of Joint Lender Forum ("JLF")

Earlier the board of the banks used to find it difficult to approve the decisions taken by JLF as JLFs do not have senior level representations from the participating lenders. In this regard, it is clarified that although the RBI has not explicitly prescribed the level representations in the JLF Guidelines, the banks are expected to depute sufficiently empowered senior level officials for discussions and decisions in the meetings of JLF. According to the Notification,JLF will finalize the Corrective Action Plan ("**CAP**") and will place it before an Empowered Group ("**EG**") of lenders which will approve the restructuring process under CAP. The composition of EG shall be as follows:

- A representative each from State Bank of India ("**SBI**") and ICICI Bank Limited ("**ICICI**") as standing members;
- A representative each of the top 3 (three) lenders to the borrower. If SBI or ICICI is among the top 3 (three) lenders to the borrower, then a representative of the fourth largest or a representative each of the fourth and the fifth largest lenders as the case may be;
- A representative each of the 2 (two) largest banks in terms of advances who do not have any exposure to the borrower; and
- The participation in the JLF-EG shall not be less than the rank of Executive Director in a public sector bank or equivalent.

Exit Option for lenders

Under this Notification the lenders have the option to exit their exposure to a company if they disagree with the restructuring plan. According to the JLF Guidelines, the banks who do not wish to commit additional finance, irrespective of whether they are within or outside the minimum 75 percent and 60 percent criteria, can exercise the exit option only by way of arranging their share of additional finance to be provided by a new or existing creditor. Now as per the Notification, it has been decided that dissenting lenders who wish not to participate in the restructuring of the account as CAP, which may or may not involve additional financing, will have an exit option by selling their exposure to a new or existing lender(s) within the prescribed timeline for implementation of the agreed CAP. The exiting lender will not have the option to continue with their existing exposure and simultaneously not agreeing for rectification or restructuring as CAP. The new lender to whom the exiting lender sells its stake may not be required to commit any additional finance, if the agreed CAP involves additional finance.

Restructuring of Doubtful Accounts

Under the JLF Guidelines no account was considered by the JLF for restructuring if it was classified as 'doubtful', even if small portion of debt is doubtful. However under the Notification, JLF may decide to take up restructuring of an account classified as 'doubtful' in the books of 1 (one) or more lenders similar to that of Special Mention Account-2 (SMA-2) and sub-standard assets, if the account has been assessed as viable under the Techno Economic Viability (TEV) and the JLF-EG concurs with the assessment and approves the proposal.

Penal Provisions

Under the JLF Guidelines the penal provisions are applicable only in certain cases. Further the duration for such penal provisions has been specified in case of an escrow account maintained by the bank. Now under the Notification the banks are advised that the penal provisions in other cases will also be applicable. Further the Notification mentions the reason for such penal provision and its duration.

The purpose of new modifications/amendments in JLF Guidelines through this Notification is to make the consortium lending and restructuring process more transparent and effective. RBI's stressed asset framework is intended to slow down the buildup of bad loans in Indian banking sector.

surrounding the aforesaid, thereby adopting the basic principles laid down by the Supreme Court in Dashrath Rupsingh case.

The amendment bill concerning this will be tabled in the winter session of Parliament likely to start in November 2015.

RBI Permits FPI to acquire NCD's/bonds, which are under default.

The Reserve Bank of India (RBI) has issued a circular on 26th November 2015 [*A.P. (DIR Series) Circular No.31*], whereby the RBI has permitted Foreign Portfolio Investors (FPI) to acquire NCDs/bonds, which are under default, either fully or partly, in the repayment of principal on maturity or principal installment in the case of amortising bond. The revised maturity period of such NCDs/bonds, restructured based on negotiations with the issuing Indian company, should be three years or more.

Cabinet approves Real Estate (Regulation and Development) Bill, 2015

The Union Cabinet chaired by the Prime Minister Shri Narendra Modi has approved the Real Estate (Regulation and Development) Bill, 2015, as reported by the Select Committee of Rajya Sabha. The Bill will now be taken up for consideration and passing by the Parliament. The Real Estate (Regulation and Development) Bill is a pioneering initiative to protect the interest of consumers, promote fair play in real estate transactions and to ensure timely execution of projects.

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