

# *Newsletter*

## **Special Edition on Competition Law**

**DMD**<sup>®</sup>  
ADVOCATES

Special Edition

January 2020

It gives us immense pleasure to circulate this special edition of DMD Advocates' Newsletter focusing on developments in the field of competition law in India.

In this edition, we have focused on the recent e-commerce market study report published by the Competition Commission of India.

The insights are provided by **Mr. Vivek Agarwal**, who recently joined DMD Advocates as the Competition Law Partner in our Delhi office. To view Vivek's detailed profile, click [here](#).

We hope you enjoy reading this edition and find it useful in your area of work.

### *Awards & Recognition*

Awarded Law Firm of the Year - Direct Tax at the **Business World** Global Legal Summit and Legal Awards, 2019 held on 12 December 2019 at the Imperial, Delhi.

The Competition Commission of India (CCI) has opened the new decade in a spectacular way by, first, publishing its key findings from the e-commerce market study on 8 January 2020 and, immediately after, opening a detailed investigation against Amazon and Walmart owned Flipkart on 13 January 2020.

Although upgradation of competition rules to address the competition issues pervading the digital economy has been at the fore of discussions in the global competition law fraternity, the CCI has now made it clear that it would not shy away from taking these issues head-on. The prima facie order against Amazon and Flipkart is a clear indication to the e-commerce industry that if they do not take self-regulating measures to address certain issues highlighted in the report, the CCI would not be averse to initiating enforcement actions.

The CCI study focused on e-commerce in the following three segments: (i) consumer goods (mobiles, lifestyle, electronic appliances and grocery); (ii) food services; and (iii) accommodation services.



### KEY ISSUES DISCUSSED IN THE CCI REPORT

- Adverse effects of the vertical integration between an online platform and its preferred sellers
- Unfair promotion of preferred sellers by a platform to the disadvantage of non-preferred sellers
- Superior bargaining power of platforms leading to imposition of unfair terms on sellers
- Deep discounting by platforms which is not based on efficiencies and which may stifle competition among sellers
- Lack of transparency and information asymmetry which causes friction between platforms and vendors

### SUMMARY OF KEY FINDINGS: CCI'S E-COMMERCE MARKET STUDY

#### **Conflict of interest**

There is an inherent conflict of interest if the same entity owns a platform and also starts selling and competing with other sellers on that platform. Major ecommerce platforms in India have structural or financial links with entities which sell on these platforms as preferred sellers. Such preferred sellers enjoy preferential treatment from the platform to the disadvantage of other (non-preferred) sellers. The platform ensures higher visibility and higher discounts to products of preferred sellers which results in high customer traffic to these sellers. The platform can use reviews/ rankings and consumption/ trends data to the advantage of preferred sellers. Also, if there is an arrangement with a brand to sell its products exclusively on the platform, sales are made only through preferred sellers.



#### **Unfair conditions**

Platforms are in a superior bargaining position and sellers are dependent on platforms to get access to maximum customers. Also, commercial objectives of platforms and sellers are misaligned – the objective of platforms is to create a large consumer base and that of sellers is to maximise profits. As a result, platforms are in a position to impose certain terms on sellers which may be unfair. Such conditions include: (i) price parity requirement, under which a seller cannot sell its products at a better price on other platforms or on its own website; (ii) non-availability of consumption data to sellers; and (iii) bundling of delivery service with listing service, in the food service segment.

#### **Deep discounts**

Discounts are offered by platforms over and above the price set by the seller which leaves the seller with no control over product pricing and results in value erosion of the product. Although discounts are funded by platforms for consumer onboarding, there is no transparency on the discount policy of these platforms. Also, deep discounting with no correlation to cost savings may distort supply side competition in the longer term. During the study, the CCI failed to identify any cost savings that could explain deep discounting by platforms and accordingly observed that consumer welfare should be judged based on efficiency and not merely lower prices.

### **Need for transparency**

The CCI observed that a major cause for the friction between platforms and vendors is the lack of transparency and information asymmetry between them. With a view to mitigate this friction, the CCI has recommended that platforms should adopt self-regulatory measures by increasing transparency in their policies for search rankings; collection, use and sharing of data collected by the platform; user review and rating mechanism; discounting; and revision of contract terms.

### **Fact specific assessment**

According to the CCI, competition law assessment of each issue will be subject to a rule of reason approach based on the facts of each case. The CCI has indicated that it may examine the identified concerns under the provisions relating to either abuse of dominance or anti-competitive agreements, depending on whether the platform is in a dominant position or not.

### CCI's posture

According to a media report, the CCI Chairman warned large e-commerce platforms of investigation into charges of opaque behaviour and unfair practices if they do not refrain from such practices. While speaking at an industry conference on 11 January 2020, the Chairman has been reported to have said: *"the Commission's observations are not mere observations which can be ignored without consequence. ... We are nudging them (e-commerce platforms). If tomorrow, this issue is agitated by some player before the Commission, then it becomes an altogether issue in terms of enforcement. ... No intervention if you can self-regulate."*

### Industry's Reaction to CCI's Report

Retailer associations have expressed disappointment with the CCI's emphasis on self-regulation stating it to be 'lack of action' by the CCI.

After the CCI published its interim findings from the e-commerce market study in August 2019 and the Chairman's speech dated 4 December 2019, some companies claimed to have taken self-regulatory measures to avoid any potential violation of the Competition Act. Vivo, a smartphone maker, recently stated that it will launch its products simultaneously on all channels (online as well as offline) and at the same price. Similar announcements were made by other smartphone makers, such as, Xiaomi and Oppo. Earlier, it was reported that Amazon disabled its search-seeding tool which was used by vendors to boost the chance of their products of appearing higher in the results.

### SUMMARY OF CCI'S PRIMA FACIE ORDER AGAINST AMAZON/ FLIPKART

Below is a summary of the CCI's prima facie order directing a detailed investigation against Amazon and Flipkart.

#### **Allegations**

Delhi Vyapar Mahasangh (a traders' association comprising traders of smartphones), filed a complaint with the CCI alleging that the following practices of Amazon and Flipkart are anti-competitive: (i) exclusive launch of mobile phones, (ii) preferred sellers, (iii) deep discounting, and (iv) preferential listing/promotion of private labels.

#### **Scope of investigation**

The CCI observed that the following practices may result in an appreciable adverse effect on competition: (i) exclusive arrangements between smartphone brands and 'preferred sellers' on one hand and e-commerce platforms on the other; (ii) preferential treatment by platforms to certain preferred sellers and possible nexus between the two; (iii) funding a part of discounts by platforms for their preferred sellers; and (iv) preferential listing/promotion of private labels and preferred sellers in search results.

The CCI also observed that, given that both Amazon and Flipkart follow the same mechanics in terms of their exclusive tie ups and preferential terms, competition between these platforms does not prima facie mitigate the potential adverse effects of the alleged practices.

The CCI therefore concluded that there is a need to investigate whether the alleged exclusive arrangements, deep-discounting and preferential listing by Amazon and Flipkart are being used as an exclusionary tactic to foreclose competition and are resulting in an appreciable adverse effect on competition contravening Section 3 of the Competition Act.

#### **No investigation into a potential abuse of dominance**

Interestingly, the CCI order limits the investigation to a violation of provisions relating to anti-competitive agreements and does not expand it to provisions on abuse of dominance. Given that agreement between a platform and a seller

qualifies to be a vertical agreement, the clauses of such an agreement can be examined for a potential violation of Section 3 of the Competition Act under the rule of reason approach.

It appears that there was not enough material to order investigation for a potential violation of Section 4 of the Competition Act which deals with abuse of dominance. The complainant only alleged collective dominance of Amazon and Flipkart (and not individual dominance) but the allegation was rejected as the concept of collective dominance is not covered under the Indian law yet.



### Focus of investigation

Based on the observations made in the order, the focus of the investigation is likely to be on the adverse effects of the vertical integration between the platform and its preferred sellers with which the platform has structural/ financial links. Non-preferred sellers, where the platform doesn't have such links, are consequently disadvantaged.

## *DMD in News*

### **DMD Advocates awarded Tax Law Firm of the Year - Direct Tax at the Business World Global Legal Summit, 2019**

DMD Advocates won the Tax Law Firm of the Year - Direct Tax at the Business World Global Legal Summit and Legal Leaders Awards, 2019. The award is a validation of our firm's par excellence tax teams across Mumbai and Delhi. It is a milestone in the history of DMD Advocates that has many accolades to its credit, including the *International Tax Review Award* received by Founding and Managing Partner of our Mumbai office, Ms Fereshte Sethna, at an event held in Singapore in May 2019.



### **Vivek Agarwal joins DMD Advocates as a Partner in the Competition Law Practice**

Vivek Agarwal has joined DMD Advocates as a Partner in the Competition Law Practice. He has been practising competition law in India since 2009, and was involved in the drafting and the finalisation of the Combination Regulations, working closely with the Competition Commission of India and the Ministry of Corporate Affairs. He has been representing and advising Indian and foreign companies on a full spectrum of competition law issues.



Prior to joining DMD Advocates, he was with Shardul Amarchand Mangaldas & Co. Earlier, he also worked with the former Chairman of the CCI, Mr. Vinod Dhall; at the Brussels and London offices of the global law firm Linklaters LLP; and as a foreign competition lawyer at Tesco PLC in London.

To view Vivek's detailed profile, please click [here](#).

## *Past Events*

### **DMD Advocates' Senior Partner, Rashi Dhir at the International Bar Association (IBA) Asia Pacific Mergers & Acquisitions Conference, 2019**

Our Senior Partner and Head of Corporate, Rashi Dhir attended the Asia Pacific Mergers & Acquisitions Conference, 2019 at The Peninsula, Tokyo. The conference was hosted by the IBA Corporate and M&A Law Committee, supported by the IBA Asia Pacific Regional Forum. IBA is a global network of legal professionals with a member base of 80,000 lawyers. Rashi is a regular at the IBA events and is an active member of the Mergers & Acquisition committee of the IBA.

### **DMD Advocates' Senior Associate Adhiraj Malhotra spoke at the 'Howdy 2020' organized in Mumbai**

Our Senior Associate, Adhiraj Malhotra spoke on "Penalties and Enforcement Mechanism relating to 2020 Sulphur Regulations" issued by the International Maritime Organization under the International Convention for the Prevention of Pollution from Ships ("MARPOL") at the 'Howdy 2020' event.



The 'Howdy 2020' event was organized by Enmarol Petroleum India Private Limited, a fuel additive company, in collaboration with Innospec Inc., a global specialty chemicals company, at the Taj Santacruz, Mumbai on 27 November 2019.



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### Partners & Directors

**Anuradha Dutt**

Founder & Managing Partner, Delhi  
*Litigation,  
International Arbitration*

**Vijayalakshmi Menon**

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*Litigation, Intellectual Property Rights*

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*International Litigation,  
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Partner, Delhi  
*Taxation*

**Anish Kapur**

Partner, Delhi  
*Litigation, Arbitration*

**Sumit Sinha**

Partner, Delhi  
*Corporate*

**Vivek Agarwal**

Partner, Delhi  
*Competition*

### Our Offices

**MUMBAI**

121, Maker Chambers – IV, Nariman Point  
Mumbai – 400 021  
Tel: + 91 22 4356 5555 | Fax: + 91 22 4356 5550 |  
E-mail: mumbai@dumeds.com

**NEW DELHI**

30, Nizamuddin East  
New Delhi – 110 013  
Tel: + 91 11 4719 4400 | Fax: + 91 11 4050 6977 |  
E-mail: delhi@dumeds.com

Please feel free to address any further questions or request for advice to: [dmdadvocates@dumeds.com](mailto:dmdadvocates@dumeds.com)

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