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AMAZON, FLIPKART V. CCI, 2020: A TURNING POINT FOR ANTI-TRUST CASES IN INDIA?

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ABSTRACT

With the advent of technology, e-commerce has played a vital role in our lives. But with this advent of technology, there also comes into existence responsibilities on the part of both e-commerce platforms as well as the customers. In 2019, The Competition Commission of India directed the Director-General to conduct an investigation against e-commerce giants, Amazon and Flipkart against an anti-trust case. Thereafter, an appeal was filed in the Karnataka High Court by Flipkart and Amazon. The case at hand is hotly debated as there are several allegations imposed on the platforms that will impose a huge threat to their reputation. Besides this, considering the relevance of these platforms, the case will have a significant impact on the market share of these e-commerce giants.

Through this research, the authors have attempted to highlight the proceeding of the case and its implications. The authors have also attempted to encompass an analysis with the Consumer protection (e-commerce) Rules, 2020 in the light of the ongoing case.

INTRODUCTION

The E-commerce industry has transformed the way business was carried out in India. In 90s India heavily relied on retail and wholesale commercial establishments for their daily needs. People traveled miles to fulfill their basic needs. Whereas in the era of the 21st century, the e-commerce industry has satisfied the smallest need ranging from buying groceries to LED television at our doorstep. However, the e-commerce industry has witnessed its share of ups and

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downs. But with time, as there is a widespread impact of smartphones, the e-commerce industry is expanding. As the pandemic struck and brought the entire economy to a standstill, the e-commerce platforms grew and served millions. The Indian E-commerce market is expected to grow to US\$ 200 billion by 2026 from US\$ 38.5 billion as of 2017². According to Forrester Research³, Flipkart's market share was 31.9% by October 2020- making it the largest online retailer in India, and Amazon had a market share of 31.2%⁴.

In January 2020, these two renowned e-commerce giants, Flipkart Internet Services Pvt. Ltd. (Flipkart) and Amazon Seller Services Pvt. Ltd. (Amazon) were involved in a case filed by Delhi Vyapar Mahasangh (DVM) at the Competition Commission of India (CCI) alleging business malpractices. DVM is a society comprising of Micro, Small, and Medium Enterprises (MSME) traders dealing in smartphones and related accessories registered under the Societies Registration Act, 1860 and affiliated to Confederation of All India Traders (CAIT). Both these e-commerce giants have their registered offices in Bengaluru, India.

FACTS OF THE CASE

In October 2019, DVM filed a complaint before the CCI under section 19(1) of the Competition Act, 2002 alleging that e-commerce giants Amazon and Flipkart have entered into vertical agreements with preferred sellers resulting in the foreclosure of other non-preferred traders from these online platforms. It was also alleged that the provisions of the Competition Act relating to anti-competitive agreements under Section 3(4) read with Section 3(1) and abuse of dominance under Section 4(2) read with Section 4(1) have been violated thereby having an appreciable adverse effect on competition in India. The allegations involved issues related to the preferential listing, deep discounting, exclusive launch of mobile phones, and preferred sellers.

Post complain CCI ordered an investigation under Section 26(1) of the Act, directing the Director General (DG) to conduct an investigation. This order was then challenged by Amazon at the Karnataka High court following which the court ordered a stay on the investigation

²E-commerce Industry in India, Indian Brand Equity Foundation, (July 5, 2021, 11.00 AM), <https://www.ibef.org/industry/ecommerce.aspx>.

³ Gabriela Barkho, How the Pandemic Strengthened Walmart-Owned Flipkart's Marketshare, ModernRetail, May 13, 2021, 5:57 PM), <https://www.modernretail.co/platforms/how-the-pandemic-strengthened-walmart-owned-flipkarts-marketshare/>.

⁴ Id.

directed by the CCI. CCI then approached the Supreme Court against the decision of the Karnataka High Court but the SC sent the case back to the High Court. In June 2021, the Karnataka High Court paved way for CCI to carry out the investigation.

ALLEGATIONS

According to DVM, the two e-giants are exploiting their competitive position by-

2.1 PREFERENTIAL LISTING-

It has been alleged that Amazon is providing preferential treatment to some of the sellers notably 'Cloudtail' and 'Appario Retail'. DVM alleged that Amazon is creating a search bias by listing the abovementioned preferred sellers on the initial pages of the search results. Further, the products of the same rating are shown in the later pages whereas the few initial pages of the search results are dominated by the products of the preferred sellers.

In the case of Flipkart, the word 'assured' has been lent to the products of the preferred sellers.

2.2 DEEP DISCOUNTING-

In respect to deep discounting, the complainant alleged that preferred sellers have been provided incentives to sell their products at 'predatory prices' and as a result, the non-preferred traders or other small sellers faced difficulties to compete with.

DVM also purported that a model has been followed by Flipkart to provide deep discounts on the products of the preferred sellers such as 'Omnitech Retail' and 'WS Retail' which was detrimental to the interest of non-preferred sellers.

2.3 EXCLUSIVE TIE-UPS-

DVM stated that the indulgence in deep discounting and preferential listing created 'defacto exclusivity'. It was also alleged that the opposite parties have been launching exclusive smartphones by entering agreements with the various brands of smartphones hurting the small sellers as they are not able to procure them.

2.4 PREFERENTIAL TREATMENT TO SOME OF THE SELLERS-

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It was alleged that though 'any person' can conduct business from opposite parties' online platforms but they only give an edge to preferred sellers by providing them preferential treatment. Further, it has been stated by the informant that the opposite parties are not encouraging neutrality in terms of online business instead of promoting the private labels of both the e-commerce firms.

Post complain CCI ordered an investigation under Section 26(1) of the Act, directing the Director General (DG) to conduct an investigation. CCI's order was challenged by Amazon and Flipkart in the Karnataka High Court through a writ petition.

3. ISSUES FRAMED BY THE KARNATAKA HIGH COURT⁵

- a. What is the nature of the impugned order passed under Section 26 (1) of the Act?
- b. Whether a prior notice and opportunity of hearing are mandatory before passing directions for investigation under Section 26(1) of the Act?
- c. Whether impugned order calls for interference?

4. FINDINGS OF THE HIGH COURT

4.1 Findings of the High Court to issue A and B:-

- The HC believed that issues A and B are inter-connected and therefore dealt them together. Section 19 of the Act states that the Commission may inquire into allegation of contravention of provisions of the Act either on its motion or receipt of any complaint or upon reference by the Central Government or State Government or statutory authority.
- As per Section 26 of the Act, CCI has been authorized to request an investigation to the Director-General in cases of prima facie violations of law, and the Director General's investigation is not bound to influence the final decision.
- The Court critically analyzed the threshold of 'prima facie' through the following reasons:-

⁵Amazon seller services Private Ltd, Flipkart internet Private Limited v. CCI, WPN 3363 of 2020.

1. Since CCI has limited finances to operate, it must conduct a cost-benefit analysis throughout the investigation.
 2. Director General's investigation plays a direct role in determining the business practices adopted by the Parties.
 3. The framework of the Competition Act does not allow CCI to define an ultimate contravention unless an investigation is conducted. Moreover, the Act empowers the opposing parties to defend themselves at the time of investigation and also after submission of the investigation report by the Director-General.
- The court also referred to the cases cited by the Additional Solicitor General for the Commission and agreed with the fact that the direction to order an investigation by CCI to the Director-General is an administrative direction to one of the department's wings and no prior notice or hearing Amazon and Flipkart was necessary.

4.2 Findings of the HC to issue C:-

- The High court noted that CCI applied mind while recording the anti-competitive case as the commission has rejected the allegation of 'Joint/collective dominance' as there are no statutory provisions in the Competition Act, 2002 concerning it.
 - Court also noted that the commission has analyzed and examined the information provided by DVM by categorizing the information under various heads such as the exclusive launch of smartphones, preferred sellers, deep discounting, and preferential listing of private labels.
 - The court finally noted that there is nothing unreasonable and CCI has acted in consonance with the law, hence rejected the following contentions of the petitioners-
1. That CCI did not send any notice to provide the opportunity of being heard before initiating an inquiry in this case whereas on earlier occasions particularly in the AIOVA case, CCI issued notice to the parties.
 2. That the informant approached the court with unclean hands.
 3. That the CCI could only exercise jurisdiction in the instant case only after the conclusion of the proceedings by the Enforcement Directorate.

Hence, the Karnataka High Court dismissed the writ petitions of Amazon and Flipkart and held that the impugned order does not call for any interference.

Amazon and Flipkart have filed an intra-court appeal against the order of the single judge.

5. An analysis

This is not the first time when a Company has been subjected to an anti-trust case. Before Amazon and Flipkart, Ola and Uber⁶ in 2018 and Google⁷ in 2020 had also faced anti-trust cases. Amazon and Flipkart have also been subjected to such allegations in the past in 2015. However, it seems that the case at hand is a turn towards the global antitrust narrative of curbing the market power of tech firms⁸. Considering CCI's previous market study on e-commerce in India, it seems that the case has a long way to go.

Fact that e-commerce companies have become a part and parcel of our daily lives, will have a huge impact on the customers. In this light, the government of India has introduced the Consumer protection (e-commerce) Rules, 2020 which shall remain open for public comments till 5 August 2021. The Rules incorporate detailed provisions relating to online business practices. Some of the most significant changes are:-

(a) The definition of 'e-commerce entity' has been expanded. The definition now includes not only the entities operating e-commerce platforms but also 'an entity engaged by such person for the fulfillment of orders placed by a user on its platform and any related party as per Section 2(76) of the Companies Act 2013'⁹. The definition has a wide outreach implying any entity related to e-commerce platforms is mandated to comply with the stringent regulations imposed.

⁶ Reuters, Google faces new antitrust case in India on smart TVs, sources say, The Hindu, (Oct. 8, 2020, 5:46 PM) <https://www.thehindu.com/sci-tech/technology/google-faces-new-antitrust-case-in-india-over-abuse-in-smart-tvs-market-sources-say/article32794752.ece>.

⁷ Prasad Banerjee, Google faces new antitrust case in India on smart TVs, Livemint, (Oct. 8, 2020, 06:06 AM), <https://www.livemint.com/companies/news/google-faces-new-antitrust-case-in-india-on-smart-tvs-11602116962927.html>.

⁸ Delhi vyaparMahasangh v. Flipkart Internet Pvt Limited and another (CCI) & Amazon Seller service Private Ltd vs. Competition Commission of India, Analysis of competition cases in India, (July 10, 2021, 1:42 PM), https://cuts-ccier.org/pdf/Edition-16-Analysis_of_Competition_Cases_in_India.pdf.

⁹ Companies Act, 2013, § 2(76).

The proposed Rule makes it just about impossible to engage in preferential treatment as alleged by the DVM.

(b) No discrimination against domestic goods- The e-commerce entities are required to provide details of importers, origin, filter mechanism to the customers, alternative suggestions, and also provide other details as specified in the Rules. This provision also ensures to provide a fair opportunity for domestic goods and ranking parameters where there shall be no discrimination between domestic sellers and/or goods and with the imported ones.

(c) The Rules require entities to disclose the name of entities providing data for and data used in cross-selling. This provision aims to substantiate the issue of preferential treatment and preferential listing.

(d) The Rules also contain a provision prohibiting e-commerce entities from misleading the customers by manipulating search results and indexes. Rules prohibit using of the platform's brand name for promotion and the use of information collected by it for the sale of goods bearing its brand name as being associated with it if such practice amounts to unfair trade practice. This provision seeks to regulate the issue of preferential listing.

(e) The Rules restrict e-commerce entities from organizing 'flash sales'. Entities can organize flash sales only when it does not intend to enable only certain sellers. This provision seeks to consider the issue of deep discounting.

(f) The Rules prohibit related parties and associated enterprises to list themselves on the e-commerce platforms as sellers.

The Rules seek to lay down a code for regulating e-commerce entities through the Consumer Protection Act, 2019. However, it seems to add confusion in the pending case as there is already an involvement of three different statutes and regulators. Moreover considering the role of e-commerce entities in an individual's life, the decision will have a huge impact.

Another backdrop that can be pointed out is the lack of legislation in the Competition Act concerning collective abuse of dominance. Section 4(1) of the Competition Act, 2002 does not recognize the collective abuse of dominance. No other law recognizes such kind of dominance in

India. Various recommendations have been made in this regard that section 4(1) of the said Act should be substituted by 'No enterprise or group shall abuse dominant position either singly or jointly.' This had led CCI to deny an investigation on the grounds of collective abuse of dominance as alleged by DVM. Therefore, an amendment paves the way to fill the lacunae in the law.

Through analysis, it is evident that collective abuse of dominance did exist in the Amazon, Flipkart case as it satisfies the following factors.

Firstly, both the e-commerce giants jointly have the majority of the market share,

Secondly, both the e-commerce giants have adopted almost similar policies such as preferential listing, promoting private labels, deep discounting, etc. which affected the competitors on the same platform,

Thirdly, implied collusion can be inferred from the conduct of both e-commerce firms. Explicit collusion is prohibited and come under the meaning of 'agreement'. When the competitors in the market started co-operating with each other instead of competing then collusion takes place. The concept of implied collusion comes into the picture when there is no expressed communication between the two market players.

If in near future any legislation on collective dominance is incorporated, CCI would be empowered in dealing with cases involving collective dominance. Moreover, a retrospective effect to the new law may place Amazon and Flipkart in a situation.

Recently, the Competition watchdog has also issued an order directing the Director-General to investigate the grounds of the anti-trust case against WhatsApp and Facebook.

Conclusion

E-commerce platforms have not only enhanced the standard of living of people but have also brought new challenges. The Competition and Consumer laws in India needed to be modified to address modern obstacles. The introduction of e-commerce rules, 2020 will play a major role in redressing such issues to a great extent. The Ministry of consumer affairs proposed the Consumer Protection (E-Commerce) Rules, 2020 amidst the investigation by CCI against

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Amazon and Flipkart. These rules gave clarity on the obligations of e-commerce entities ensuring the protection of consumers as well as the smooth functioning of the industry. Not only Amazon and Flipkart but other e-commerce entities shall also ensure that their acts lie within the framework of these Rules, Competition Act, and FEMA regime.

Aggrieved by the dismissal of their pleas by the single judge of the Karnataka High Court, Amazon and Flipkart appealed to the division bench. On 25th June 2021, the division bench of the Karnataka High Court reserved its order¹⁰. Two e-commerce giants will leave no stone unturned to protect their goodwill and market share. On the other hand, CCI and Indian courts will take every possible step to serve justice to micro, small and medium enterprises and protect their interests.



¹⁰ Lexterz Laboratory, Karnataka High court division Bench reserves judgment in appeals filed by Amazon and Flipkart, Lexterz Laboratory, (July 4, 1:57 PM), <https://lexterz.com/karnataka-high-court-division-bench-reserves-judgment-in-appeals-filed-by-amazon-and-flipkart/>.