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Antitrust Cases against Amazon in India: An Analyses in Context of Scope of Investigation

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ABSTRACT

The article examines the allegations made by Indian retailers against Amazon for engaging in anti-competitive practices and hindering entry in the relevant market. It examined the Reuters report which shows evidence against Amazon pertaining to preferring certain sellers over others and adopting exclusionary tactics which results in discrimination towards retailers. The article explores Amazon's conduct in India and investigates whether their practices violate the Antitrust laws. It discussed various anti-trust cases brought against Amazon by Indian retailers regarding anti-competitive practices of amazon.

Keywords: Abuse of Dominance, Anti-competitive practices, Anti-competitive agreements.

I. INTRODUCTION

As the world grapples with the Wall Street Journal expose of Facebook and struggles to comprehend the consequences of the Facebook papers, other media investigations of a Big Tech company's internal records and procedures have shown legally questionable actions. In 2011, Reuters has recently published reports in which there is sufficient evidence against Amazon which shows the anti-competitive practices adopted by Amazon. Report showed that Amazon has been preferring certain sellers over other on which they have direct or indirect control thereby hindering entry in the relevant market or adopting exclusionary tactics.

The third-party sellers in India have made allegations against Amazon of indulging into anti-competitive practices resulting in discrimination towards retailers to eliminate the competition in the market². Besides, approaching CCI, the retailers have gone to various authorities and have also approached Ministry of Commerce and Industry.

The article examines the Amazon's conduct in India in regard to the allegations made by Indian retailers about the dual capacity of Amazon i.e. seller and marketplace as well and the practices

¹ Author is a LL.M. Student at National Law University, Jodhpur, India.

² Mohammad Haarisbeg, *Amazon gave preferential treatment to certain sellers, CCI argues in court*, BUSINESS TODAY (March 25, 2013, 5:00 PM) <https://www.businesstoday.in/latest/economy-politics/story/Amazon-gave-preferential-treatment-to-certain-sellers-cci-argues-in-court-291195-2021-03-19>

adopted by Amazon which could be in violation of antitrust laws in India.

II. COMPETITION CASES AGAINST AMAZON IN INDIA

1. In Re: Delhi Vyapar Mahasangh And Amazon Seller Services Private Limited And Its Affiliated Entities

The informants are MSME traders who place their product on online marketplaces (one of them being Amazon). The informant made allegations against Amazon that they have entered several vertical agreements with their preferred sellers. Further, it is alleged that these preferred sellers are controlled by Amazon directly or indirectly thereby violating Section 3(4) read with Section 3(1) of the Act. They alleged following practices adopted by Amazon as violation of “section 3(1) read with Section 3(4) of the Act”.

a. Deep discounting

It is alleged that Amazon provide discounts to theirs preferred sellers on its platforms named Cloudtail India and Appario Retail which are directly or indirectly controlled by amaxon itself. As Amazon have started to attach private label on its brands and they allegedly sell these private label brands through these preferred sellers only.

b. Preferential Listing

It is alleged that Amazon tampered search results by preferring some sellers on first few pages and provides a tag to that preferred sellers so that it could be easily identifies by the consumers. According to reports, the initial few pages of search results are dominated by products offered by Appario Retail and Cloudtail India, while later pages feature products with similar ratings from vendors who are not recommended.

c. Exclusive Tie-ups and Private Labels

Amazon has a number of agreements and private labels that receive more priority in terms of sales. A select number of preferred sellers handle the distribution of the Amazon private label brands that are sold through its platforms.

d. Exclusive launch of mobile phones

A list of phones that were only released on the platforms has been supplied by The Informant. The informant claimed that because Amazon has released 45 mobile devices solely on its platform, offline shops are forced to buy smartphones from either the makers' or platforms' online storefronts.

CCI'S OBSERVATIONS-

The commission is of the view that the vertical agreements with mobile brands and certain preferred sellers and in view of the fact that these preferred sellers is directly or indirectly controlled by Amazon warrants an investigation to be conducted. It must be looked into to see if the purported exclusive agreements, deep discounts, and preferential listings by Amazon are being utilized as an exclusionary method to prevent competition and are having an appreciable adverse effect on it, in violation of the Sections 3(1) and 3(4).

The Amazon filed a writ³ to single bench of Karnataka high court against the order of CCI. The single judge bench refused to grant stay on order of the commission to initiate investigation. Amazon further appealed to division bench of same high court and the division bench also refused to interfere with the judgment of single bench. The Amazon then went on to appeal to Supreme Court against judgment of division bench of Karnataka High Court. The supreme court also refused to interfere with the judgment of division bench of Supreme Court.

2. In Re: Lifestyle Equities C.V And Amazon Seller Services Private Limited.⁴

ALLEGATIONS-

- a. The Informants have stated that there are instances of “unfair and anti-competitive practices” by the Ops (“Amazon Seller Services Private Limited”, “Amazon Export Sales LLC” and “Cloudtail India Private Limited”) and their affiliate entities has entered into various anti-competitive agreements which has the effect of eliminating the competition in the relevant marketplace. These agreements allegedly makes certain products of a certain brand to be less visible on the marketplace thereby effecting the overall sales of the product. Further, the Informants alleged that Amazon has used its position of dominance in one relevant market to hinder the entry of other enterprises in another relevant market thereby violating section 4(2)(e) of the Act.
- b. Allegation of Section 4: Abuse of Dominance- It is alleged that Amazon is dominant in the relevant market i.e., ‘online fashion retail in India’. The informant provided that Amazon and Flipkart has 62% market share in the relevant market with Amazon holding 31.1% share in the market. it is alleged that they have abused their dominant position by preferring only certain sellers on their marketplace.
- c. Allegation of Section 3(4): Anti-Competitive Agreements- The Informants alleged that the inter se agreements of Amazon with Flipkart and Cloudtail to sell unauthorized products are

³ Amazon Seller Services Private Limited Versus CCI, 2021 SCC OnLine Kar 12626.

⁴ In Re: Lifestyle Equities C.V And Amazon Seller Services Private Limited. Case No. 09 of 2020

anti-competitive which have created significant entry barriers, and foreclosed the market for other competitors and have had a debilitating effect on competition in India.

CCI'S APPROACH TO ALLEGATIONS-

- a) Relevant market as per CCI- "market for services provided by online platforms for selling fashion merchandise in India"
- b) Finding with regard to dominant position-

According to the Red Seer Report from June 2019, there are several players in the online fashion market, including significant horizontal players like Amazon and Flipkart and vertical ones like Myntra, Ajio, and Koovs. According to the Study, the combined market share of fashion marketplaces understood to be approximately 50%, and that of the major horizontal and multiproduct marketplaces, including Amazon and Flipkart, is estimated to be around 35%. Several firms are active in the relevant market of selling fashion goods in India, which is noted for the assessment of dominance. CCI refused to hold Amazon as in dominant position because there are other enterprises as well which holds significant percentage of market share in the relevant market e.g., Flipkart, Snapdeal, Paytm Mall etc. Therefore, CCI negated the contention that Amazon has dominant position in the relevant market.

- c) Allegation pertaining to counterfeiting/unauthorized selling of its products

Commission observed that as the Amazon doesn't exercise dominant position in the relevant market the commission is not empowered to look into the matter of selling of counterfeiting/unlicensed/unauthorized products.

- d) Allegations pertaining to deep discounting, exclusive arrangements and preferential listing by the Amazon.

The Commission stated that there are several channels of intermediary accessible for fashion brands, retailers, and consumers to access/reach each other, and that exclusive tie-ups between platforms and fashion labels do not appear to exist..

Therefore, the commission held that there exists no prima facie case to be made out against the Ops.

3. In Re: Aiova Sellers Association And Amazon Seller Services Pvt. Ltd⁵

ALLEGATIONS-

- a. Deep discounting

⁵ In Re: AIOVA Sellers Association and Amazon Seller Services Pvt. Ltd Case No. 29 of 2020

The Informant has alleged that Amazon buys goods in large quantities worth hundreds of crores directly from manufacturers, then sells it at a loss, unlike other wholesalers, who would sell at a profit, to Amazon Retail India Pvt Ltd and Cloudtail India Pvt. Ltd. who, in turn, sell their products to consumers at massive discounts on Amazon's platform. Most sellers selling similar categories of goods as Amazon Retail India Pvt Ltd and Cloudtail India Pvt. Ltd on Amazon's platform is unable to sell at such losses. This anti-competitive arrangement amongst the Amazon, Amazon Retail and Cloudtail is driving existing and independent sellers out of the marketplace, resulting in the foreclosure of competition.

b. Private labelling

The Informant has further alleged that OPs (Amazon Seller Services Pvt. Ltd., Amazon Wholesale India Pvt. Ltd, Amazon Retail India Pvt. Ltd and Cloudtail India Pvt. Ltd.) 'in collusion' use the data of successful manufacturers/sellers on its marketplace to float private labels and sell them at massive discounts to underpin competition. They exploit 'competitors' data to build their products, without having to invest the time and resources in testing the products, unlike their 'competitors', and get a better placement on the marketplace of Amazon, which is a paid service for the 'competitors'. The 'lack of platform neutrality' on the marketplace owing to the aforementioned private labels and preferential treatment (reduced platform fee) is resulting in a foreclosure of competition on the marketplace.

CCI'S OBSERVATION

The Commission considered the Information and directed the Informant, inter alia, to file a certificate under Section 65B of the Indian Evidence Act, 1872, in support of the electronic evidence relied upon in the Information filed.

The informant failed to furnish certificate under Section 65B of the Indian Evidence Act, 1872 and also failed to furnish additional information required by the commission. The commission observed that the information lacks actionable material and held that a prima facie case is not made out.

In this particular case, commission have not examined the practices of Amazon due to lack of sufficient material to form a prima facie view in the matter.

III. THE REUTERS INVESTIGATION REPORTS

Amazon always maintained that the charges against it were untrue and that it had access to the same data as all other vendors on its marketplace. Amazon also insisted that it did not exploit the private internal information of other sellers. The same goes for Amazon, which asserts that

its search results are determined by relevance, reviews, and other objective factors and do not unfairly favour preferred sellers or private brands. Reuters claims that among other things, the internal documents it has access to show that Amazon, at least in India:

- (i) Preferred a few selected merchants or sellers by providing them discounts.
- (ii) Huge discounts to its preferred sellers.
- (iii) Tempered with the search results which causes the products of some selected sellers to be shown in first few pages.

The investigations not only cast doubt on Amazon's claims, but they also show just how widespread these tactics are. Similar behaviour was seen across a variety of product categories, including smartphones, home furnishings, health, and domestic goods, as well as retail textile and fashion. The Reuters revelations support recent findings and disclosures from the Markup, Wall Street Journal, New York Times and Capitol Forum that make related allegations about how Amazon prioritises its own private brands and leverages internal data from vendors. These assertions are supported by several staff testimonies, in-depth research, studies, and substantial internal papers. Amazon's response to these reports is to simply state that they are untrue and unsupported. Moreover, Amazon has claimed that its corporate policy forbids the use of internal sellers..⁶

Authorities who should know have already taken notice of the Reuters findings, both in India and abroad. The reports had a number of repercussions. Amazon is the subject of an investigation by the Indian Enforcement Directorate regarding possible regulatory violations involving foreign direct investment. Amazon filed a writ appeal asking the courts to halt the competition regulator's probe, but both the Supreme Court of India and the High Court of Karnataka rejected it. American politicians demanded that Amazon be divided up. In a letter to Amazon, five members of the US House Judiciary Committee accused Amazon's top executives of misleading Congress and threatened to bring criminal charges against them.⁷ This paper contends that, independent of these developments, the recent reports from Reuters and other media outlets about Amazon's behavior have significant ramifications for the current competition investigation and legal actions against Amazon in India.

⁶ Aditya Kalra and Steve Stecklow, *Amazon copied products and rigged search results to promote its own brands, documents show*, REUTERS (26 March, 2023, 10:00 PM) <https://www.reuters.com/investigates/special-report/Amazon-India-rigging/>

⁷ Supra note at 13.

IV. WHAT APPROACH CCI SHOULD ADOPT?

The big problem seems to be the approach of CCI in handling the matters related to competition in digital markets. The CCI has in *Delhi Vyapar Mahasangh* only for the product category of smartphones and there are other cases like in *Lifestyle Equities* the CCI refused to order for an investigation on the ground of lack of sufficient material. In *Lifestyle Equities* also the allegations were related to fashion and smartphone retail. However, as the Reuters' and other reports revealed that the Amazon is indulged in anti-competitive practices in various categories of products which in different relevant market (including smartphones, textile/fashion retail, home furnishings, health and household products) and as the is private labeling more of its products the list of products is keep on increasing.⁸ Therefore, the CCI should be more active in its approach as it has full power to Suo-motu investigate the cases of anti-competitive practices.

The CCI must investigate each and every product category because every product category has the potential of a relevant product market. Investigating all product market will clear the picture and could disclose all anti-competitive practices Amazon may be indulged in⁹. Refusal of CCI in investigating Amazon for abuse of dominance position under section 4 of the Act shows the lenient conduct CCI take against these big players in digital market.

The necessary elements of a vertical agreement under section 3(4) are:

- (i) the existence of an agreement;
- (ii) amongst enterprises at different levels or stages of the production chain;
- (iii) which causes or is likely to cause an appreciable adverse effect on competition in India.

Therefore, the CCI in the first instance only has to look into the nature of agreement between the enterprises there is no need to go for determining the relevant market for the purpose of violation of Section 3 of the Act. The CCI has to only look into the vertical agreement between the parties and the chaotic task of determining the relevant market is not required. Rather, the vertical agreement between Amazon and preferred sellers or merchants through which Amazon sells its private labels would be examined as the first phase in the antitrust assessment of Amazon's activities. The first two components of section 3(4) would particularly examine the

⁸ Karunjit Singh, *Explained: Issues in antitrust probe against Amazon and Flipkart*, TNE INDIAN EXPRESS (March, 27, 2023 12:00 PM) <https://indianexpress.com/article/explained/explained-sc-ruling-on-antitrust-investigations-into-amazon-flipkart-its-impact-7446970/>

⁹ Aman Gupta, *CCI carries out raids on Amazon, Flipkart top sellers over alleged anti-competitive practices*, ET NOW (28 March, 2023 7:56 PM) <https://www.timesnownews.com/business-economy/companies/cci-carries-out-raids-on-amazon-flipkart-top-sellers-over-alleged-anti-competitive-practices-article-91166951>

conditions of Amazon's agreements with its favored sellers (such as exclusivity, special perks, etc.) and the phases of the production chain at which they operate (role of Amazon as inventory-manager, distributor, producer etc.)

Different product categories on Amazon have varied competitive dynamics and market structures, which may be important when determining whether the vertical agreement(s) had a "appreciable adverse effect on competition," which is the third element of section 3(4). For instance, a vertical agreement in the smartphone product category could have a "appreciable adverse effect on competition" if Amazon has a large market share in that industry¹⁰. The impact of Amazon's vertical agreement on competition may not be as noticeable in product categories like fashion retail or grocery, where Amazon's market share may be relatively lower and competition may be severe. Although it is true that Amazon's market share varies depending on the product category, an evaluation of the third criterion, "appreciable adverse effect on competition," looks at more than simply market share and takes into account entrance obstacles, foreclosure effects, among other things.

The fact that Amazon has a small market share in a certain product category does not, therefore, automatically imply that its vertical agreement for that category cannot have a "appreciable adverse effect on competition." The power the Amazon enjoys in digital market in India should be considered while investigating the case of antitrust against it. Overall investigating is necessary for coming to clear picture about the practices Amazon adopt to foreclose the market for other competitors⁵². The variation in competitive dynamics between Amazon's various product categories only comes into play (if at all) when determining whether section 3(4)'s final requirement, "appreciable adverse effect on competition," has been met. If such a differentiated study of the "appreciable adverse effect on competition" for each product category is required, it can be done as part of the Director General's thorough investigation into competition. It does not clarify why the scope of the inquiry should be constrained to or defined in terms of one or two product categories.

For finding the dominant position of Amazon in relevant market the CCI looks into the competitive forces in one relevant product market. The benefit of this approach is that the Amazon may become active and stop its anti-competitive practices in other relevant markets. This type of approach may have other drawbacks as well one of them being that CCI could punish only those entities which have abused its dominant position and for that it must be

¹⁰ Manish Singh, *India orders investigation into alleged anti-competitive practices by Amazon and Walmart's Flipkart*, TECHCRUNCH (27 March 2023 6:45 PM) <https://techcrunch.com/2020/01/13/India-orders-investigation-into-alleged-anti-competitive-practices-by-Amazon-and-walmarts-flipkart/>

established that one has dominant position in concerned relevant market. Therefore, if Amazon could prove that it doesn't enjoy dominant position in certain categories of products it could continue its anti-competitive practices without anyone getting hold of it. As a result, it is doubtful that a directive issued for one product category would have a cascading impact and cause Amazon to voluntarily alter its behavior across all categories. Moreover, if Amazon believes it has a chance to be able to distinguish the cases based on various market structures and competitive dynamics, it is unclear why an order of the CCI pertaining to one particular product category would have the desired domino effect.

For the purpose of section 3(4), the investigation against Amazon should not be limited to only a certain product category instead it should be focused on the bigger categories so that overall anti-competitive practices of Amazon could be ascertained. By making different categories for investigation the CCI has made the task more difficult because Amazon deals in very large no. of categories. As we know that section 3 only talks about an agreement between the enterprises there is no use of limiting the investigation to only a certain product category. Thus, there is a dire need to increase the level of investigation for finding the anti-competitive behavior of Amazon the scope of the competition investigation against Amazon should be broadened.

The DG has been invested with the power to expand the scope of investigation. The CCI is also vested with the power to initiate Suo-motu investigation on its own knowledge against any enterprise for anti-competitive practices¹¹. Therefore, the CCI must engage itself in a detailed investigation in the practices adopted by big techs in digital market.

V. CONCLUSION

It is evident from the Reuters reports and leaked documents that Amazon is carrying out its business in various markets in violation of the Competition Act. Therefore, it is necessary for CCI to investigate these cases in a broader market considering the power Amazon enjoys in digital market. the CCI should investigate the case on the basis of vertical agreements entered between enterprises and CCI should also comprehensively deal with the abuse of its dominant position by Amazon. CCI got the power under the Act to investigate the case on Suo-motu basis and should use the power for making the market competition friendly. Further, the CCI should prohibit the Amazon to operate both in the capacity of marketplace and seller.

11 The Competition Act, 2002, s 19(1)