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Internet Minimum Advertising Policies

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ABSTRACT

MAPP stands for "Minimum Advertised Price Policy," which is a policy implemented by manufacturers or distributors that sets a minimum price that retailers are allowed to advertise for their products. The goal of a MAPP is to prevent retailers from advertising products at very low prices, which can hurt the overall perception of the brand and make it more difficult for other retailers to sell the product at higher prices. MAPP policies are legal in the United States, but they must be enforced fairly and not be used to restrict competition. For the present discussion, the response has been divided into 3 parts which are:

- i. Laying foundations and a brief analysis on the issue of MAP Policies*
- ii. Considering the Indian position and the stand taken by CCI on RPM and MAPP*
- iii. Case study on Asmodee and Game and the discussion primarily based on the gaming industry.*

Keywords: *Minimum advertising policies, resale price maintenance, competition law.*

I. INTRODUCTION

In recent years there is a growth in what the experts have called the 'MAPP Trap' by which there have been many fields in with hundreds of manufacturers and merchants across a variety of marketplaces (including toy, juvenile, pet, gift, automotive, power tools, and more) have applied this practise of Minimum Advertised Pricing Policies. With the spread of hyper-discounting and its negative effects having progressed at diverse rates in various industries, uncertainty about the policies with regard to Minimum Advertised Pricing Policies has persisted. The present paper would try to look at various issues with regard to the conundrum which is faced by these kinds of policies and whether they serve a valid purpose, the effectiveness and efficacy of the said policy and the repercussions for various players. One of the rationales to apply these policies could be the perceived value of the said brand. MAPPs are unilateral policies developed by vendors to protect their brands against price erosion and brand management. Vendors defend their brands against extreme price erosion and product commoditization by developing, observing, and uniformly implementing a MAPP. They also protect their brick-and-mortar retailers by levelling the playing field so that all shops can enjoy

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a respectable profit margin. Unprotected companies run the risk of seeing their retail prices fall, but also of losing distribution, seeing their wholesale prices deflate, and losing enough money on sales to no longer be able to maintain their product quality and level of customer service. Another major reason could be that the retailers could work in tandem and don't undersell the products, by keeping a stationary price they can profit more by keeping a fixed margin throughout the region.²

On the other hand, minimum advertised price (MAP) restrictions can limit the ability of consumers to search for product prices and have a certain vertical antitrust issue that arise.³ One empirical study showed that MAP diminishes the effect of increased retailer competition on decreased price dispersion, whereby prices are up to 6% more dispersed with MAP than without MAP.⁴ But that is not something that the famous company CMON claimed. According to their statement with regards to MAP they were of the opinion that it would be beneficial to their customers. They state:

*“CMON believes that by unilaterally imposing restrictions on the minimum prices advertised by our distribution and retail partners, we can reduce counterfeiting and enhance our customer’s perceived value of the CMON brand, and that serves the best interests of our consumers, retailers, and distributors.”*⁵

Another thing which needs consideration at the outset is the with regards to resale price maintenance (RPM). A MAP policy is one in which a supplier or manufacturer limits the ability of their distributors to advertise prices below a certain level. Unlike a resale-price-maintenance agreement, a MAP policy does not prohibit a retailer from actually selling below any minimum price. In a resale price maintenance policy or agreement, by contrast, the manufacturer doesn't allow distributors to sell the products below a certain price.

II. RPM: COMPETITION LAW CONCERNS

Simply put, resale price maintenance is the setting of prices by manufacturers through their distributors or retail stores, which they do not directly own or manage but merely provide with their products in the downward flow of the distribution chain, to the final customers. Resale price maintenance (RPM) is defined in Section 3(4) of the Vertical Agreements Act (which also

² Thomas A. Lambert, Dr. Miles Is Dead. Now What?: Structuring A Rule of Reason for Evaluating Minimum Resale Price Maintenance, 50 Wm. & Mary L. Rev. 1937 (2009).

³ Julie Beth Albert, Adding Uncertainty to the Virtual Shopping Cart: Antitrust Regulation of Internet Minimum Advertised Price Policies, 80 FORDHAM L. REV. 1679 (2012).

⁴ Asmat, Danial and Yang, Chenyu, An Empirical Analysis of Minimum Advertised Price Restrictions (September 30, 2019). NET Institute Working Paper No. 19-07, Accessed Through: <https://ssrn.com/abstract=3468421>

⁵ CMON, Inc., BRAND PROTECTION POLICY AND GUIDELINES (MAPP), June 1, 2017. Accessed Through: <https://www.cmon.com/mapp>

covers tie-in agreements, exclusive supply agreements, exclusive distribution agreements, and refusal to deal agreements) as any agreement to sell goods on the condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller, unless it is explicitly stated that the price lower than those prices may be charged.⁶

III. APPROACH BY CCI

According to how the Competition Act of 2002 is written, CCI should approach vertical agreements (VAs) under Section 3(3) differently than horizontal agreements (HAs) under that section (4). While CCI presupposes an appreciable adverse impact on competition (AAEC) for HAs, it cannot do so in situations involving VAs and can only declare an agreement to be anti-competitive if the party making the allegation can demonstrate an AAEC.⁷

This distinction, which applies to horizontal and vertical agreements, is sometimes confused with the terms per se rule and rule of reason. But this is really very deceptive. It is important to remember that Section 3(3) establishes a rebuttal presumption of AAEC, which may be inferred from the word "must suppose" in that section. On the other hand, the per se rule deems a contract invalid without checking to see if it contains any AAEC. The burden of evidence has been the only distinction CCI has kept between the two types of agreements thus far. The burden of proof to show any agreement and any AAEC that resulted from it falls on the opposing party in HA, but the informant and CCI have that duty in VA. In what may be considered a milestone decision on the evolution of law on VAs, the case of Ghanshyam Dass Vij and Bajaj Corp. Ltd.⁸, this distinction has been established authoritatively and explicitly. In this instance, CCI has applied the de minimis test and determined that vertical agreements covered by Section 3(4) may only be declared null and void if they result in an AAEC in the market as determined by the criteria given in Section 19(3) of the act.

However, the first stage of information review, CCI should also set some unique rules for horizontal and vertical agreements. In the event of vertical agreements, it will only be appropriate if CCI applies more scrutiny and informant has the burden of evidence. In the Shubham Sanitarywares and HSIL Limited Red Cross,⁹ CCI made a positive move in closing the case under Section 26(2) after not concluding that there was an AAEC even though a discount control system was in place.

⁶ Dhruv Rajain, Nandini Pahari and Satvik Mohanty, Vertical Restraints in the Indian E-Commerce Sector: The New-Age Competition Issues, (2019) PL (Comp. L) August 73.

⁷ Anshuman Sakle and Nandini Pahar, The Interaction Between Competition Law & Digital and E-Commerce Markets in India, 16.2 IJLT (2020) 18

⁸ Ghanshyam Dass Vij and Bajaj Corp. Ltd. (2015) CCI 155

⁹ Shubham Sanitarywares and HSIL Limited Red Cross, (2015) CCI 31

As may be concluded from the description above, it is acceptable to prescribe a maximum price or suggested price as long as an agreement permits charging a price that is lower than the specified price. In *Jasper Infotech (P) Ltd. v. KAFF Appliances (India) (P) Ltd.*¹⁰, the company that owns and runs Snapdeal claimed that Kaff, a company that makes chimneys and stoves that are sold on Snapdeal, was trying to impose a "Minimum Operating Price" (MOP) on the company in order to prevent sales from occurring below a certain price and had threatened to stop all online sales if such prices were not maintained. Allegations of RPM, notably minimum RPM, on online platforms were addressed by CCIs under Section 26(6). However, Kaff escaped punishment since the CCI found that the numerous competitors that competed with Kaff on Snapdeal meant that the limits placed on Snapdeal did not result in an AAEC in the market.¹¹

Similar allegations of RPM were made in *Counfreedise v. Timex Group India Ltd.*¹², where it was claimed that the Timex Group had discriminated against the informant, Counfreedise, the distributor of Timex Group wrist watches on e-commerce platforms, in comparison to other e-commerce players like Cloutail, XL Retail, etc. The Timex Group allegedly forbade Counfreedise from providing discounts over a specific level, according to the main charges. The CCI noted that in order for RPM to be effective as a form of discount regulation, it must be enforced on all online merchants, not only the informant, and that any arrangement of this sort must pass the AAEC test in India in order to be deemed anti-competitive. As Counfreedise dealt with the selling of wrist watches from several other firms and was not primarily dependent on the sale of Timex Group's products, the CCI could not find any infringement in the current instance based on RPM.

Given the effects-based approach used in the aforementioned examples, CCI adopted a flexible approach to the minimum RPM. However, it was noted in *Jasper v. KAFF* that in India, such restrictions should be examined through the lens of the "rule of reason"/effects-based approach on a case-by-case basis. Minimum RPM has the unfavourable effect of eliminating intra-brand competition, and it is treated as a hardcore restriction in many antitrust jurisdictions. Since the CCI has made prominent mention of the pro-competitive advantages of online vertical restraints while referring to how strictly RPM is occasionally treated in other jurisdictions, this may be interpreted as a sign that the CCI is still considering all possible antitrust regulation options before deciding on a suitable framework to address such anticompetitive practises.¹³

¹⁰ *Jasper Infotech (P) Ltd. v. KAFF Appliances (India) (P) Ltd.*, 2019 SCC On Line CCI 2

¹¹ Gokul Plaha, CCI's Order in the Snapdeal – KAFF Case, India Corp Review, February 2, 2019. Accessed Through: <https://indiacorplaw.in/2019/02/ccis-order-snapdeal-kaff-case.html>.

¹² *Counfreedise v. Timex Group India Ltd.*, 2018 SCC On Line CCI 67

¹³ Dhruv Rajain, Nandini Pahari and Satvik Mohanty, Vertical Restraints in the Indian E-Commerce Sector: The

(A) Positive impact

Nothing in this should be taken to imply that this activity is waning or will eventually become unnecessary; just that competition legislation will make it more geared toward the interests of consumers.¹⁴ Furthermore, it would be impractical to regularise RPM beyond what is necessary due to a number of benefits that result from it. One of RPM's main benefits is that it aids in the problem of free riders. Anyone who uses another person's investment without paying for it is referred to as a free rider. A straightforward illustration of a budget store and a high-end retail establishment will help you understand it.

After learning about the product, comparing it to other products, and getting more information about it at a premium retail outlet, the consumer will go and buy the product from a discount store at a lower price, without any effort being put in by the store owner. The latter will employ trained salespeople and pay for local promotion in an effort to persuade the consumer and effect the sale of the product. This is not only unsustainable for the premium retail store, but it will also discourage retailer collateral services, which might result in less customer awareness and, in the long run, bad consumers breed bad manufacturers. RPM gives retailers a level playing field on which to compete in the market. This is particularly true with e-tailing, which sells branded items for such low costs that it is driving customers away from brick and mortar stores and small wholesalers. While it may be argued that this is the cost of efficiency and progress, the argument must be weighed against the nation's economic reality. Furthermore, RPM is occasionally required to uphold the product's brand image. For a standardised branded product, price variation for the same item in multiple locations is a highly undesirable condition. The argument that RPM discourages competition at the expense of consumers has to be re-examined because it also encourages inter-brand competition amongst competing businesses, which in turn disciplines the manufacturer in determining retail pricing in the marketplace.¹⁵

(B) Negative effects

The fact that RPM limits intra-brand rivalry, which distorts competition at various stages of production or supply and limits the independence of retailers, is one of the key complaints with this system. The possibility that the consumer may not receive actual value for their money and may be compelled to purchase the goods at falsely inflated costs is also a source of concern. This might happen through retailer cartels, when merchants band together to establish high

New-Age Competition Issues, (2019) PL (Comp. L) August 73

¹⁴ Peeyush Agarwal, CCI on Resale Price Maintenance, (2016) PL (Comp. L) April 71

¹⁵ MM Sharma, Do Online Markets Effect Competition?, Mondaq, 14 November 2014. Accessed Through: <https://www.mondaq.com/india/trade-regulation--practices/353986/do-online-markets-effect-competition>.

pricing for the goods and persuade the manufacturer to uphold the RPM agreement and prevent opportunistic undercutting. It could also be one of the ways a dominant company uses its market dominance to keep the product's pricing at monopoly levels.

It should be noted that many of RPM's unfavourable impacts depend on other outside variables, particularly the market strength that firm has. It has been correctly noted that an organisation can only impact market competitiveness by imposing RPM if it possesses some kind of market strength or a dominating position. For this reason, a local TV maker entering into an RPM arrangement with a shop won't have the same negative effects on market competitiveness as Samsung engaging into comparable agreements will. Similar to how a cartel at the state or national level will have considerably less impact than one of small shops.

IV. RPM ACROSS JURISDICTIONS

Around the world, many norms have been adopted to address the practise of resale price maintenance. They are either unlawful per se (without considering how they can influence market competition or the intents of the parties), illegal under the rule of reason (if it can be demonstrated that their actions have a negative impact on competition), or illegal when abuse can be demonstrated.

The US Supreme Court's 2007 decision in the *Leegin* case¹⁶, which reversed the *Miles* case¹⁷ and abandoned the per se rule for regulating RPM agreements in favour of the rule of reason, marked a significant shift in US legal doctrine governing how courts handle RPM agreements. RPM agreements, on the other hand, are viewed as "hardcore restrictions" in the EU.¹⁸ RPM inclusion in contracts raises suspicions that it limits competition and is unlikely to satisfy the requirements of Article 101(3) of the TFEU (Treaty on the Functioning of the European Union). However, there is evidence that the trend toward RPM agreements is easing globally; even EU courts let businesses to use the efficiency defence under Article 101(3) in some circumstances.

V. MAP: A LESS RESTRICTIVE ALTERNATIVE

RPM should not be entirely abandoned since doing so would have the undesirable effect of reducing market competitiveness and raising prices for consumers. Online merchants, which benefit from minimal operating costs, will easily match and undercut offline stores' pricing because of a lesser incentive. RPM can be replaced with Minimum Advertised Price (MAP) regulation, which would achieve the stated efficiency gains of RPM and greatly limit its anti-

¹⁶ *Leegin Creative Leather Products v. PSKS Inc*, 127 SC 2705 (2007).

¹⁷ *Dr Miles Medical Co. v. John D. Park*, 220 US 373 (1911).

¹⁸ EU Guidelines on Vertical Restraints, Brussels, SEC (2010) 411

competitive implications.¹⁹

The key distinction between the two is that MAP won't prevent the merchant from providing a price that could be less than the advertised price. The retailer will continue to have the freedom to choose the price at which he wants to provide the items to his clients. The price at which the product is listed online will be the sole limitation. The anti-competitive effects that an RPM policy brings about may be completely countered by MAP policies thanks to their true price flexible structure.

Additionally, the brand value of the manufacturer's goods may be relied upon. Low pricing and steep reductions frequently have a negative effect on the brand value of goods, especially those that target a particular market. MAP regulations would make sure that only the manufacturer-set high discounts would be advertised to customers. The store has the discretion to set the final price if a customer decides to buy the goods in spite of such marketing. Once the customer has added the item to their virtual shopping cart, or after applying promotional coupons, the total price may be shown.

If we did study of the divergent viewpoints across these countries, it would lead us to the various ways that RPM policies are handled in each of those jurisdictions. In contrast to the EU, which views RPM as a harsh limitation unless efficiency advantages are demonstrably significant, US RPM regulations are evaluated using the "rule of reason" method and reasoning.

VI. CASE STUDY IN GAMING INDUSTRY: ASMODEE AND GAME

According to *GAME Minimum Advertised Pricing Policy*²⁰ the purpose of the MAP policy is to:

“GAME seeks to offer its products as premium products in its industry. To achieve that goal, and to protect the investment of Resellers who provide valuable education, sales assistance, and product support to their customers, GAME has unilaterally adopted this Minimum Advertised Pricing policy (the “MAP Policy”).”

Clause 6.0 of Asmodee North America Hobby Games Toy & Gift Account Retailer Policy,²¹ specifically deals with the Retailer's Conduct. *Clause 6.3 titled ‘Minimum Advertised Price’*

¹⁹ Divyansh Prasad, Resale Price Maintenance in the Online Retailing Era: Exploring an Alternative, India Corp Review, September 19, 2018. Accessed Through: <https://indiacorplaw.in/2018/09/resale-price-maintenance-online-retailing-era-exploring-alternative.html>.

²⁰ GAME Minimum Advertised Pricing Policy, In the United States, Effective October 1, 2018. Accessed Through: http://www.game-group.com/wp-content/uploads/2019/08/GAME_MAPPolicy.pdf

²¹ Asmodee North America Hobby Games Toy & Gift Account Retailer Policy – Effective Date: January 1, 2021. Accessed Through: https://b2b-media-production-ana.s3.amazonaws.com/filer_public/4a/fc/4afc1e16-4d17-468b-b997-0f8e81757cf1/toy_gift_sales_policy_v2_12182020.pdf

reads:

“Retailer will not advertise the price of an ANA Product to be below that ANA Product’s MAP. Retailer will not represent the MSRP of an ANA Product to be anything other than the MSRP communicated by ANA for that given ANA Product”

Hence it can be argued that a minimum advertised pricing approach can be considered a condition precedent, or an important clause in a binding contract which the retailer must abide by and respect. A MAP “Policy” is a unilateral statement that establishes a vendor’s rules. Retailers tacitly agree to the terms of that policy by buying the vendor's products and getting into business with them. A MAP "Agreement" can be argued is a binding contract that calls for the signatures of both parties. Any revisions to a MAP Agreement must be renegotiated and approved by all parties, which is one of its risks. But unlike the general understanding of the terms being a binding contract according to GAME Minimum Advertised Pricing Policy it is specifically stated that:

*“This MAP Policy is disseminated for informational purposes only and should not be considered an agreement between GAME and Reseller(s). This **MAP Policy does not constitute any agreement between GAME and Reseller(s)**, and no contractual or procedural rights are granted to any Reseller by this MAP Policy.”*

This is where the controversy lies because the application and the real nature of these policies are still questionable. While according to GAME Minimum Advertised Pricing Policy it is not considered to be a contract in the common parlance it has every essential to be termed as an important consideration in the agreement.

Price-fixing, is the prerogative of the manufacturers and they all are in the business of profit making which, by the way, is lawful if done properly, has nothing to do with MAPP. The selling price of a product has nothing to do with a Minimum Advertised Pricing Policy. *Clause*

6.3 (i) of Asmodee North America Hobby Games Toy & Gift Account Retailer Policy, states with regards to the selling price that:

“This Section 6.3 and the MAP of ANA Products applies only to the advertised price and does not apply to actual point-of-sale checkout price, which is at the sole discretion of the Retailer.”

Further, *Clause 6.3 (iii) of Asmodee North America Hobby Games Toy & Gift Account Retailer Policy*, reads:

“ANA will consider Retailer’s actual advertised price to be the price at which an ANA Product

is offered by or on behalf of Retailer to an End-User (potential or actual) after applying all discounts, rebates, allowances, coupons, and similar price reductions advertised by or on behalf of Retailer in connection with the ANA Product, excluding certain taxes and shipment charges paid by the customer.”

Hence, although the price advertised to the consumer should not be less than decided by the manufacturer according to the MAP policy, the actual selling price and the discounts at checkout are with the sole discretion of the retailers.²² It is a unilaterally determined statement that tells retailers the price at which a manufacturer’s product(s) may be advertised. Any discounts the shop wants to offer can be used after the product reaches the checkout screen or cash register.

Another issue which gains significance is the enforcement process. While it is confusing whether these policies can tantamount to being a contract, there are policies applied by the manufacturer to make them applicable. According to the GAME Minimum Advertised Pricing Policy violation of the policy or actions intended to circumvent the intent of this MAP Policy should lead to reseller’s ineligibility to receive any additional or future Reseller Rebates, stoppage/termination of further shipments in case of multiple breaches and pursue any legal remedies possible.

Although the terms are quite clear, they generally could turn to be onerous to apply, as the compliance part is quite tough to implement. For instance, amazon is a consumer centric business and, therefore, puts their buyers in the driver’s seat by allowing any and every product listing discount. Their entire algorithm is structured around the idea of vendors (and Amazon itself) competing on price, cent by cent.²³ They offer no help to vendors when it comes to enforcement of their policies. This lack of cooperation extends to refusing to help identify merchants’ contact information, refusing to take down product listings of MAPP violators, sluggishness in removing scam sellers and more. In certain instance, Amazon may agree to delist merchants who have been proven to sell counterfeit goods, or out-of-date vitamins and supplements, but those vendors must provide irrefutable proof of their claims. Getting that proof can be time-consuming and costly.

VII. CONCLUSION

The Indian Competition Act requires that decisions about such measures be made using a rule of reason analysis. However, if the strategy is applied unilaterally and consistently, the

²² Alexander I. Passo, *Internet Minimum Advertising Price Policies: Why Manufacturers Should Be Wary When Implementing*, 48 *Suffolk U. L. REV.* 795 (2015).

²³ Stonemaier Games Blog, *our 6-Month MAPP Experiment and Why It Failed*, 28 January 2019. Accessed Through: <https://stonemaiergames.com/our-6-month-mapp-experiment-and-why-it-failed/>

manufacturer may evade the CCI scanner. Without a doubt, the rise of internet retailing has increased to the detriment of conventional brick and mortar stores. MAP rules, as opposed to RPM regulations, can unquestionably be utilised as a solution. However, the implementation of MAP rules would provide unique issues and challenges for the CCI.
