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Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

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Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and

learning.

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DELHI VYAPAR MAHASANGH V. FLIPKART **INTERNET PVT.LIT & ANOTHER (2020)**

AUTHORED BY - AMBIKA KANWAR SISODIYA

Reg. No. 2357108

CO-AUTHOR - SHAREEKA H S

Masters Of Law - LLM In Corporate And Commercial Law

Christ University, Bengaluru, India

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Delhi Vyapar Mahasangh and ... vs -Flipkart-The-Fight-For-Oneplus-

Exclusivity- on 13 January, 2020

COMPETITION COMMISSION OF INDIA

Case No. 40 of 2019

FACTS:

In the case before the Competition Commission of India (Case No. 40 of 2019), Delhi Vyapar Mahasangh (DVM) filed a complaint against Flipkart Internet Private Limited and Amazon Seller Services Private Limited, collectively referred to as "Opposite Parties" (OPs), for alleged violations of the Competition Act, 2002, Here are the key facts and allegations:

Delhi Vyapar Mahasangh (DVM), a society of Micro, Small, and Medium Enterprises (MSME) traders, filed the complaint alleging violations of Section 3(4), Section 3(1), Section 4(2), and Section 4(1) of the Competition Act. DVM's members included MSME traders dealing in smartphones and related accessories who used online marketplaces to sell their products.

Flipkart, based in Bengaluru, operates as an e-commerce portal that enables third-party sellers to offer goods to consumers on its platform. Amazon Seller Services Private Limited, also based in Bengaluru, is the marketplace affiliate of Amazon.com Inc., a multinational technology company. It operates the e-commerce platform Amazon India, which supports third-party sellers, claimed that Flipkart and Amazon had formed vertical agreements with their favoured sellers, resulting in the exclusion of non-preferred traders and sellers from their online marketplaces. Many sellers said they are directly or indirectly affiliated with Flipkart or Amazon.

Allegations under Section 3(4) of the Act:

DVM claimed a violation of Section 3(4) and Section 3(1) of the Act. Allegedly, the vertical agreements between Flipkart and its favoured sellers, as well as Amazon and its favoured sellers, resulted in the exclusion of non-preferred sellers from the online marketplace. They also alleged that these select sellers had affiliations with or controlled by Flipkart or Amazon.

The platforms are accused of influencing prices by providing discounts and inventory to their preferred sellers. They also gathered data on consumer preferences and allegedly used it to their advantage, which was considered anti-competitive under Section 3(1) and Section 3(4) of the Act.

Allegations included:

Deep discounting: Flipkart provided deep discounts to select preferred sellers, adversely affecting non-preferred sellers. Amazon also offered deep discounts through its preferred sellers, which were linked to Amazon. Preferential listing: Both Flipkart and Amazon offered preferential listing to their select sellers, pushing non-preferred sellers down in search results. Exclusive tie-ups and private labels: Both platforms had exclusive tie-ups with smartphone companies, which resulted in exclusivity through discounting and preferential listings, leading to the exclusion of other competitors.

Market Power:

DVM alleged that Flipkart and Amazon, due to substantial funding, could subsidize prices on their platforms, creating high entry barriers for new entrants.

The Informant claimed that the platforms could unilaterally terminate agreements with non-preferred sellers, creating unreasonable vertical restraints.

Allegations under Sections 4(2)(a)(ii), 4(2)(b)(ii), and 4(2)(c):

Both Flipkart and Amazon were alleged to be jointly dominant in the relevant market and were accused of abusing their dominance.

They held significant market shares, which contributed to their dominance.

Their practices restricted services in the market, created high entry barriers due to network effects, and allowed them to terminate agreements with their sellers unilaterally.

Based on these allegations, DVM requested an investigation into the matter, a cease and desist order against Flipkart and Amazon, and the imposition of maximum penalties under Section 27 of the Competition Act.

ISSUES:

The issues raised in the case before the Competition Commission of India are as follows:

Violation of Competition Act: The primary issue is whether Flipkart and Amazon have contravened the provisions of the Competition Act, 2002, particularly Sections 3(4), 3(1), 4(2), and 4(1) of the Act **Vertical Agreements:** The case revolves around the alleged existence of vertical agreements between Flipkart and its preferred sellers and between Amazon and its preferred sellers. These agreements lead to the foreclosure of other non-preferred traders or sellers from these online marketplaces. The critical question is whether these vertical agreements are anti-competitive.

Price Influence: Both Flipkart and Amazon accused of having the ability to influence the prices charged by sellers by providing discounts and inventory to the sellers. It needs to be determined whether these practices violate the Competition Act.

Deep Discounting: The case highlights allegations of deep discounting by Flipkart and Amazon, favouring select preferred sellers over non-preferred sellers. The impact of this practice on competition in the online marketplace is a key issue.

Preferential Listing: Flipkart and Amazon allegedly provided preferential listing to their preferred sellers, pushing down the search results for non-preferred sellers. Whether this preferential treatment harms competition is a central concern.

Exclusive Tie-Ups and Private Labels: The case raises concerns about exclusive tie-ups between the e-commerce platforms and smartphone companies, providing exclusivity through discounting and preferential listings. The consequences of such arrangements on competition are under scrutiny.

Market Power: The case investigates whether Flipkart and Amazon's market power, combined with significant funding, allows them to cross-subsidize and offer pricing below cost. The resulting high entry barriers for new entrants is an important issue.

Vertical Restraints: The ability of Flipkart and Amazon to unilaterally terminate agreements with non-preferred sellers and the resulting unreasonable vertical restraints are been examined.

Dominance and Abuse: Both companies alleged to be jointly dominant in the relevant market. The abuse of this dominance, including predatory pricing and data-based targeting of advertisements, is a central issue.

Competitive Impact: The case questions whether the practices of Flipkart and Amazon have created an inherently anti-competitive model for e-commerce. It raises concerns about the exclusion of other competitors and the impact on the economy.

Investigation and Penalties: The case requests an investigation into the alleged anti-competitive activities of Flipkart and Amazon. It also seeks penalties under Section 27 of the Competition Act if the violations are confirmed.

PROVISION OF LAW:

The provisions of law cited are as follows:

- Section 3(4) Competition Act, 2002
- Section 3(1) Competition Act, 2002
- Section 4(1), 4(2)(a)(ii); 4(2)(b)(ii) and 4(2)(c) Competition Act,2020
- Section 26(1) in the Competition Act, 2002
- Section 27 of the Competition Act, 2002
- Section 65B Indian Evidence Act, 1872

PLAINTIFF ARGUMENTS:

The Plaintiff's arguments in the case are as follows:

Alleged Violations of Section 3(4) of the Competition Act, 2002: The Plaintiff, Delhi Vyapar Mahasangh (DVM), contends that there is a clear violation of Section 3(4) of the Competition

Act, 2002, read with Section 3(1) and Section 4(2) read with Section 4(1) of the Act by Flipkart and Amazon. They claim that these violations relate to various vertical arrangements between the platforms (Flipkart and Amazon) and their preferred sellers, which result in the foreclosure of other non-preferred sellers from the online marketplace. It further alleged that these select sellers have affiliations with or controlled by Flipkart or Amazon.

Anti-Competitive Practices: The Plaintiff asserts that the online marketplaces Flipkart and Amazon have been engaging in anti-competitive practices violating Section 3(1) of the Act. These practices include:

Deep Discounting: Both Flipkart and Amazon alleged to provide deep discounts to their select preferred sellers, creating an unfair advantage that negatively impacts non-preferred sellers. This practice allegedly prevents fair competition in the online marketplace.

Preferential Listing: The Plaintiff claims that these platforms use preferential listing for their assured or fulfilled sellers, which discriminates against non-preferred sellers and affects their visibility and competitiveness in search results.

Exclusive Tie-ups and Private Labels: Both platforms are accused of having exclusive tie-ups with smartphone companies, which provide exclusivity through discounting and preferential listings. According to the Plaintiff, leads to the exclusion of other competitors from the market.

Market Power and Abuse of Dominance: The Plaintiff contends that Flipkart and Amazon have significant market power and are jointly dominant in the relevant market. Their dominance allows them to engage in predatory pricing through their sellers and to restrict the provision of services, particularly for Micro, Small, and Medium Enterprises (MSMEs) and small retailers. They allegedly achieve this by creating a separate "preferential list."

Data and Network Effects: The Plaintiff argues that the platforms, due to their market power, have access to a large data repository. It allows them to target advertisements based on consumer preferences, further marginalizing their competitors who lack such access. These practices create high entry barriers on account of network effects.

Unilateral Termination of Agreements: The Plaintiff claims that Flipkart and Amazon will have the ability to unilaterally terminate their agreements with non-preferred sellers without assigning

any reason. This results in unreasonable vertical restraints, according to the Plaintiff.

Plaintiff alleges that the actions of Flipkart and Amazon collectively create an inherently anti-competitive model for e-commerce, involving deep discounts and preferential treatment to select preferred sellers on their platforms. As a result, the Plaintiff has requested an investigation into the matter and has urged the Competition Commission of India to direct Flipkart and Amazon to cease engaging in anti-competitive activities. The Plaintiff also seeks to impose the maximum penalty under Section 27 of the Competition Act, 2002, on Flipkart and Amazon.

DEFENDANT ARGUMENTS:

The defendant's arguments in the case "Delhi Vyapar Mahasangh vs. Flipkart and Amazon" are not explicitly provided in the text. To give a balanced overview of the case, we should consider potential defenses and counterarguments that Flipkart and Amazon might present.

No Violation of Competition Laws: Flipkart and Amazon could argue that their business practices do not violate the relevant provisions of the Competition Act 2002. They may contend that their arrangements with preferred sellers are lawful and do not constitute anti-competitive behavior.

Consumer Benefits: The defendants might assert that their practices, including providing deep discounts and preferential treatment to certain sellers, ultimately benefit consumers by offering competitive prices and a wide range of products. They may argue that these practices increase consumer choice and promote healthy competition.

Market Entry and Competition: Flipkart and Amazon may claim that they have not created high entry barriers for other sellers or new entrants in the market. They could argue that the online marketplace is open to various sellers, and they do not engage in activities that unfairly limit competition.

No Abuse of Dominance: The defendants may contest the allegations of market dominance and abuse of dominant, arguing that market share alone does not establish abuse of dominance. They may present justifications for their market practices.

Data and Consumer Preferences: Flipkart and Amazon may argue that their use of consumer data is essential for improving customer experience and tailoring services. They might contend that this practice is a common industry standard.

No Unreasonable Vertical Restraints: The defendants could challenge the claim of unreasonable vertical restraints, arguing that sellers voluntarily enter agreements with them and that these arrangements are legitimate business practices.

Economic Impact: Flipkart and Amazon may emphasize the positive impact of e-commerce on the Indian economy, including the growth of small and medium-sized enterprises (SMEs), by providing them with a platform to reach a broader customer base.

It's important to note that these are potential arguments that the defendants might make. Still, the arguments and defenses presented in court would depend on the specific legal strategy adopted by Flipkart and Amazon.

FINDINGS:

In the Delhi Vyapar Mahasangh vs. Flipkart case, the Competition Commission of India addresses allegations of anti-competitive behavior in the e-commerce market, focusing on Flipkart and Amazon. The case is brought forward by Delhi Vyapar Mahasangh, representing MSME traders heavily reliant on online platforms to sell smartphones and related accessories. The primary allegations revolve around vertical arrangements, deep discounting, preferential listing, exclusive tie-ups, and the market power of these e-commerce giants. These platforms are accused of forming exclusive agreements with preferred sellers, leading to the exclusion of non-preferred sellers from their platforms and offering deep discounts to a select few, making it difficult for others to compete—additionally, preferential listings further disadvantage non-preferred sellers. Smartphone manufacturers' exclusive launches on these platforms were also questioned for their potential to exclude competition. The Competition Commission recognizes the interconnected nature of these allegations and, while dismissing the concept of joint dominance, calls for a holistic investigation into how these vertical agreements impact competition. The analysis aims to determine whether these practices contravene Section 3(1) of the Act, read with Section 3(4). This case underscores the pressing competition concerns in the e-commerce sector, where vertical agreements, preferential treatment of sellers, and exclusive product launches can have far-

reaching consequences on both competition and consumers. The investigation will clarify whether regulatory intervention is necessary to address these potential anti-competitive practices.

ANALYSIS:

Allegations of Anti-Competitive Practices: The case revolves around allegations of anti-competitive practices by Flipkart and Amazon. These practices include providing deep discounts to select preferred sellers, preferential listing of products from these sellers, exclusive tie-ups and private labels, and influencing prices. These allegations suggest that these e-commerce giants may have engaged in anti-competitive behavior to the detriment of other sellers.

Market Dominance: The case highlights the market dominance of Flipkart and Amazon. Both companies were accused of holding a significant market share in the relevant market. Market dominance can be a critical factor in competition law, as it can lead to the abuse of market power. In this case, the market dominance of Flipkart and Amazon is alleged to have been used to create entry barriers and to promote their preferred sellers.

Data Utilization: The case mentions that the companies have an extensive repository of data to target advertisements based on consumer preferences. This ability to leverage data to their advantage is seen as a source of competitive advantage and potential anti-competitive behavior. It also highlights the role of data in creating entry barriers.

Impact on Small Retailers: The case emphasizes how the alleged practices impact micro, small, and medium-sized enterprises (MSMEs) and small retailers. These businesses claim to face restrictions and disadvantages in the marketplace, which can have economic and competitive repercussions.

Investigation and Penalties: The Informant has called for an investigation into these practices and has requested that maximum penalties be imposed under Section 27 of the Competition Act, 2002. The case's outcome will depend on the findings of the investigation and whether the allegations are proven to be true.

Overall, this case underscores the complex nature of competition law, especially in the e-commerce sector, where issues of market dominance, data utilization, and their impact on smaller

businesses are significant concerns. The critical analysis would require a detailed review of evidence, legal arguments, and expert opinions to determine whether the alleged anti-competitive practices have occurred and what actions, if any, should be taken in response.

CONCLUSION:

The conclusion of this case, as of the information provided, is that the Competition Commission of India (CCI) has directed an investigation under Section 26(1) of the Competition Act, 2002 into the allegations made by Delhi Vyapar Mahasangh against Flipkart and Amazon. The key findings and allegations in the case include:

The Informant has alleged that Flipkart and Amazon engaged in anti-competitive practices, including deep discounting, preferential listing of products from preferred sellers, exclusive tie-ups and private labels, and influencing prices. Both Flipkart and Amazon are alleged to hold a significant market share in the relevant market. This market dominance is considered a factor contributing to their alleged anti-competitive behavior. The companies are accused of using their large data repositories to target advertisements based on consumer preferences, which can create entry barriers for other competitors. The case highlights the adverse impact of these alleged practices on micro, small, and medium-sized enterprises (MSMEs) and small retailers, limiting their ability to compete in the marketplace. The Informant has requested that an investigation be carried out, and the CCI directs Flipkart and Amazon to cease engaging in anti-competitive activities. They have also called for imposing the maximum penalty under Section 27 of the Competition Act, 2002.

The case's conclusion, however, will depend on the findings of the investigation and the subsequent legal proceedings. The CCI will assess the evidence and arguments presented by both parties and determine whether the allegations of anti-competitive behavior are valid. If the CCI finds merit in the allegations, it may take actions as deemed necessary to address the anti-competitive practices identified.