



## Exclusive Deal: No Big Deal, says CCI

Thought Leadership • June 1, 2015

*E-commerce websites in India can breathe a sigh of relief as the Competition Commission of India (CCI) has declined to order an investigation into the allegedly anti-competitive practice of entering into “exclusive agreements” with manufacturers, frequently adopted by major e-tail players, saying that no prima facie case had been made out against these websites.* **The Complaint** The complaint filed against e-tail majors Flipkart, Amazon, Myntra, Snapdeal and Jabong alleged that the websites’ practice of entering into “exclusive agreements” with product manufacturers was causing an ‘appreciable adverse effect on competition’ (“AAEC”) in the relevant market and was detrimental to consumer interests and hence squarely covered by Section 3(1) and Section 3(4) of the Competition Act, 2002 (the “Act”). One of the examples relied upon by the Complainant is that of Rupa & Co’s agreement with Flipkart which granted the latter the rights to sell Indian author Chetan Bhagat’s latest novel ‘Half Girlfriend’, to the exclusion of other e-commerce websites and brick and mortar sellers. The complainant alleged that such agreements systematically destroy players in the brick and mortar market, and create a product specific monopoly which in turn allows for manipulation of price, production and supply and hence distorts competition. Similar examples in the context of products like mobile phones and apparel were cited against the other websites. The complainant further alleged that by virtue of exclusive rights to deal in a particular product, the websites had 100% market share in the “relevant market” for that product and therefore enjoy a position of dominance. Entering into such exclusive agreements and acting upon them amounted to an abuse of dominance and consequently a violation of Section 4 of the Act. The complainant further alleged that by virtue of exclusive rights to deal in a particular product, the websites had 100% market share in the “relevant market” for that product and therefore enjoy a position of dominance. Entering into such exclusive agreements and acting upon them amounted to an abuse of dominance and consequently a violation of Section 4 of the Act. **The Websites’ Response** The e-commerce websites argued that the relevant product market identified by the complainant was incorrect and that the market for each product individually cannot be taken as the relevant product market for the purpose of ascertaining if AAEC could occur in that market. For example, in the case of books the relevant product market could be determined by genre such as travel books, fiction books, children’s books, etc. Similarly, in the case of phones the relevant product market would have to be that of smartphones and not a specific model of smartphone for which an exclusive agreement had been signed. The websites further contended that online and offline retail do not constitute separate relevant markets as they are merely different channels of distribution which are in fact substitutable. The websites argued that online retail accounts for only 1% of the total retail market in India and as such no AAEC could be felt as a result of the exclusive agreements. The websites also argued that there was in fact no exclusivity in their agreements with manufacturers. If at all there was any exclusivity in the agreements, it was only vis-à-vis other online stores and not in relation to brick and mortar stores. As a consequence the manufacturer is free to sell through physical stores. The websites relied on the fact there is



significant competition within the retail market and even in the e-tailing market and each player consequently has too small a market share for these exclusive agreements to cause AAEC. **The Commission's Analysis and Conclusion** Though the websites denied the existence of exclusive agreements, the Commission proceeded on the assumption that such agreements exist and analysed their potential to cause AAEC on the touchstone of Section 19(3). The CCI found that such exclusive agreements are unlikely to cause barriers to entry as the products in question are themselves subject to competitive constraints since there is no dominance or monopoly in the respective markets for phones, books, cameras, etc. The CCI further noted that existing competitors were not being driven out from the market and with more e-tailers entering the market, competition seems to be growing. Lastly, it noted that there were significant consumer benefits accruing to consumers as a result of e-tailing such as the ability to compare products easily and facilities like door step delivery. The CCI therefore concluded that these exclusive agreements between manufacturers and the websites do not lead to AAEC in the market. On the question of abuse of dominance, the CCI concluded that each individual product cannot be taken as the relevant market and, further, that even if the e-tailing sector was treated as separate relevant product market, none of the named websites could be said to be dominant. As a result the CCI held that no *prima facie* case had been made out to order an investigation into these agreements. **Cause to Celebrate?** While the latest order of the CCI is certainly good news for e-tailers it may be premature to treat this as a stamp of approval for all exclusive agreements. For one, this order can be appealed. Moreover, this order does not signify a free pass for all exclusive deals since the relevant market analysis could differ significantly for different products. Additionally the CCI order does not satisfactorily explain how the latest novel by a bestselling author whose books have a distinctive following of consumers is substitutable with other books available in the market. Even the determination of the relevant geographic market could be viewed differently in future cases. E-tailers have much greater penetration in smaller cities as compared to brick and mortar stores when it comes to certain categories of products. It is therefore not beyond the realm of possibility that a better defined "relevant market" could result in, at the very least, an investigation into the potential impact of such exclusive agreements. In the event that the CCI were to order an investigation into these deals it would be quite possible for e-tailers to demonstrate the efficiency enhancing (and therefore pro-competitive) effects of such exclusive deals. For one, exclusive deals push both buyers and sellers to make relationship-specific investments which would otherwise not have been made. For example, the exclusive launch of Mobile X on online platform Y would encourage Y to train its employees in the handling troubleshooting queries from X's customers. *Authored by Aman Taneja.*

