June 15, 2017

Competition Commission of India imposes a penalty of INR 87 crore on Hyundai Motor India Limited

On 14 June 2017, the Competition Commission of India ("**CCI**") passed an order imposing a penalty of INR 87 crore (approx. USD 13.54 million) on Hyundai Motor India Limited ("**HMIL**") for engaging in the practices of resale price maintenance[1] ("**RPM**") and tying in, in contravention of the provisions of Sections 3(4)(e) and 3(4)(a) read with Section 3(1) of the Competition Act, 2002 ("**Act**").

In the present case, the CCI combined the information filed by authorised dealers of HMIL, Fx Enterprise Solutions India Private Limited and St. Anthony's Cars Private Limited ("**Informants**") against HMIL (which is engaged in the sale and distribution of Hyundai cars and its parts in India), alleging a contravention of Section 3 of the Act. Such contravention was alleged on the grounds that: (i) HMIL had restricted the Informants from acting as dealers of competing brands by virtue of clause 5(iii) of their dealership agreement, which required prior consent of HMIL for investing in any new or existing business which was unrelated to the Hyundai dealership; (ii) HMIL had fixed the maximum retail price of the cars (which included the pre-fixed margin of the dealers) and the maximum discount which could be offered by the dealers through its Discount Control Mechanism ("**DCM**"); and (iii) HMIL tied the purchase of popular cars to the sale of high-end unwanted cars and also, designated certain companies as the preferred suppliers of complementary goods (being CNG kits, lubricants and insurance policies).

The CCI found a *prima facie* case against HMIL and directed the Director General ("**DG**") to cause an investigation specifically for alleged contravention of Section 3 of the Act. On investigation, the DG concluded that HMIL had contravened the provisions of Section 3(4) of the Act on account of the aforesaid facts, except in respect of the allegation of tying in the sale of high end cars with fast moving cars. In addition, the DG also concluded that HMIL, being a dominant entity in the aftermarket for services of its cars, had violated Section 4 (relating to abuse of a dominant position) of the Act.

On merits, particularly with respect to the contravention of the provisions of Section 3(4) of the Act, the CCI's findings are as follows:

1. Exclusive Supply Agreement and Refusal to Deal: The CCI observed that requirement of taking prior consent from HMIL for dealing with competing brands was not a prohibition and hence, did not amount to an exclusive supply agreement under Section 3(4)(b) and/or refusal to deal under Section 3(4)(d) of the Act.

2. Resale Price Maintenance: The CCI held that fixing of a maximum retail price and maximum permissible discount which could be given by dealers, effectively amounts to setting a minimum resale price, thereby resulting in RPM. Hence, HMIL's arrangement of setting a minimum resale price and monitoring the same through a penalty mechanism contravened Section 3(4)(e) of the Act, since it stifled both *intra* and *inter* brand competition.

3. Tie-in arrangement:

   (i) CNG kits: The CCI held that cancellation of warranty for use of non-designated CNG kits may be objectively justified and as such did not amount to a contravention of Section 3(4)(a) of the

[1] Explanation (e) to Section 3(4) of the Act defines resale price maintenance to include "*any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.*"

Act. Further, the CCI observed that HMIL may have a legitimate interest in ensuring that alternative brands of CNG kits are not used since ultimately HMIL would have to bear the costs of warranty.

(ii) Lubricants and Oil: HMIL mandated its dealers to purchase engine oil only from its two designated vendors, at the price indicated by HMIL in its circular. In case of non-compliance by the dealers, HMIL threatened to terminate the dealership agreement. The CCI noted that such practice followed by HMIL resulted in price discrimination, without accruing any benefit to the dealers or the consumers, thereby contravening Section 3(4)(a) of the Act.

(iii) Car Insurance Services: The CCI noted that it was a usual business norm to have a tie-up with insurance companies and hence, merely recommending that the dealers suggest designated insurance companies to consumers does not amount to a tie-in arrangement, since it is not mandatory for the consumer to purchase the same.

On the procedural front, placing reliance on the case of *Competition Commission of India v. Steel Authority of India & Ors.*[2], the CCI has reiterated the contours of the DG's powers of investigation. The CCI was of the view that the DG's investigation of contravention of Section 4 of the Act by HMIL was *ultra vires* the scope of investigation as directed by the CCI at the *prima facie* stage (since the DG was specifically directed to investigate only a Section 3 violation) and therefore deserved to be disregarded in entirety.

In terms of penalty, the CCI, after considering factors such as proportionality, absence of supra-normal profits, voluntary introduction of competition law compliance programme in the business by HMIL, and the penalty already imposed in the *Autoparts* case[3], imposed a penalty of INR 87 crore (approx. USD 13.54 million), i.e., 0.3 per cent. of the average turnover of the past three years of HMIL which accrued from the sale of motor vehicles (i.e., the relevant turnover).

Key Takeaway

While the CCI has imposed a penalty on HMIL in relation to certain business practices, interestingly, it has adopted a business friendly view and steered away from the approach in the Autoparts case by making a clear distinction between prudent/standard business practices and anti-competitive conduct. This is demonstrated through the CCI's approval of the consumers' disentitlement to warranties and incentives as a consequence of non-usage of the manufacturer's designated products, thereby aiming to intervene only when necessary. Further, by analysing the effects in the relevant market for each allegation, not only has the CCI followed the principle laid down by the Hon'ble Supreme Court of India in the West Bengal Artists' case[4], but it has also affirmed the evolving undertone that exclusivity is not anti-competitive per se [5] and may often be a fundamental part of doing business. Also, being one of the few cases to examine the issue of RPM, the decision provides valuable insight in as much as it classifies the practice of setting a limit on maximum discount as RPM and demonstrates that any assessment in this regard should necessarily consider intra and inter brand competition as well as the factors stipulated under Section 19(3) of the Act. While the CCI could have used this opportunity to possibly distinguish between price and non-price related vertical restraints, this decision evidences that the CCI does not deem it necessary to treat RPM cases in a different light, and similar to other vertical arrangements, will be tested on the

[2] Civil Appeal No. 7779 of 2010.
[3] *Shamsher Kataria vs. Honda Siel Limited & Ors*., Case No. 03 of 2011.
[4] *Competition Commission of India vs. Coordination Committee of Artists and Technicians of West Bengal Film and Television and Others*, Civil Appeal No. 6691 of 2014. The Supreme Court stressed on the requirement of defining a relevant market for an assessment under Section 3 of the Act and also widened the scope of the analysis to include "*affected markets*", a concept not explicitly provided for under the Act.
[5] *Dr. L.H. Hiranandani Hospital vs. Competition Commission of India & Another*, Appeal No. 19 of 2014.

touchstone of "rule of reason". Pertinently, this is also the first instance where the CCI pursuant to the Excel Crop case[6] has applied the principle of "relevant turnover" in the imposition of penalty.

[6] *Excel Crop Care Limited vs. Competition Commission of India & Another*, Civil Appeal No. 2480 of 2014.