IN RE: M/S K.C. MARKETING VS. OPPO MOBILES MU PRIVATE LIMITED

Case No. 34/2018

Decision date: 08/11/2018

Keywords: vertical restraints, AAEC, abuse of dominant position

Issue: Whether restraining online sale, allocating territories, imposing penalties in the event of market infiltration and mandating a minimum operating price policy would amount to a contravention of Section 3(4) of the Act.

Rule: Sec. 3(4), 3(3)(c), 3(1), 4 of the Competition Act, 2002.

The case arose out of allegations by M/s Karni Communication Private Limited and M/s Karni Telnet Private Limited (collectively "Karni"), who had entered into a distributorship agreement to sell Vivo mobile phones. Karni submitted that Vivo imposed vertical restraints on its distributors in the the various forms of: (i) restricting online sales by distributors; (ii) allocating territories for their dealers; (iii) imposing penalties on distributors in the event of market infiltration; and (iv) mandating a minimum operating price policy ("MOP"), which amounts to minimum resale price maintenance (**'RPM'**). In order to determine whether there was any abuse of dominant position, the CCI first held the relevant market to be the "smartphones in India".

CCI's dismissed the allegations under Section 3(4) of the Act and observed the following. *First,* the CCI observed that Vivo Companies did not appear to command a position which could have enough influencing power to adversely affect competition in India. The CCI did not find any evidence of controlling influence by the parent BBK Group on Vivo. The CCI further observed that Vivo had an independent marketing team and competed in the market for sale and distribution of smartphones in India with other BBK Groups brands, thus causing it to exclude the other subsidiaries of the BBK Group while calculating Vivo's market share.

Second, the CCI held that the restriction on distributors to sell products through online portals, does not directly withhold the supply of Vivo products in the market, and consumers have the option to buy such products through online platforms such as Flipkart, Amazon and Vivo's website. Considering Vivo India did not have rights for online sales, the question of restriction on online sales by Vivo India in the secondary agreement with sub-distributors did not arise. Additionally, the CCI noted that there were no exit barriers in the market and the complainants could opt out of distributorship if the terms were not agreeable. Therefore, this allegation was also dismissed.

Third, the CCI observed that the distributors were not restricted from dealing with other brands either within or outside the allocated territory. In this case, the territory allocation did not appear to cause or was unlikely to cause AAEC in the market for sale and distribution of smart phones in India. The CCI relied on M/s K.C. Marketing v. OPPO Mobiles MU Private Limited to ascertain this. *Fourth,* the CCI noted that there were several players in the market for sale and distribution of smartphones in India and there were sufficient number of distributors/retailers from whom the consumers could purchase Vivo smart phones (online and offline). The imposition of RPM through the MOP Policy did not appear to cause or was unlikely to cause AAEC in the market for sale and distribution of smartphones in India since there was intense inter-brand competition in the said market. Further, it was observed that there were no entry/exit barriers or foreclosure of competition. Accordingly, this allegation was not founded.

CCI also observed that in addition to the allegations under Section 3(4) of the Act, Karni in a subsequent submission to the CCI also alleged that the Vivo Companies were facilitating a cartel at the retailer level under the aegis of the All India Mobile Retailers Association ("AIMRA"), in violation of Section 3(3) of the Act. However, in the absence of any evidence to prove such an allegation and considering that no retailers or AIMRA had been impleaded in the matter, this allegation was also dismissed by CCI.