



PXV LAW PARTNERS

COMPETITION LAW IN THE RETAIL SECTOR

1. INTRODUCTION

1.1 The retail sector is not recognised as an industry by the government even though it is the second-largest employer after agriculture. Lack of recognition as an industry affects the retail sector in the following ways:

- (i) Due to the lack of established lending norms and consequent delay in financing activity, the existing and new players have lesser access to credit, which affects their growth and expansion plans
- (ii) The absence of a single nodal agency leads to chaos, as retailers have to oblige to multiple authorities to get clearances and for regular operations

1.2 Competition is high and is characterised by many factors, including assortment, products, price, quality, service, location, reputation, credit and availability of retail space, etc. New entrants (business houses and international players) are expected to further intensify the competition and so would the foreign players' entry.

2. COMPETITION CONCERNS IN THE SECTOR

2.1 The following are the four dimensions of **horizontal competition** between retailers:

- (i) Pricing;
- (ii) Geographical location;
- (iii) Product selection; and
- (iv) Retailer service.

2.2 Vertical issues: It including vertical restraints, differential discounting, and own-brand competition. The vertical restraints that may exist in the retail sector may include:

- (i) Retail price restrictions: such as resale price maintenance (RPM);
- (ii) Manufacturer non-linear pricing: that is, non-linear manufacturer discount schemes such as franchise fees, quantity discounts, or differential discounts for different retailers;
- (iii) Quantity forcing: requiring retailers to sell minimum quantities of the manufacturer's products;
- (iv) Full-line forcing: requiring retailers to carry the full line of the manufacturer's products;
- (v) Exclusive dealing: requiring the retailer not to carry the products of competing manufacturers;
- (vi) Territorial exclusivity: which protects one retailer from intra-brand competition from other retailers within that territory;
- (vii) Refusal to supply: as a general means of enforcing the compliance of retailers with any kind of requirements set up by manufacturers, or simply as a method of constraining total sale.

3. RELEVANT PROVISIONS IN THE COMPETITION ACT

The competition policy in India is laid out in the Competition Act, 2002 (“**Act**”). The Act aims to prevent practices having an adverse affect on competition and abuse of dominance of enterprises either by entering into anti competitive agreements, or combination The relevant areas of the Act are as follows:

- 3.1 Anti-Competitive Agreements (Section 3)
- 3.2 Abuse of dominance (Section 4)
- 3.3 Combination Regulation (Section 5)

3.1 Anti-competitive Agreements

- (i) Section 3 of the Act deals with the prohibition of agreements, which have an adverse effect on competition. It states that no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.
- (ii) The specific anti-competitive practices of the retail Industry covered under Section 3 of the Act are, exclusive supply agreements, exclusive distribution agreements, refusal to deal and resale price maintenance. The prohibition of cartel agreements (price fixing, output restricting, market sharing or bid rigging) between enterprises or persons is the strongest provision in the Act however the act shall not apply in case such an agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods and provision of services. Having said this it must be noted that cartels may increase efficiency but alongside may also increase prices that may be detrimental to the consumers.

3.2 Abuse of Dominance

The Act does not prohibit the mere possession of a dominant position but only the abuse of such dominance by the way of imposition of unfair or discriminatory conditions of purchase/sale or unfair/ discriminatory pricing. Abuse of dominance may arise in the retail industry in the case of abuse of monopoly status granted by patents. Thus in case of retail, if the companies engage in overpricing of their products or are unreasonable with respect to licensing terms etc then the competition law may be resorted to for redressal.

3.3 Combination (Mergers & Acquisitions)

Section 5 and section 6 of the Act deals with what is denoted by a combination of enterprises and persons, delineating the specific circumstances as per which the acquisition of one or more enterprise by one or more persons.

The Act provides for merger review beyond a certain threshold level which would be defined as the turnover of the group to which the enterprise would belong after the completion of the acquisition or merger. Unlike most other countries merger notification in India is not compulsory and is only voluntary. Moreover since the threshold level for regulation is quite high, the Indian industry may become an easy target for MNCs for acquisition. In case of retail combination can be a common practice since it will help the enterprises to consolidate the market power and achieve monopoly in the market.

4. FDI POLICY IN RETAIL SECTOR

- (i) India has liberalized its single and multi-brand retail industry to permit 100% foreign investment, with regulatory issues and legal structures pertinent to establish operations in this new dynamic market.
- (ii) The impact is likely to be mixed initially as small retailers and middlemen/agents will face increased pressure on their business with the entry of the international retail-chain operators. However, it may work positively for farmers and small-scale manufacturing hubs as they will find large-scale buyers for their products. It may also be beneficial for customers as this will increase one-stop shopping options with access to international brands.
- (iii) Though the central government has allowed FDI in multi-brand retail, the state governments are at liberty to make their own decisions about the implementation of the policy.
- (iv) Though the real effect of FDI in Multi-Brand retail is yet to be tested.

Thank You

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