



COMPETITION COMMISSION OF INDIA

Case No. 61 of 2014

In Re:

Jasper Infotech Private Limited (Snapdeal)
246 Okhla Phase III,
New Delhi

Informant

And

KAFF Appliances (India) Pvt. Ltd. (Kaff)
First Floor, Malibu Arcade,
New Water Reservoir, Malibu Towne,
Sohna Road, Gurugram, Haryana

Opposite Party

CORAM

Mr. Ashok Kumar Gupta
Chairperson

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Appearances

For the Informant

Mr. Gautam Shahi, Advocate
Mr. Pranav Mehra, Sr. Legal Counsel

For the Opposite Party and
its officials, *namely*
Mr. Deepak Anand,
Mrs. Kamlesh Anand and
Ms. Malvika Anand

Mr. Jitender Malik, Head-HR and Admin



Order under Section 26(6) of the Competition Act, 2002

1. The present information was filed by Jasper Infotech Private Limited (hereinafter, the '**Informant**') under Section 19(1)(a) of the Competition Act, 2002 (hereinafter, the '**Act**') against Kaff Appliances (India) Private Limited (hereinafter, the '**Opposite Party**'/ '**OP**') alleging contravention of the provisions of Section 3(4) of the Act.

Brief facts of the case

2. The Informant is stated to be a company that owns and operates the online marketplace website www.snapdeal.com (hereinafter, referred to as '**Snapdeal**'), which provides a medium for buyers and sellers to sell various products. It is stated that Snapdeal provides a platform for third party sellers across the country to connect with customers and cater to their shopping needs with coverage in almost 4000 cities across India. It has a wide assortment of products from thousands of international, national and regional brands across diverse categories like mobile telephones, laptops, cameras, appliances, apparel, watches, home and kitchen, automotive and health.
3. The Opposite Party is stated to be a company engaged in the manufacture and sale of a wide variety of kitchen appliances, under its brand name 'Kaff', which *inter alia* includes electric chimneys, kitchen hobs, induction cookers, air purifiers, dishwashers, refrigerators, microwave, ovens and other apparatus for lighting, heating *etc.*
4. As per the information, the Informant had displayed the OP's products on its online portal 'Sanpdeal' at a discounted price, aggrieved by which the OP displayed a caution notice on its website on 16.04.2014 (hereinafter, the



‘**Caution Notice**’) alleging that the OP’s products sold by the Informant through its website are without its authorization and are counterfeit. Further, the Caution Notice stated that the OP will not honour warranties on its products sold through the Informant’s website and any purchase made from these websites shall be at customers’ own risk.

5. Aggrieved by the said Caution Notice, the Informant served a legal notice dated 29.05.2014 (hereinafter, the ‘**Legal Notice**’) to OP for withdrawal of the said Caution Notice from its website alleging violation of the provisions of the Act. In response, the OP stated that it does not permit any online sale of its products and has not authorized any of its dealers in this regard. Furthermore, the OP stated in its Legal Notice that the Informant neglected to disclose the source of procuring such products and the name of the vendors supplying the alleged counterfeit /defective products on its website.
6. The Informant alleged in the information that the main grievance of the OP was not with respect to the authenticity of the products sold on Snapdeal but the discounted price at which such products were sold by the Informant through its website. To substantiate its claim, the Informant submitted an email dated 04.02.14 (hereinafter, the ‘**E-mail**’), received from a certain Mr. Mohit Seth of OP, which stated that “...*if the MOP is not maintained properly company will not allow you to sell our products either by authorised or unauthorised dealers or distributors. Kindly update your pricing within 24 hrs*”. The Informant submitted that the E-mail clearly revealed that the OP was attempting to impose a price restriction in the form of Minimum Operating Price (‘**MOP**’), on the Informant’s website to make sales at a minimum price and threatened to ban online sales if such prices were not maintained. This, as per the Informant, resulted in a contravention of Section 3(4)(e) of the Act.



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7. The Informant also stated that through this threat of not honouring warranties on products sold on the online markets/ websites, the OP attempted to cut off supplies to distributors who were aiming to sell through online channel. Such a restriction allegedly operated as an absolute ban on any internet sales by e-commerce companies, and amounted to a violation of Section 3(4)(d) of the Act.
8. The Commission, after considering the facts and allegations, took the view that the alleged practice of prescribing a resale price in the form of MOP by the OP on its dealers *prima facie* contravenes the provisions of Section 3(4)(e) read with Section 3(1) of the Act. The DG was thus, directed to carry out an investigation in the matter and submit a report. After seeking due extensions of time, the DG submitted its report on 29.01.2016 (hereinafter, the '**Main Investigation Report**').
9. In the Main Investigation Report, the DG analysed the existence of players and competitive dynamics in the kitchen appliances market, specifically chimneys and built-in hobs (in which the OP is present) as well as the e-commerce sector (in which the Informant operates) in India. Thereafter, the DG undertook assessment of aspects of online marketplace with off-line marketplace to ascertain whether these channels are used interchangeably by the manufacturers as well as customers in sale and purchase of the products. With regard to the chimneys and built-in hobs, the DG observed that in order to cater to the demand of consumers, the dealers adopted a mixed business model. The DG found that the lower prices at online portals are due to discounts offered by the portals on prices quoted by the dealers.
10. The DG defined the relevant market, comprising of relevant product market and relevant geographic market, to assess whether the restraints imposed by OP resulted into any appreciable adverse effect on competition (AAEC), which is a prerequisite for examining vertical restraints under Section 3(4)



read with Section 3(1) of the Act. The DG defined two relevant markets—one for ‘Chimneys in India’ and the other for ‘Hobs in India’. Based on the total sales of these products during 2010-11 to 2014-15 by various players in these markets, the market shares were calculated. The DG then carried out a comparative analysis of market shares of various players and also considered other parameters such as level of existing as well as potential competition, low entry barriers, options available to consumers *etc.*, in the said relevant markets. Based on all these factors, the DG found that the markets are competitive and none of the players held a significant market power to control and/or dictate the market in its favour.

11. The DG further observed that the Informant only provides a platform where products are listed, without any checks and balances as to whether the said products are supplied by an authorized or unauthorized dealer. Thus, the DG found that the restriction on sale of products by OP emanated from its apprehension regarding the unknown/unverified sources, which may be justified in a quality-driven market where brand image and goodwill are important concerns.
12. The DG also observed that the impact of Caution Notice, if any, was also temporary as once it was established that dealers listed on online portal of Informant were dealers of OP and no complaint of counterfeit product from any customer was received, the differences between Informant and the OP were resolved. It was further opined that the E-mail sent by Mr. Mohit Seth to the Informant was not followed by any real action from OP, and products of OP continued to be sold on the portal of the Informant at discounted prices.
13. Further, the DG observed that the relevant markets *i.e.* market for chimneys and hobs in India are very competitive with approximately 30 active players. Faber, a renowned player in the relevant market, was found to be the leader with the highest market share on the basis of turnover in last 5 years (from



2010-11 to 2014-15) followed by the OP. Their respective market shares in the market for chimneys and hobs for 2014-15 was found to be Faber: 26.4% in Chimney and 31.2% in Hob and the OP: 19.7% in Chimney and 25.2% in Hob. Each player in the relevant market was found to be having several dealers in each district and town and most of the dealers were found to be multi-brand dealers. Based on these factors, the DG concluded that the OP did not possess sufficient market power to cause AAEC as provided under Section 19(3) of the Act.

14. With regard to alleged imposition of resale price maintenance (hereinafter, 'RPM'), the DG observed that there are 1422 dealers selling OP's kitchen appliances all over India who are competing with each other for turnover-linked incentives. Discounts are variable in nature and increase as higher level of targets are achieved. The DG found no discrimination between dealers as targets are based on previous year's achievements. Since incentives are variable, the net landing price for each dealer is also different. This enables the dealers to offer different prices to customers for the same product. Moreover, competition among distributors, who fall in the vertical chain between the OP and the dealers, is even stiffer as they are exclusive to OP while the dealers are multi-brand dealers and can purchase products from any distributor. Therefore, sticking to any particular price cannot be a good business strategy for the company as well as dealers.

15. Based on the foregoing, the DG concluded that *firstly*, the OP is not involved in maintaining a resale price and *secondly*, it does not possess sufficient market power to cause AAEC as provided under Section 19(3) of the Act. Accordingly, contravention of the provisions of Section 3(4)(e) read with Section 3(1) of the Act could not be established. Though the DG did not find any contravention by the OP, the DG identified 3 officials, *namely* Mr. Deepak Anand, Mrs. Kamlesh Anand and Ms. Malvika Anand, as



responsible for the management of OP for the purposes of Section 48 of the Act, in the event of Commission finding the OP in contravention.

16. On 23.02.2016, the Commission considered the Main Investigation Report filed by the DG and forwarded the same to the parties, for seeking their comments/objections. A hearing was also scheduled for 12.04.2016. On 23.03.2016, the Informant filed an application seeking cross examination of certain persons, including the officials and some of the dealers/distributors of the Opposite Party. On 13.07.2016, the Commission after hearing both the parties on the aforesaid application, directed the DG to conduct cross-examination of the witnesses highlighted in the application. The DG submitted the Report on Cross-Examination on 31.03.2017 containing cross-examination of all the persons in respect of whom application was made except for one individual, *namely* Mr. Sanjeev Dayal. The said report was forwarded to the parties. Subsequently, on an application moved by the Informant dated 18.04.2017, the Commission allowed the cross-examination of Mr. Sanjeev Dayal, an ex-official of the OP, by the Informant. Accordingly, the cross examination of Mr. Sanjeev Dayal by learned counsel for the Informant, was conducted on 03.07.2017 in the Commission, proceedings of which were forwarded to the parties. The hearing on Main Investigation Report and Report on Cross-Examination took place on 24.08.2017.

17. During the said hearing, the Informant raised multiple objections to the procedural irregularities as well as substantive analysis carried out by the DG. It was submitted that investigation report has failed to consider the effect of 'Caution Notice' which was uploaded by OP on its website, due to which the Informant allegedly incurred heavy losses and sales were adversely affected during the said period. The Informant further alleged that the sample selected by DG in respect of dealers who were examined was not



representative of the population as the DG only selected 10 dealers out of 1422 dealers, that too from the list of dealers/distributors provided by the OP. The Informant objected to such conduct of DG arguing that the list provided by the Informant comprising of 99 dealers of OP which were selling through Informant's e-portal, was neither considered nor enclosed with the Main Investigation Report.

18. The Informant further submitted that during cross-examination, several witnesses acknowledged OP as the market leader, but the DG ignored such submissions during the assessment of market power. Further, the Informant went on to highlight the discrepancies in the statements given by Mr. Mohit Seth in the context of E-mail dated 04.02.2014, sent by him to the Informant, at the time of his deposition during investigation and during cross-examination. It was stated that such discrepancies read in light of the material on record, indicate that such E-mail was sent on the instructions of the OP.
19. The Commission, upon consideration of the objections raised by the Informant, observed that in order to enable a complete assessment of AAEC, examination of dealers in the downstream market and presence of price restriction, if any, imposed by OP needs to be undertaken over a large, representative sample of dealers, including both offline and online dealers. Further, assessment of various distribution channels and share of online and offline sale in the total sales of the chimneys and hobs in India on monthly basis over a period of time needs to be collected and analysed.
20. The Commission further observed that to enquire whether the OP imposed a price restriction on OP, it needs to be ascertained whether OP had instructed Mr. Mohit Seth to send the impugned E-mail dated 04.02.2014. Accordingly, further investigation was directed by the Commission in the matter under Section 26(7) of the Act *vide* its order dated 30.10.2017. In pursuance of the said directions, the DG carried out supplementary investigation and



submitted a report (hereinafter, the ‘**Supplementary Investigation Report**’) on 16.08.2018.

21. For selection of a proper representative sample, the DG considered the list of 1422 distributors and dealers submitted by OP and a list of 99 dealers and distributors provided by the Informant which were registered with OP. To ascertain the presence of minimum RPM, the DG sent probe letters to a total of randomly selected 120 dealers and 25 distributors by giving equal representation to each zone out of the list of 1422 dealers/distributors provided by OP. The replies of 54 dealers and 17 distributors were received out of these distributors/dealers to whom probe letters were sent. Further, the DG sent similar probe letters to 66 distributors/dealers (20 names common to the list provided by OP), randomly selected, from the list of 99 dealers/distributor of OP’s products registered on the Informant’s e-portal. Out of these, 30 dealers/distributors responded.

22. These 211 dealers/distributors were asked *inter-alia* whether they were getting any price or discount prescriptions/instructions from the OP. The said dealers/distributors denied any resale price imposition. They, however, stated that they never sold their products below net landing prices. They further confirmed that no prior approval was required for online selling. Many of these dealers also spoke about the discounts offered by OP/other online portals. It was stated that dealers offer their respective prices to the online retailers, and any extra discounts/ cash-backs offered by the online retailers are funded by the latter only. One of the dealers of the OP, *namely* Mr. Jagjeet Singh Luthra, Proprietor, Luthra Paints stated that though there was a direction from OP to adhere to minimum resale price, the same was not effective due to high degree of competition prevalent in the market.

23. Based on the abovementioned statements, the DG observed that the allegation made by the Informant in its information dated 08.09.2014,



regarding existence of an agreement between the OP and its dealers, by virtue of which OP enforced an RPM was not tenable.

24. With regard to the E-mail dated 04.02.2014 sent by Mr. Mohit Seth, employee of the OP, wherein a warning was given that the OP will not allow sale of its products on the Informant's portal (Snapdeal) if MOP is not maintained, the DG noted that the E-mail was sent by the said employee through his official e-mail ID. As such, he could not have sent such an E-mail without the express/implied authority/consent of OP and that the E-mail was written by him in his official capacity as an employee of the OP during the relevant time. The DG concluded that irrespective of the fact whether the E-mail was sent on the instructions of the OP or its General Manager, Mr. Sanjeev Dayal, the OP was very much aware about the contents of the E-mail.

25. To ascertain the impact of the Caution Notice, the DG examined downstream competition and importance of various distribution channels, *i.e.* online and offline, in the overall sale of the relevant product. In respect of dealers, engaged in sale of the relevant product, it was revealed that majority of dealers were opting for the offline mode. Based on this, the DG concluded that despite e-tailing having double digit growth in India, in case of relevant product, its share in comparison to offline sales was relatively low. However, in absolute terms (based on monthly sales data), the DG was of the view that sale of chimneys and hobs increased manifold through the Informant's online portal, despite the issuance of the Caution Notice. Thus, the DG was of the view that there was hardly any impact and even if there was any impact, it was temporary, as the sale of relevant product on Informant's portal had multiplied in just two years post issuance of Caution Notice.

26. In addition, the DG also examined whether any practice of imposing price restrictions existed/prevailed in the kitchen appliances industry. The DG



probed 09 competitors of OP and their dealers/distributors and sought clarifications. However, most of the competitors and/or their dealers/distributors denied imposition of any strict or hard core price restrictions by them.

27. With regard to AAEC, the DG reiterated the observations made in the Main Investigation Report that there existed strong inter-brand competition due to presence of large number of competing companies selling the relevant product. Based on the data collected during the investigation, it was also established that there was easy entry for new comers as ‘every second year new players were entering in a growing market’, and there was no instance found wherein a competitor had exited the market because of practices adopted by OP. Further, the Caution Notice did not have any actual impact and the E-mail dated 04.02.2014 was not followed by any real action by the OP. The DG further opined that the market was in a dynamic state and prone to disruptions due to innovation which made it impossible for any e-commerce company, to be dissuaded because of the conduct/practices of the OP, from entering the market.

28. On the basis of all these factors, the DG concluded that the alleged conduct of OP did not lead to any AAEC under Section 19(3) of the Act.

29. Furthermore, the DG also opined that since the Informant was only a market platform and not a purchaser of the product, as per the definition under Section 3(4)(e) of the Act, RPM could not be imposed by the OP on the Informant and as such the present information filed by the Informant is questionable.

30. On 11.10.2018, the Commission considered the Supplementary Investigation Report and decided to forward a copy of the same to the Informant as well as the Opposite Party, including to its officials identified by the DG in the Main



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Investigation Report dated 01.02.2016, through electronic mode. The Commission directed the Informant to file its suggestions/objections to the supplementary Investigation Report, if any, latest by 16.11.2018 with a copy to the Opposite Party, in advance. The Opposite Party, including its officials referred to above, were also directed to file their suggestions/objections to the supplementary Investigation Report and replies to the submissions made by the Informant, if any, latest by 22.11.2018, and provide a copy in advance to the Informant. The parties were further directed to appear for an oral hearing on the Investigation Reports, including the supplementary Investigation Report, on 29.11.2018.

31. On 29.11.2018, the Informant as well as the Opposite Party appeared before the Commission through their representatives. The learned counsel for the Informant submitted that the Informant has no further submissions to make and the Commission may proceed in the matter on its own. The representative of the Opposite Party also submitted that they do not wish to make any further submissions. Accordingly, the Commission decided to proceed with the matter based on the evidence collected by the DG and material available on record.

32. On a consideration of the aforesaid material, the main issue that arises for determination by the Commission in the present matter is whether the allegation of the Informant against the Opposite Party with regard to imposition of resale price maintenance, in contravention of the provisions of Section 3(4)(e) read with Section 3(1) of the Act, is established on the basis of the facts and evidence on record.

33. Before delving into the main issue, the Commission finds it utmost relevant to discuss a preliminary, yet a larger, issue of the applicability of Section 3(4) of the Act to the facts of the present case, given that the DG has opined that since the Informant is only a market platform, it does not form part of the



vertical chain and hence, cannot be subjected to a vertical restraint by the OP under Section 3(4)(e) of the Act.

34. The DG has primarily made the said observation based on three pronged arguments, *firstly*, the Informant/e-retailer/online portal does not perform any material function which could make it a part of vertical/supply chain; *secondly*, the Informant not being the buyer/purchaser of goods in the distribution chain, the basic ingredient for sustaining an allegation of RPM (*i.e.* presence of purchaser and seller) is not fulfilled; and *thirdly*, the Informant does not have any influence on price on its online platform.
35. The Commission notes that these aspects need to be addressed at the outset to resolve the preliminary issue under scrutiny. The DG has opined that the Informant/e-tailer does not perform any material function which could make it a part of vertical/supply chain. The Commission finds this observation inconsistent with the working of the technology driven markets. The online portals or platforms often provide various value added services *e.g.* logistics (inbound as well as outbound), warehousing, marketing and sales including provision of assistance to consumers in sorting and buying products, return/replacement services, tracking services for orders placed *etc.* Such e-portals perform series of activities designed to meet business needs as well as consumer satisfaction by adding value or cost in each phase of the process. Capitalising on the advantages of internet penetration, these online market platforms synthesize the advantages of traditional commerce and e-commerce and reduce their administrative and transaction costs. In many ways these online portals act as a parallel distribution chain along with the off-line distribution channels. The customer/buyer also, when purchasing the products online, perceives the online portal as a valuable link between such customer and the seller.



36. Another value adding characteristic of online platforms is their capability to match a very large number of users in a market in order to facilitate an exchange. E-commerce platforms help users of different sides of the market (sellers, buyers, social media users, advertisers, software developers, *etc.*) to find what they are looking for. The quantum of users attracted to the platform depends upon how efficient the platform is in matching users with their desired product/service. Online platforms do not only provide a (virtual) location for market exchanges, contrary to conventional (offline) markets they also actively collect information on suppliers' products and consumers' preferences and use matching algorithms to match these in an efficient way in order to reduce search costs. Thus, the observation of the DG that the Informant/online portal does not perform any function which could make it a part of vertical/supply chain seems illusory in context of a technology driven markets, as opposed to traditional markets.

37. Further, the inference of the DG, that the Informant not being the buyer/purchaser of goods in the distribution chain, the basic ingredient for sustaining allegation of RPM (*i.e.* presence of purchaser and seller) is not fulfilled, is not tenable. In the traditional brick and mortar business (offline), the stages/players forming part of the vertical chain are predefined. However, considering the entry of digital markets and online platforms, the same customary structure may not be present in every situation, especially in constantly evolving markets. Any entity/firm contributing value to product/service will be deemed to be a part of the value chain. The ownership of such product to pass through every stage/entity cannot be considered as a prerequisite in the value addition process. With the advancement in technology and upsurge in digital markets, an online platform may help an individual residing in a particular area to source a product/machine/equipment that is being manufactured/ sold/ available in any other far-off/remote location. The product is sent out by the vendor to



the end-consumer directly but it is made possible through the online platform, and in case of any issue/requirement/discrepancy, the end-consumer/customer can approach the online platform for redressal. Thus, though the online platform does not take possession of the goods in the literal sense of the word, it may not be appropriate to say that it does not form part of the value chain through which ownership is transferred from the seller to the buyer.

38. The argument regarding absence of seller-purchaser relationship in case of online platforms is premised on 'form' rather than 'substance'. The definition of RPM under the Act is inclusive and the basic ingredients are 'resale' and seller's determination of the resale price. RPM essentially refers to agreements among enterprises at different levels in a distribution channel, wherein the resale price at which a product or service must be sold by a distributor is pre-determined by the seller in some manner. There can be no two views on the 'resale' of the products on the platform and the platform's direct and active role in such resale and as elucidated in the ensuing para, in determination of the price of such resale. Thus, regardless of the identity of the direct purchaser, the resale of the product is effected through the platform and thus, the essential ingredients of resale price maintenance are fulfilled. Moreover, owing to the nature of the high-tech digital markets, the principles of transit/movement of products in traditional market cannot be applied *stricto sensu* to such digital markets.

39. Lastly, the observation of the DG that the Informant does not have any influence on price on its online platform may not be appropriate. It is evident from the responses obtained from various dealers during investigation that though the dealers/distributors offer a particular price to the online portals, it is the prerogative of such online portal (Informant is the present case) to decide the incentive/discount it wishes to offer to its customer on the relevant



product. Even if the Informant decides to list a particular product at a price lower than the agreed price or provides cashback to the buyer(s), the dealer/manufacturer cannot legally interfere in such matters. Thus, to say that the Informant/online portals have no role or influence over the prices may not be correct.

40. Section 3(4) of the Competition Act, 2002 deals with agreements amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services. For the sake of convenience, the Section is reproduced herein below:

*“(4) Any agreement amongst enterprises or persons at different stages or levels of the **production chain** in different markets, in respect of production, supply, **distribution**, storage, sale or price of, or trade in goods or provision of services, including—
[...]*

(emphasis supplied)

41. Upon a bare perusal of the provisions and the material available on record, it is evident that the Informant’s online portal, *i.e.* Snapdeal, is offering an online distribution service to various distributors/dealers. It may also be relevant to highlight that the Commission has earlier held, though not in a case involving similar issues, that online retail portals are a part of distribution channel. The Commission, in *Deepak Verma v. Clues Network* (Case No. 34/2016, order dated 26.07.2016), while determining the dominance of an online retail portal, held that online and offline are not two different relevant markets, but are two different channels of distribution to the same relevant market. Similarly, in the case of *Confederation of Real Estate Brokers Association of India v. Magicbricks.com & Ors.*(Case No. 23/2016, order dated 03.05.2016), while determining the relevant market, the



Commission held that online and offline services of brokers cannot be distinguished. Both are alternative channels of delivering the same service.

42. The Commission, therefore, observes that in the instant case also, when the distributors/ dealers are using the services of Informant while selling the products of the OP, it *ipso facto* becomes a part of distribution/vertical chain and thus, it would be incorrect to state that the Informant is only a market place facilitating interaction of the buyers and sellers online. It is not necessary in such evolving markets that any entrant in the downstream level of the value chain should join at the behest of the manufacturer or with its explicit concurrence. What may be relevant is to examine as to whether such player provides any active service to the end customer in availing the product or service involved, which given the facts of the present case can be answered in affirmative.
43. The aforesaid observations of the Commission are further supplemented by the international jurisprudence on this aspect. Almost all the evolved competition authorities have considered restraints imposed by or on the online platforms as vertical restraints *e.g.* cases pertaining to Most Favored Nation (MFN) clauses, Across Price Parity Agreements (APPA), non-price restrictive clauses *etc.*
44. In view of foregoing reasons, the Commission is not in agreement with the DG's observation and is of the view that the agreements between manufacturers/distributors and e-commerce players can be looked into under Section 3(4) read with Section 3(1) of the Act.
45. Having dealt with the aforesaid preliminary issue, the Commission will analyse the main issue *i.e.* whether the allegation of the Informant against the Opposite Party with regard to imposition of an RPM, in contravention of the



provisions of Section 3(4)(e) of the Act, is established on the basis of facts and evidence on record.

46. An RPM agreement is recognized under Section 3(4)(e) of the Act. It is a vertical imposition whereby a manufacturer/seller dictates the price at which the product can be resold by the downstream distributor/wholesaler/retailer (hereinafter, the 'reseller'). An RPM can be of various forms, but the Act generally proscribes a price prescription/agreement when the agreement imposes a restriction on a resale at a price below the price stipulated in the agreement between manufacturer and downstream distributor. The purpose of such stipulation is to set a floor price so as to avoid price competition between retailers beyond a certain price. The economic objective of infusing competition at all levels is to ensure efficiency that leads to consumer welfare in the form of reduced prices and wider set of choices.

47. The competition at the retailer's level can be divided into inter-brand and intra-brand price competition. When the dealers are reselling (competing) different brand, they are said to be competing inter-brand. However, when the dealers are selling the same brand, they are said to be competing intra-brand. Such competition can be on price or non-price factors. Resale price maintenance agreements perceptibly destroy the intra-brand price competition because the manufacturer fixes the minimum price or below which his product cannot be resold. Such apprehension of the perceived ability of minimum RPM to eliminate intra-brand price competition has instigated the competition authorities in different jurisdictions to prohibit and penalise such conduct as it may not result in consumer welfare. In some jurisdictions, owing to its pernicious effects, RPM is also treated as a hard-core restriction.

48. In India, however, the alleged RPM is assessed under rule of reason analysis *i.e.* only if such conduct/agreement/understanding causes or is likely to cause



an AAEC, that the same falls foul of Section 3(4)(e) read with Section 3(1) of the Act. This is in sync with the existing economic literature which suggests that vertical agreements deserve a rule of reason analysis, simply owing to the fact that the vertical agreements are concluded between entities operating at different levels in the production chain who generally produce complementary products or services and are not as such placed in a competitive relationship. To safeguard their respective interests, such entities necessarily enter into number of commercial agreements, many of which may not necessarily be anti-competitive and rather may be efficiency enhancing with sound economic justifications. Since these parties are not producing substitutes as such and thus not competing as such, their incentives are generally aligned to that of end consumer. In such a scenario, it becomes imperative that the competition authorities which are mandated to proscribe anti-competitive agreements, do not end up restraining pro-competitive commercial agreements/arrangements.

49. Further, many a time, the vertical agreement safeguards the interest of the end-consumer. Though restraints like minimum RPM may affect price competition amongst retailers/distributors, in situations where intra-brand price competition among retailers/distributors is likely to create an incentive to free ride in the short run and under-provisioning or complete eradication of such useful services in the long run, imposition of such vertical restraint may not only be desirable from the manufacturer-retailers' point of view but also from the point of view of consumers. However, the Commission is cognizant that the vertical agreements (including minimum RPM) may lead to anti-competitive outcomes—when they have a horizontal dimension to it *i.e.* when the restraint, though imposed vertically, has the ability to restrict competition at the horizontal level in either of the markets—upstream level (inter-brand) or downstream level (intra-brand).



50. The aforesaid literature suggests that the competition authority needs to strike a balance while analysing the alleged contraventions pertaining to vertical agreements/restraints to ensure optimum intervention.

51. In light of the aforesaid, the Commission has analysed the issue under consideration. As stated earlier, an agreement falling under Section 3(4) of the Act requires to be analysed under the rule of reason to gauge whether such an agreement has the potential to cause an AAEC and thus can be held as an anti-competitive agreement under Section 3(1) of the Act. Thus, to establish a contravention under Section 3(4) read with Section 3(1) of the Act, two conditions need to be fulfilled – *firstly*, that the agreement/arrangement/understanding ought to exist and, *secondly*, that such agreement/arrangement/understanding has caused or has the potential to cause AAEC. Section 19(3) lays down the analytical framework to examine whether an agreement/arrangement/understanding has or is likely to have an AAEC. Only those agreements/arrangements/understanding whose net effect is anti-competitive *i.e.* anti-competitive effects exceed the pro-competitive effects, are proscribed by the Act.

52. The Informant alleged the imposition of a vertical restraint on its online portal by the OP while dealing with the latter's chimneys and hobs. The Commission, at the *prima facie* stage, directed investigation into a larger issue as to whether the OP was imposing a price restriction in the form of minimum RPM on its dealers and also Informant.

53. As a matter of record, neither the Main Investigation Report nor the Supplementary Investigation Report revealed the existence of any such practice *vis-a-vis* the dealers of the OP. While carrying out the supplementary investigation, the DG surveyed 211 dealers/distributors of the OP. However, the said survey did not bring out the existence of any agreement/understanding/arrangement between the OP and its dealers. On



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being asked whether they were getting any price or discount prescriptions/instructions from the OP, the dealers/distributors denied any such imposition and categorically stated that they never sold their products below net landing prices and there was no prior approval required for online selling. The Commission notes that though one of the dealers, *namely* Shri Jagjeet Singh Luthra, Proprietor, Luthra Paints stated that there was a direction from OP to adhere to minimum price, the same may not be sufficient to lead to an inference of AAEC given that the other dealers have unequivocally denied the presence of any such price restraint.

54. Many of the dealers also spoke about the discounts offered by Snapdeal/online portals. The survey further revealed that the dealers used to offer their respective prices for products displayed on the online portal of the Informant or other online portals, and any extra discount/cash-back was funded by those online retailers themselves.

55. Thus, *vis-à-vis* the dealers, the DG could not find any evidence of an imposition of a minimum RPM by the OP. In the absence of any evidence to the contrary, the Commission agrees with this finding of the DG.

56. Specifically with regard to the price prescription/imposition *vis-a-vis* the Informant, the Commission notes that the information highlighted 3 pieces of evidence at the *prima facie* stage, the E-mail dated 04.02.2014, the Caution Notice dated 16.04.2014 and the Legal Notice dated 18.04.2014. The OP has not denied the issuance of the Caution Notice and the Legal Notice. Rather, the OP has sought to justify them. The OP has claimed that the Caution Notice was issued to warn the general public about the selling of counterfeit products on the online portals. Similarly, it has been alleged that the Legal Notice was issued to give an opportunity to the Informant to remove the products of OP from its online portal as the same were counterfeit and were procured from unauthorised/unverified sources.



57. With regard to the E-mail dated 04.02.2014 sent by Mr. Mohit Seth, wherein a warning was given that the company (the OP) will not allow sale of products on Informant's portal if MOP is not maintained, the OP sought to argue that the said E-mail was sent by Mr. Mohit Seth in his personal capacity. In the Supplementary Investigation Report, the DG, however, noted that the E-mail was written by Mr. Mohit Seth in his official capacity and as an employee of the OP during the relevant time. The Commission agrees with the DG in this regard. The discrepancy in the stands taken by Mr. Mohit Seth have already been dealt by the Commission in its order dated 30.10.2017 passed under Section 26(7) of the Act. In his original deposition before the DG, Mr. Mohit Seth stated that he had forwarded the E-mail dated 04.02.2014 to the Informant under the direction of the top level management. However, during his cross-examination by the Informant, he (then a re-employed functionary of the OP) submitted that he sent the said E-mail to the Informant under the direct supervision of Mr. Sanjeev Dayal, the then General Manager (Sales and Marketing) of the Opposite Party, who had since left the services of the company.

58. Evidently, the E-mail was written by Mr. Mohit Seth using his official e-mail ID. There does not seem to be any motive for an employee to send such an E-mail, other than protecting the interest of his employer *i.e.* OP. Even if such E-mail was written without the express consent of the OP, the OP cannot deny its responsibility for the acts done by its employees as long as the act (writing E-mail in the present case) was done within the scope of employment. Even otherwise, the material on record shows the displeasure on the part of the OP against the Informant, as can be seen from the Caution Notice issued by the OP on its website and the Legal Notice sent by the OP to the Informant thereafter. These, to a great extent, explain the motivation behind the E-mail sent by Mr. Mohit Seth on behalf of OP.



59. The Commission observes that this E-mail was sent 2 months prior to the 'Caution Notice' dated 16.04.2014, which was displayed by the OP on its website. Through the said caution notice, the OP was alerting the customers of kitchen appliances to not purchase the OP's products from Informant's portal as the e-commerce platforms like Snapdeal of the Informant and 'NAAPTOL' were stated to be selling various counterfeit products of OP. This Caution Notice was not denied by the OP. Further, the OP sent a Legal Notice to the Informant, threatening the Informant to cease and desist from displaying the OP's products on its portal on the pretext that the same amounts to misusing the trademark of the OP. Thus, this E-mail appears to be a part of the overall reactionary approach of the OP towards the sale of its products on Informant's online portal. At this juncture, it needs a mention that while the E-mail is more focussed on the price on which the products were being displayed on the Informant's online portal, the tenor/content of the Caution Notice and Legal Notice demonstrates the apprehension of the OP regarding the source of procuring OP's products by the Informant.

60. During the hearing held on 24.08.2017, the OP had vehemently argued that the Caution Notice was a knee jerk reaction to the excessively low priced products being displayed on Informant's online portal which raised a genuine apprehension in the mind of the OP, of such products being counterfeit. It was further argued that though the Caution Notice threatened that warranties on online purchased products would not be respected, there has not been a single instance where the warranty (when claimed) was not honoured. The OP thus, stated that the Caution Notice and Legal Notice were sincere attempts by OP to safeguard the reputation and goodwill of its products, which have been developed over the years.

61. It was also argued by the OP that it has made considerable investment on creating its dealership network. Its dealers set-up the showroom, spend



money on display and pre-sale services and thus, they expect to be incentivised for making such investments. Allowing discounting strategy of the online portal has the potential of adversely affecting the dealership network of the OP, besides giving encouragement of selling spurious products.

62. The OP concluded by stating that it never hindered the sale of its products on online portals and the E-mail, Caution Notice and Legal Notice were not followed by any concrete action on its part and hence, there was no impact on the online sale of OP's products, much less on the online portal of the Informant. It was further stated that the products of OP are being sold widely on online portals, including the online portal of the Informant.

63. In view of the foregoing, the Commission notes that though the existence of the E-mail, Caution Notice and Legal Notice are established in the present case, the justifications offered by the OP in the context of the Caution Notice and Legal Notice cannot be completely disregarded. A right of the manufacturer to choose the most efficient distribution channel ought not to be interfered with, unless the said choice leads to anti-competitive effects. The Commission finds merit in the justifications offered by the OP. Further, the Commission observes that the evidence on record does not demonstrate that the conduct/practice of the OP led to any AAEC.

64. The data collected by the DG does not show any decrease in the volume of sales after the issuance of Caution Notice which was issued two months after the impugned E-mail, and on the contrary there has been an increase, as shown in the subsequent paragraphs.

65. The data of sale of relevant product on Snapdeal made by the 99 dealers/distributors of OP during 2011 to 2016 is provided hereunder:



Table 1: Sale of OP's products through Informant's portal

S.No.	Sale (in numbers) between 01.03.2011 to 16.04.2014	Sales (in Rupees lakhs) between 01.03.2011 to 16.04.2014	Sale (in numbers) between 17.04.2014 to 31.03.2016	Sales (in Rupees) between 17.04.2014 to 31.03.2016
Chimney	781	47.68	2998	2.31 crores
Hob	39	5.56	66	8.50 lakhs

66. It is apparent from the aforesaid table that the sale of OP's products on the Informant's portal, namely chimneys and hobs, increased (quadrupled in case of chimneys and doubled in case of hobs). Further, this number goes up if the sales of all dealers/distributors selling products of OP or other competing manufacturers on Informant's portal is taken into account.

Table 2: Sale of chimneys, hobs and 'gas stoves through Informant's portal

S.No.	Sale (in numbers) between 01.03.2011 to 16.04.2014	Sales (in Rupees crores) between 01.03.2011 to 16.04.2014	Sale (in numbers) between 17.04.2014 to 31.03.2016	Sales (in Rupees crores) between 17.04.2014 to 31.03.2016
Chimney	3133	2.77	27529	25.33
Hob & Gas stoves	8913	3.74	175189	60.09



67. As stated earlier, the vertical agreements/arrangements under Section 3(4) of the Act are considered anti-competitive only when AAEC is established. The aforesaid figures clearly indicate that the sales of chimneys and hobs of the OP as well as that of the other competing manufacturers on Informant's portal multiplied in the two years post issuance of the Caution Notice and thus, there was no deterrent effect of such notice. Thus, the data on record shows that the adverse impact of Caution Notice, if any, was not sufficient enough to meet the criteria laid down under the Act *i.e.* AAEC. The DG also found that the impugned E-mail dated 04.02.2014, which formed the gravamen of the present matter, was not followed by any real action from OP, and products of OP continued to be sold on portal of Informant at discounted prices.

68. The findings of the DG have not been challenged by the Informant as such. The Informant, in response to the Main Investigation Report, raised objections to the procedural irregularities as well as substantive analysis carried out by the DG. Primarily, the Informant was aggrieved with the sample selected by the DG in respect of dealers who were examined as the same was allegedly not representative of the population. All those objections were dealt with in the Supplementary Investigation Report of the DG which was forwarded to the Informant. As a matter of record, on receipt of the Supplementary Investigation Report, the Informant submitted before the Commission that it has no further submissions/objections to make in the matter.

69. Based on the material available on record, the Commission is of the view that in the present case there was no AAEC. Further, the presence of a large number of dealers who were competing with each other suggests a fair degree of intra-brand competition. The data collected by the DG showed that there



were 1422 dealers selling OP's kitchen appliances all over India during the relevant time period who were found to be competing for the turnover linked incentives. Discounts were variable in nature and linked to the target being achieved. Since incentives were variable, the net landing price for each dealer was also different. This enabled different dealers to offer different prices to customers for the same product. Moreover, competition among distributors was found to be even stiffer as they were exclusively dealing with the OP's products.

70. Thus, the Commission is of the view that vis-à-vis the dealers the evidence did not reveal the existence of any price restriction or minimum RPM. As regards the Informant, though the existence of Caution Notice, Legal Notice and Email has been established, it has not been conclusively established that they were used as instruments for imposing a minimum RPM on the Informant. Further, since vertical agreements falling under Section 3(4) read with Section 3(1) are subjected to rule of reason analysis, even if there exists a price restriction by the OP, AAEC needs to be established. As highlighted above, the actual impact of the conduct of OP did not demonstrate any adverse effect on competition. Furthermore, the existence of intra-brand competition among dealers/distributors negate the anti-competitive impact of the OP's alleged conduct. Thus, no contravention of the provisions of Section 3(4)(e) of the Act is found against the OP, in the facts and circumstances of the present case.

71. For the foregoing reasons, the Commission is of the view that the evidence on record does not establish a case of contravention against the OP within the provisions of Section 3(4)(e) read with Section 3(1) of the Act. Hence, the case is hereby directed to be closed.



72. The Secretary is directed to inform the parties accordingly.

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(Augustine Peter)
Member

Sd/-
(U. C. Nahta)
Member

New Delhi
Date: 15/01/2019