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Jindal Initiative on Research in IP and Competition

5TH ANNUAL JINDAL MOOT COURT COMPETITION, 2022

JINDAL INITIATIVE ON RESEARCH IN IP AND COMPETITION

IN ASSOCIATION WITH

JINDAL GLOBAL LAW SCHOOL, O.P. JINDAL GLOBAL
UNIVERSITY

PROPOSITION

Dates:

11th to 13th March, 2022

1. Arishem is a Republic in South Asia, whose laws are *pari materia* with the laws of India, with the limited exceptions laid out in this Proposition. Arishem enacted its competition law, the Arishem Competition Act ("*Competition Act*"), in 2002. However, the Competition Act was brought into force in a phased manner, with the last provisions coming into force only in June 2011.
2. The **Competition Commission of Arishem** ("*CCA*") treats decisions of the **Competition Commission of India** as well as other authorities as having high persuasive value. The CCA also regards the competition regulators of the European Union and the United States of America highly and relies on established precedent from these jurisdictions as well. The CCA has been established under the aegis of the Competition Act, and is governed by it, as well as by associated regulations, notifications, and amendments published in the Gazette of Arishem from time to time.
3. Businesses in Arishem followed the traditional retail brick and mortar stores for the sale of goods and services. In 2015, to boost the digital economy, the government of Arishem introduced regulations to facilitate the provision of internet access at cheap rates to its citizens. This resulted in a sharp increase in the number of internet users in Arishem. This increase of access to internet promoted the growth of e-commerce in Arishem. The businesses were cautious in their adoption of e-commerce channels for the sale of their goods and services. They relied on the traditional retail brick and mortar stores as their main source of sale and utilised the e-commerce channels to supplement their existing sales.
4. Despite the slow adoption by businesses, **Celestial**, an e-commerce platform, gained significant market share due to its popularity amongst consumers, as it allowed shopping from the comfort of their homes, and amongst businesses which did not have the capability to host an e-commerce channel or website could utilise the distribution channel established by Celestial.
5. There are four established toy manufacturers and retailers in Arishem. **Ajax Pvt. Ltd.** is the largest toy manufacturer and retailer in Arishem, enjoying a market share of 35% as of 2019 in the market for manufacture and sale of toys to retail customers in Arishem. The other market players included **Icarus Pvt. Ltd.** with a share of 30%, **Kingo Pvt. Ltd.** with a share of 10% and **Spirite Pvt. Ltd.** with a share of 10%. The remainder of the market was fragmented among the unorganised sector and imported toys.

6. In 2018, welcoming the new opportunities presented by the internet proliferation in Arishem, the four established toy manufacturers and retailers set-up their dedicated e-commerce websites. However, their main source of revenue generation still continued to be from the traditional retail brick and mortar stores for the sale of their goods, as their physical stores appealed to their target consumers (children and teenagers) creating better demand than from their e-commerce websites.
7. In 2019, manufacturers realised that their dedicated e-commerce websites were not generating revenue and profits were at an all-time low as sales through their brick-and-mortar stores had declined. To identify the reasons for the decline, Ajax Pvt. Ltd. and Icarus Pvt. Ltd. funded a market study.
8. The study attributed two main reasons to the decline in profitability. Firstly, customers preferred shopping from e-commerce platforms (mainly Celestial) over dedicated e-commerce websites provided by the toy manufacturers because customers had access to all types of products on one website, most products were available at a discount and Celestial's platform was particularly appealing to consumers due to its user-friendliness. Secondly, each toy manufacturer had independently deployed a price tracking algorithm to track their competitors' prices from every publicly available source to help price their toys competitively. The constant tracking and price setting by the algorithm resulted in all similar products being offered by the four manufacturers to be priced similarly. However, the algorithm did not capture Celestial's prices which were usually discounted.
9. In 2020, the global coronavirus pandemic affected Arishem. With multiple waves of outbreaks, the Government of Arishem was forced to declare an indefinite lockdown across the country. The lockdown had a significant impact on the businesses in Arishem. The lockdown forced businesses, which were otherwise measured in their adoption of e-commerce channels, to adopt e-commerce channels for survival.
10. With the onset of the pandemic and the indefinite lockdown, like many other sectors, the four established toy manufacturers and retailers were forced to promote their sales through their e-commerce channels for sale of their toys. Mr. Harrington, Managing Director of Ajax Pvt. Ltd. called for a meeting of the other three established toy manufacturers. Over a Zoom call, Mr. Harrington shared the findings of the market study and informed the representatives from the other toy manufacturers that it was only commercially prudent to

list their products on Celestial and abandon the use of independent algorithms to price their products.

11. It was decided amongst the toy manufacturers that from March 2020 they would stop using independent algorithms which resulted in similar pricing of products and adopt a proprietary algorithm created by '**Black Knight**', purchased by Ajax Pvt. Ltd. It was further decided that the parameters on the Black Knight's algorithm would be set in such a way that, on a rotation basis, the products of one of the four manufacturers would be priced lower than the products of other three manufacturers for a period of two months. The manufacturers also decided that they would list their products and actively promote sales of their products on Celestial's platform to maximise their gains.
12. Following this meeting, the manufacturers approached Celestial to enter into an agreement to sell their respective products on Celestial. During negotiations, the manufacturers queried on the manner of listing of products. Celestial executives informed them that listing was based on a complex algorithm which took into account various factors such as price, user rating etc. Celestial executives also apprised the manufacturers that given their importance in the segments their ranking was bound to be better. Moreover, they noted that they provide specific assistance and service to sellers to improve and maintain ratings. The executives also asked the manufacturers for a higher than usual commission to provide this service.
13. Due to the effects of the pandemic and lockdown, in January 2021, a co-operative society by the name of **Starfox Co-operative** ("*Co-Operative*") was formed by the voluntary association of local toy manufacturers and retailers in the unorganised sector in Arishem. The Starfox Co-operative wanted to sell its products primarily through Arhishem's most popular e-commerce platform, Celestial.
14. In March 2021, two months after listing on Celestial's e-commerce platform, the Co-operative noticed that none of its products were listed on the first few pages of any search results for toys and the more expensive products of the four established toy makers were displayed before the Co-operatives products.
15. The Co-operative raised its concerns with Celestial and sought similar treatment between itself and the other toy manufacturers selling on Celestial's platform. Celestial dismissed all the concerns raised and attributed the placement of products of the four established

manufacturers on the algorithm deployed by Celestial which placed products based on user ratings.

16. Not being able to generate significant revenue due to the product placement on Celestial, in May 2021, the Co-operative filed an information with the CCA alleging that Celestial had abused its dominant position by discriminating it against other toy manufacturers and had constructively denied market access.
17. The CCA also received an anonymous information alleging that the Ajax Pvt. Ltd., Icarus Pvt. Ltd., Spirite Pvt. Ltd., and Kingo Pvt. Ltd. have been cartelising and fixing prices, and Black Knight and Celestial have been facilitating the cartelisation.
18. In May 2021, the CCA clubbed both the information against Celestial and passed a prima facie order directing the Office of the Director General (*'DG Office'*) to investigate the following:
 - i. Whether Celestial abused its dominant position in the 'market for services provided by retailers for selling toys in Arishem' in violation of Section 4 (2) (a) and 4 (2) (c) of the Competition Act?
 - ii. Whether Ajax Pvt. Ltd., Icarus Pvt. Ltd., Spirite Pvt. Ltd., and Kingo Pvt. Ltd. are in violation of Section 3 (3)(a) of the Competition Act?
 - iii. Whether Black Knight and Celestial have facilitated the cartelisation between Ajax Pvt. Ltd., Icarus Pvt. Ltd., Spirite Pvt. Ltd., and Kingo Pvt. Ltd. in violation of Section 3 (3) of the Competition Act?
19. In September 2021, the DG Office submitted its investigation report (*'DG Report'*) before the CCA. The findings of the DG Report are as follows:
 - i. Celestial is not dominant in the market for services provided by retailers for selling toys in Arishem, as the market is highly competitive.
 - ii. Celestial, through its platform, does not provide an essential facility in the market for services provided by retailers for selling toys in Arishem.
 - iii. Celestial has not abused its dominant position by not providing Starfox Co-operative product placement preference on Celestial's platform, thereby did not constructively deny access to the market.
 - iv. Ajax Pvt. Ltd., Icarus Pvt. Ltd., Spirite Pvt. Ltd., and Kingo Pvt. Ltd. have formed a cartel. This cartel has been fixing prices since 2018. The DG Office concluded on the cartelisation based on the following evidence:

- a) Mr. Harrington, M.D. of Ajax Pvt. Ltd, made a speech during an annual meet of South Asian toy manufacturers in 2018, in which Icarus Pvt. Ltd., Spirite Pvt. Ltd., and Kingo Pvt. Ltd. are also participants. In his speech, Mr. Harrington emphasised for the need to focus on e-commerce as a channel for distribution and called for the manufacturers in Arishem to provide uniform discount to counter imported toys and the discounts provided by platforms such as Celestial.
 - b) Following the annual meet, Ajax Pvt. Ltd., Icarus Pvt. Ltd., Spirite Pvt. Ltd., and Kingo Pvt. Ltd. had implemented price tracking algorithm and priced all their products similarly with negligible difference.
 - c) In 2020 Ajax Pvt. Ltd., Icarus Pvt. Ltd., Spirite Pvt. Ltd., and Kingo Pvt. Ltd. deployed a 'Black Knight' algorithm, which priced the products of one of the four manufacturer lower than the prices of the products offered by the other three and this happened on a rotation basis.
 - d) Ajax Pvt. Ltd., Icarus Pvt. Ltd., Spirite Pvt. Ltd., and Kingo Pvt. Ltd. paid 20% commission instead of usual 15% commission to Celestial to ensure their products are placed at the top of the search results.
 - v. Celestial has facilitated the cartelisation between Ajax Pvt. Ltd., Icarus Pvt. Ltd., Spirite Pvt. Ltd., and Kingo Pvt. Ltd. on its platform by allowing the products of Ajax Pvt. Ltd., Icarus Pvt. Ltd., Spirite Pvt. Ltd., and Kingo Pvt. Ltd., to display at the top of the search results on its platform. As a consideration for this these four manufacturers paid a higher commission to Celestial for every purchase made through its platform (20% instead of the usual 15%). Celestial also denied similar preferencing services, when requested by Starfox Co-operative, to preserve the cartel formed by Ajax Pvt. Ltd., Icarus Pvt. Ltd., Spirite Pvt. Ltd., and Kingo Pvt. Ltd.
 - vi. Black Knight has facilitated the cartel between Ajax Pvt. Ltd., Icarus Pvt. Ltd., Spirite Pvt. Ltd., and Kingo Pvt. Ltd. by providing them with the software which allowed them to fix the prices.
20. The CCA has called all parties involved for the final hearing on their comments and objections to the DG Report.

21. The anonymous informant supports the DG Report in their comments and objections. Starfox Co-operative supports most of the findings in the DG Report but challenges the conclusion that Celestial is not a dominant and has not abused its dominant position.
22. Celestial, Ajax Pvt. Ltd., Icarus Pvt. Ltd., Spirite Pvt. Ltd., and Kingo Pvt. Ltd. and Black Knight have filed lengthy submission challenging various findings of the DG Report to the extent relevant to them.