



Indian Competition Law Roundup: April & May 2019

In this Roundup, we highlight the main developments in Indian competition law in April and May 2019.

Constitutionality of the Competition Act

As discussed in our earlier briefing, a Division Bench of the High Court of Delhi ruled on the constitutionality of the Competition Act, 2002 (*Competition Act*).¹ The Court held that Section 22(3) of the Competition Act, in giving the Chairman of the Competition Commission of India (CCI) a casting vote in the event of an equality of votes, was “anathema to and destroys the Rule of Law” and was therefore unconstitutional. The Court also issued directions requiring the CCI to frame guidelines to ensure that the composition of the bench hearing a matter did not change and that a judicial member was present during final hearings.

Abuse of Dominance

Absence of Dominance

The CCI issued several orders closing at *prima facie* stage a number of cases alleging abuse of dominance. The CCI found that opposite parties were not dominant in Indian markets for the provision of fire insurance services,² for the provision of home loans,³ for commercial units for office space in Gurugram⁴ and for the supply/installation of smart home solutions:⁵ the question of whether there was abuse did

not therefore arise.

Complainant Lacked Good Faith

The CCI also dismissed a complaint by a processor of “green pipes” used by oil exploration companies that *Maharashtra Seamless (MSL)*, allegedly the only Indian manufacturer of certain dimensions of green pipes, had abused its dominant position by failing to supply green pipes to it, in order to allow it to respond to a tender.⁶ The CCI declined to entertain the complaint on the ground that the complainant had approached MSL at a very late stage and was therefore not acting in good faith. Moreover, the CCI took on record submissions by MSL that, as a participant in the tender process, it could not supply green pipes to a competitor and that it had no presence in the upstream market for supply of green pipes as it manufactured these only for its own consumption.

Interim Measures

The National Company Law Appellate Tribunal (NCLAT) heard an appeal against an order of the CCI which directed the Director General to investigate alleged bid-rigging in the printing of school text books and, as a part of the order, refused to grant interim relief to the complainant.⁷

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The NCLAT held that, although the order to investigate under Section 26(1) of the Competition Act was not appealable under Section 53B of the Competition Act, an element in the order dealing with interim relief (based on Section 33) could be appealed. The NCLAT agreed with the view of the CCI that to grant interim relief would cause irreparable damage to students – as they would not be able to obtain the text books – and dismissed the appeal.

Mergers

Clearance in the Health Care Sector

The CCI cleared a merger combining the hospital businesses of *Radiant Life Care* and *Max Healthcare*.⁸ Whilst leaving the market definition open, the CCI considered the impact on competition in different health care segments in Delhi/NCR. It found that the segments for primary care and secondary care service providers were highly fragmented with each provider having a very low market share. In the tertiary care segment as a whole, the parties' combined market share raised no competition concerns; even looking at individual specialities/procedures where the parties overlapped, the combined market shares/incremental increases in shares were not significant and the combined entity would face significant competitive pressure from other hospitals. At the quaternary level of care, covering organ and other transplants, the CCI found negligible increment in areas of overlap. It added that such transplants were at a very nascent stage and that these segments were growing rapidly.

Car Parts: No Change in Competition Dynamics

In the car parts space, the CCI cleared the acquisition by *CK Holdings (CKH)* of the automotive business of *Fiat Chrysler Automobile*.⁹ Although the CCI found that the parties overlapped in five broad categories of components, it found that there were no market facing overlaps at

component/module level and hence no change in competition dynamics. Likewise, although there were potential vertical relationships, these were not likely to change the competition dynamics as *CKH* was not engaged in any market facing activities in relation to the products concerned.

Calculating Turnover/Assets: Getting it Right

In an acquisition by investment company *Deli CMF (CMF)* in the logistics field,¹⁰ the CCI underlined the importance of correctly calculating the turnover/assets of the parties in order to determine whether the notification thresholds were met. The acquirer claimed that the thresholds had not been crossed and that it had notified only "by way of abundant caution". However, applying the definition of "group" set out in Explanation (b) to Section 5 of the Competition Act, the CCI noted that *CMF's* general partner *Fosun China Momentum Fund (FCM)*, a subsidiary of *Fosun International (FI)*, had the ability to control the affairs of *CMF*. It was thus necessary to take account of the assets and liabilities of *FI*, which resulted in the acquisition qualifying as a notifiable combination.

Insolvency Cases: Failing Firm Defence

The failing firm defence is apt to be raised in proposed acquisitions involving insolvency resolution proceedings under the Insolvency and Bankruptcy Code (*IBC*).

In relation to the proposed acquisition by *Reliance Industries* and *JMFARC* of *Alok Industries*,¹¹ the acquirers expressly raised the failing firm defence. However, the CCI did not need to consider this defence since, given the low market shares of the parties, there were no horizontal or vertical concerns.

In clearing the proposed acquisition by *JSW Steel Coated Products* of a competing steel producer¹² the CCI also found no horizontal

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or vertical concerns. However, the CCI noted that, if the insolvency of the target was not resolved, it would be liquidated and end-consumers would be impacted by the removal of capacity utilisation and production from the market; “removal of the target from the market thus appeared to

be imminent irrespective of the proposed transaction”. It is not entirely clear what the CCI meant here, but it appears to reflect the failing firm defence.

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- 1 WPC(C) 6610/2014 *Mahindra & Mahindra v. CCI and Or.* (10 April 2019).
- 2 Case No. 13 of 2019 *Anil Rathi v Oriental Insurance Company* (10 May 2019).
- 3 Case No. 11 of 2019 *Kanhaiya Singhal v Indiabulls Housing Finance and Others* (24 May 2019).
- 4 Case No. 6 of 2019 *Dejee Singh and Others v Sana Realtors* (23 April 2019).
- 5 Case No. 2 of 2019 *Sun Electronics v ElecTek Solutions* (22 April 2019).
- 6 Case No. 48 of 2018 *Oil Country Tubular v Maharashtra Seamless* (23 May 2019).
- 7 Competition Appeal (AT) No. 17 of 2019 *Askokbhai Manilal Mehta v CCI* (23 April 2019).
- 8 Case No. C-2019/01/629 *Radiant Life Care/Kayak Investments Holding/Max Healthcare Institute/Max India* (6 March 2019). (See, also, Case No. C-2019/01/635 *Mitsui* (6 March 2019).)
- 9 Case No. C-2019/01/639 *CK Holdings* (8 March 2019).
- 10 Case No. C-2019/02/640 *Deli CMF* (22 March 2019).
- 11 Case No. C-2019/03/648 *Reliance Industries/JMFARC* (15 April 2019).
- 12 Case No. C-2019/03/650 *JSW Steel Coated Products* (9 April 2019).

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