



Indian Competition Law Roundup: February 2020

In this Roundup, we highlight the main developments in Indian competition law in February 2020.

Draft Competition (Amendment) Bill

As reported in our earlier briefing, the Ministry of Corporate Affairs (MCA) published the Draft Competition (Amendment) Bill seeking public comments until 6 March 2020 (the MCA has just extended this to 13 March).¹ The Draft Bill, which reflected recommendations made by the Competition Law Review Committee, contained a large number of proposed amendments to the Competition Act, 2002 (*Competition Act*). Important proposed changes included: (i) the introduction of settlement/commitment procedures for vertical agreements and abuse of dominance cases; (ii) the extension of the intellectual property rights defence to cover all IPR rights and to apply to abuse of dominance cases as well as to anti-competitive agreements; (iii) the possibility of introducing deal value, market or other criteria for the notification of mergers; and (iv) new governance arrangements for the Competition Commission of India (CCI).

Vertical Agreements

Amazon/Flipkart Investigation Stayed

As mentioned in our January *Roundup*, in January 2020, the CCI had directed an investigation into allegations of anti-competitive agreements between e-commerce marketplaces *Amazon* and *Flipkart*, on the one hand, and sellers on those marketplaces, on

the other.² This was challenged before the High Court of Karnataka on the grounds, amongst others, that: (i) the CCI could not direct an investigation where the Central Government was already investigating the matter under the Foreign Exchange Management Act 1999; (ii) that the complainant had been “set up” by the Confederation of All India Traders (CAIT), which had unsuccessfully made an earlier complaint to the CCI; and (iii) the CCI had, in stating that there appeared to be an agreement between the marketplaces and the sellers, failed to form a *prima facie* opinion that such an agreement existed, or that it caused an appreciable adverse effect on competition. The High Court considered that the matter required deeper consideration and in the interim stayed the CCI Order.³

Abuse of Dominance

Rounding Off of Train Fares Not Abusive

The CCI found that the *Indian Railways* had not abused its dominance in the market for the sale of tickets by railways in India by the rounding off of base fares to the next highest multiple of INR 5 in the sale of e-tickets on-line.⁴ The CCI recognised that such rounding up might seem unfair but concluded that it was socially and commercially justified. It was established that the rounding off was intended to help bridge the cost/income deficit, that there was no discrimination between passengers and that it reflected a long-standing policy of the Ministry of Railways. There was therefore no exploitative abuse.

In this Issue

Draft Competition (Amendment) Bill

Vertical Agreements

- Amazon/Flipkart Investigation Stayed

Abuse of Dominance

- Rounding Off of Train Fares Not Abusive

Cartels

- NCLAT Affirms CCI's First Leniency Order

Procedure and Due Process

- CCI Amends the General Regulations
- CCI Out of Time in Appealing

Merger Control

- CCI Approves Suzuki/Toyota Arrangements



Competition Matters

Cartels

NCLAT Affirms CCI's First Leniency Order

In 2017, the CCI passed its first leniency decision⁵ imposing penalties on three firms for bid rigging of tenders floated by *Indian Railways* for the procurement of brushless DC fans in 2013. The CCI relied on evidence in the form of call data records, emails and statements of the opposite parties to establish the existence of a cartel. The CCI granted a 75% reduction in penalty to *Pyramid Electronics* under the Competition Commission of India (Lesser Penalty) Regulations, 2009. The National Company Law Appellate Tribunal (NCLAT) dismissed the appeal⁶ preferred by *Western Electric* and *R. Kanwar Electricals (RKE)* against the CCI's order. The NCLAT held that the e-mail exchanges, call records and identical rates quoted in the bids sufficiently established the sequence of events. It rejected the argument raised by RKE that the penalty on it should be reduced as its net profit for the entire year was less than the penalty imposed.

Procedure and Due Process

CCI Amends the General Regulations

The CCI amended Regulation 20(4) of the *CCI (General) Regulations 2009* on the extent of findings in reports of the investigating Director General (DG).⁷ As it stood, the DG's report had to contain findings "on each of the allegations made in the information or reference". The Supreme Court⁸ and the Delhi High Court⁹ have made it clear that the DG's investigations are not limited to the matters raised in the information (complaint) or in the *prima facie* order. The CCI has now deleted this text, which makes it clear that the DG's report is to contain findings on matters considered during the investigation, whether or not they were raised in the information or reference.

CCI Out of Time in Appealing

In 2015, *Forech India Limited (Forech)*, a conveyor belt manufacturer which was being investigated by the DG was denied access to the file on the basis that the entire file was confidential. Forech approached the Delhi High Court which closed the case after the CCI consented to furnish all non-confidential documents and orders granting confidentiality, and to allow Forech to cross-examine and to make a further statement.¹⁰ Although the CCI had consented to the above, the CCI subsequently sought modification of the order to limit it to documents which had been relied on against Forech and excluding provision of orders granting confidentiality. The Delhi High Court largely rejected this, but accepted limitations in relation to confidentiality orders.¹¹ The CCI appealed to the Division Bench of the Delhi High Court but was 67 days late in filing the appeal. The Division Bench refused to condone this delay and thus did not allow the appeal.¹² However, it made it clear that there were no grounds for modifying the 2015 order as it related to the provision of non-confidential documents.

Merger Control

CCI Approves Suzuki/Toyota Arrangements

The CCI published its order approving the acquisition by car manufacturers *Suzuki Motor Corporation* and *Toyota Motor Corporation* of insignificant minority shares in each other without any right to appoint directors or other rights (including veto or control rights).¹³ The CCI concluded that mere cross-holding amongst competitors, with a view to pursue permissible competitor collaborations, did not raise any competition concerns.

In this Issue

Draft Competition (Amendment) Bill

Vertical Agreements

- Amazon/Flipkart Investigation Stayed

Abuse of Dominance

- Rounding Off of Train Fares Not Abusive

Cartels

- NCLAT Affirms CCI's First Leniency Order

Procedure and Due Process

- CCI Amends the General Regulations
- CCI Out of Time in Appealing

Merger Control

- CCI Approves Suzuki/Toyota Arrangements

1 <http://feedapp.mca.gov.in/pdf/Draft-Competition-Amendment-Bill-2020.pdf>.

2 Case No. 40 of 2019, *Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited and Amazon Seller Services Private Limited* (13 January 2020).

3 Writ Petition No. 3363 of 2020, *Karnataka High Court, Amazon Seller Services Private Limited v. CCI* (14 February 2020), and Writ Petition No. 4334 of 2020, *Karnataka High Court, Flipkart Internet Private Limited v. CCI* (27 February 2020).



- 4 Case No. 30 of 2018, Meet Shah and Anand Ranpara v. Ministry of Railways and Indian Railway Catering and Tourism Corporation Ltd. (3 February 2020).
- 5 Suo Moto Case No. 3 of 2014, In Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items (18 January 2017).
- 6 Competition Appeal No. 37 of 2017, Western Electric and Trading Company (Western Electric) v. CCI (17 February 2020).
- 7 The Competition Commission of India (General) Amendment Regulations, 2020 (6 February 2020).
- 8 Excel Crop Care v. CCI (2017) 8 SCC 47.
- 9 Letters Patent Appeal No. 160 of 2018, Delhi High Court, Cadila Healthcare Limited v. CCI (12 September 2018) and No. 137 of 2014, CCI v. Grasim Industries Limited (12 September 2019).
- 10 Writ Petition (Civil) No. 11072 of 2015, Delhi High Court, Forech India Limited v. CCI (2 December 2015).
- 11 CM No. 32052 of 2015 in Writ Petition No. 11072 of 2015, Delhi High Court, Forech India Limited v. CCI (29 September 2016).
- 12 Letters Patent Appeal No. 97 of 2017, Delhi High Court, CCI v. Forech India Limited (22 January 2020).
- 13 Combination Reg. No. C-2019/10/692 Suzuki Motor Corporation and Toyota Motor Corporation (26 November 2019).

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Draft Competition (Amendment) Bill

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- Amazon/Flipkart Investigation Stayed

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