



Indian Competition Law Roundup: March 2020

In this Roundup, we highlight the main developments in Indian competition law in March 2020. The month has, of course, been dominated by the impact of the Covid-19 outbreak, which has impacted the functioning of the Competition Commission of India (CCI), the National Company Law Appellate Tribunal (NCLAT) and the Courts. Before this took hold, the month saw an upsurge of activity at the NCLAT, which issued a number of significant judgments largely upholding CCI orders finding breach of the Competition Act, 2002 (*Competition Act*). In the merger control area, the CCI made important changes to its guidance in completing Form I.

The Impact of Covid-19

On 17 March, the CCI decided to adjourn all but urgent matters listed for hearing until 31 March 2020.¹ A week later, on 23 March, it suspended: (a) all filings in relation to Sections 3 and 4 of the Competition Act (anti-competitive agreements and abuse of dominant position); (b) all notifications in relation to combinations (merger control); (c) all other filings, submissions and proceedings under the Competition Act and associated regulations; and (d) pre-filing consultations (merger control).²

On 30 March, the CCI announced that its office would remain closed until 14 April, the last day of the nation-wide lockdown which came into effect on 25 March.³ It also updated its 23 March notice: (a) all matters listed for hearing up to 14 April were adjourned and fresh dates would be announced in due course; (b) all filings and compliances due on or before 14 April in respect of pending Section 3 and 4

cases were suspended and fresh dates would be announced in due course; and (c) all other filings, submissions and proceedings under the Competition Act and associated regulations would remain suspended until 14 April.

However, the CCI announced measures for the electronic filing of combinations under the Green Channel (including providing certain procedural modalities for such filings) and stated that it would endeavour to process combination notices that had been filed prior to 20 March. CCI case teams are working from home on these existing merger cases and are responding, as far as possible, to e-mails and telephone calls.

The National Company Law Appellate Tribunal (NCLAT), various High Courts across the country and the Supreme Court are also not conducting regular sittings. Several courts, including the NCLAT, have ordered that these days will be excluded from limitation periods for filing appeals, etc. The NCLAT has directed that any interim relief already granted will continue until further orders.

Horizontal Agreements

NCLAT Upholds CCI Order in Malayalam Movie Artists Case

In March 2017, the CCI had found that the *Association of Malayalam Movie Artists (AMMA)* and a number of other associations had acted in breach of Section 3 of the Competition Act by boycotting the informant, a movie director.⁴ The CCI imposed penalties on the associations of 5% of their average income over three years,

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amounting to INR 23.2 lakh (approx. 31,000 USD) and on office bearers of the associations 3% of their average income, amounting to USD 2,600). On 13 March 2020, the NCLAT dismissed appeals by AMMA and others.⁵ The NCLAT noted that the Supreme Court had in the 2017 *Coordination Committee* case⁶ held that trade unions were not exempt from the application of the Competition Act. It also noted that the term “agreement” was broadly defined under the Competition Act, that there was no need to define the relevant market and that there was a presumption of an appreciable adverse effect on competition (AAEC). The NCLAT found that there was a large amount of evidence enabling the Director General (DG) and the CCI to come to a definite conclusion that the appellants had acted in breach of Section 3 and it was therefore not inclined to grant any relief.

Abuse of Dominance

NCLAT Reduces Penalty on Adani Gas

In July 2014, the CCI found that *Adani Gas Limited (Adani)* had abused its dominant position by imposing unfair conditions on buyers under its Gas Supply Agreements (GSAs).⁷ As well as directing Adani to cease and desist from indulging in prohibited conduct, the CCI directed it to modify the GSAs and imposed a penalty of 4% of its average turnover over a three-year period (amounting to INR 25.6 crores (approx. USD 3.4 million)). Adani appealed to the then appellate tribunal, the COMPAT, and a cross-appeal was made by the complainant in the case. Unfortunately, before the COMPAT could pronounce judgment, the NCLAT replaced the COMPAT in May 2017 and the NCLAT had to rehear the matter. In its judgment of 5 March 2020,⁸ the NCLAT upheld the CCI’s findings that Adani was dominant in the supply of natural gas during the relevant period and that it had, in imposing unfair conditions, abused its dominant position. However, since Adani was willing to revise the GSAs before the conclusion of the CCI’s enquiry and was amenable to NCLAT’s suggestions on the incorporation of consumer-friendly clauses in the GSAs, the NCLAT reduced the level of penalty from 4% to 1%.

CCI Finds Abuse in Man-Made Fibre Sector

The CCI found that *Grasim Industries (GIL)* had abused its dominant position in the “market for

supply of viscose staple fibre (VSF) to spinners in India”.⁹ The CCI held that GIL had charged discriminatory prices to the spinners and, in seeking details of production and exports from India spinners, had imposed supplementary obligations which, by their nature or according to commercial usage, had no connection with the subject of the supply contracts. In addition to “cease and desist” obligations, the CCI directed GIL to put in place a transparent and non-discriminatory discount policy and not to place any end-use restriction on the spinners. It imposed a penalty of 5% of the relevant turnover averaged over a three-year period from 2014 to 2017 (amounting to INR 301.61 crores (approx. USD 40 million)).

Procedure and Due Process

Delhi High Court Affirms Need for Prima Facie Case for Show Cause Notice

The Delhi High Court has made it clear that enterprises may be proceeded against under the Competition Act only where a *prima facie* case for breach has been made out.¹⁰ In a case involving alleged cartelisation in the supply of bearings, the CCI, basing itself on reports submitted by the Director General (DG), in August 2019 issued a Show Cause Notice against *National Engineering Industries Limited (Petitioner)* directing it to furnish financial statements for the financial years 2009-2010 to 2011-2012. In November 2019, the CCI dismissed an application seeking recall/review of this Show Cause Notice and the Petitioner challenged this before the Delhi High Court. The High Court found that there was nothing in the DG’s reports showing the Petitioner to be in breach of the Competition Act and that the DG had merely recorded that the Petitioner had a relationship with another company concerned in the investigation. It therefore set aside the CCI orders.

No Appeal to NCLAT from a Show Cause Notice

Section 53A(1)(a) of the Competition Act provides that the NCLAT shall hear and dispose of appeals from directions issued, decisions made or orders passed by the CCI under a number of different specified provisions of the Act. These include orders passed by the CCI under Section 27 where it finds a breach of Section 3 or Section 4. In the course of an investigation against the

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Competition Matters

Uttarakhand Agricultural Marketing Board (Board) and two distributors, the CCI passed an order issuing show cause notices against the distributors asking them why their conduct should not be seen as a breach of Section 4 of the Competition Act prohibiting abuses of dominance. Although it was not an addressee of the show cause notice, the Board appealed to the NCLAT, which held that the appeal was not maintainable as the order could not be treated as a final order under Section 27 of the Competition Act.¹¹

Merger Control

Reintroduction of Exemption for Distressed Banks

On 11 March, the Ministry of Corporate Affairs published a notification exempting a Banking Company in respect of which the Central Government has issued a notification under Section 45 of the Banking Regulation Act, 1949, from the application of the provisions of Sections 5 and 6 of the Competition Act in the public interest for a period of five years from the date of publication of the notification in the Official Gazette.¹² This covers distressed banks and replaces an earlier exemption which expired in January 2018.

Eli Lilly Wins Appeal in NCLAT

In July 2016, the CCI found that *Eli Lilly*, the US-based pharmaceutical company, had failed to notify the acquisition of *Novartis Animal Health India* (the *target*) and imposed a penalty of INR 1 crore (approx. USD 132,000). Eli Lilly had relied on the *de minimis* Target Exemption as it then stood, as the target's turnover and assets fell well below the prescribed levels (turnover of INR 750 crores (approx. USD 90 million) and assets of INR 250 crores (approx. USD 33 million)). The CCI considered that, as the target was an *unincorporated* entity, the thresholds should apply to the target's parent company, where the Target Exemption did not apply. This was appealed to the NCLAT which found that the CCI had erred.¹³ Referring to the stated intention of the Government when it revised the Target Exemption in March 2017, the NCLAT held that the CCI should have looked only at the turnover/assets relating to what was being acquired and not the turnover/assets left with the seller. This is, in fact, the stated position in the current Target Exemption.

The NCLAT also took issue with the requirement in Regulation 9(1) of the Combination Regulations that, in the case of an acquisition, the acquirer should make the filing. Section 6(2) of the Competition Act requires notice to be given by "any person or enterprise, who or which proposes to enter into a combination". In this case, the NCLAT considered that no one party had proposed the combination, so the obligation to file, and the ability to benefit from the Target Exemption, fell on both parties. The NCLAT stated, in terms, that the obligation on the acquirer to file the notice stated in the Regulations was contrary to the express statutory provision and its intent.

Amendment of Form I Guidance Notes

On 28 March 2020, the Competition Commission of India (CCI) published revised Guidance Notes for Form I (*i.e.*, the short form merger notification).¹⁴ The revised Guidance Notes – which reflect recent changes in Form I and the introduction of the Green Channel route – set out important clarifications on the information to be provided. Although some may reduce the burden on filing parties of collecting and providing information, others may be more problematic. Key points are as follows:

- i) *Guidance on complementary activities*: the CCI is increasingly looking at the complementarity of the parties' products/services in its review of combinations. The Green Channel route will also not be available where the parties have complementary activities. The CCI states that products/services will be considered complementary when they are related because they are combined together (e.g., printers and ink cartridges). In general, a complementary product or service will enhance the value of the combined product or service.
- ii) *Relaxation in providing market information for 3 years*: the CCI has clarified that filing parties only need to provide market information for 3 years where their market shares are 10% or above in any plausible market where there is a horizontal overlap or a vertical or complementary relationship.
- iii) *Scope of entities while determining overlaps*: Previously, the CCI had treated any entity in which parties had any shareholding as

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'affiliates', which were to be accounted for in the competitive assessment. The CCI has now clarified that parties are required to provide disclosures and undertake assessment of horizontal overlaps and of vertical or complementary activities with respect to any entity in which the party has:

- a) a direct or indirect shareholding of 10% or more; or
- b) a right or ability to exercise any right (including any advantage of a commercial nature with any of the parties) that is not available to an ordinary shareholder; or
- c) a right or ability to nominate a *director* or *observer* in another enterprise.

Although setting a shareholding threshold of 10% is a welcome change, the requirement that parties provide details and undertake overlap mapping with any entity in which there is a right or ability to appoint one director or even merely an observer on the board may prove to be problematic.

- iv) Parties will be required to provide exhaustive and in-depth information on the sector concerned, including the number of players and growth trends.
- v) Parties must also identify, upfront, a member of the business team/senior management to attend business meetings with the CCI.

- 1 CCI Circular, 17 March 2020.
- 2 CCI, Measures in view of threat of CORONAVIRUS/COVID-19 pandemic, 23 March 2020.
- 3 CCI, Measures in view of threat of CORONAVIRUS/COVID-19 pandemic, 30 March 2020.
- 4 Case No. 98 of 2014, T. G. Vinayakumar v Association of Malayalam Movie Artists and Others (23 March 2017).
- 5 Competition Appeal (AT) No., 05 of 2017 Association of Malayalam Movie Artists v CCI etc. (13 March 2020).
- 6 Civil Appeal No. 6691 of 2014, CCI v Coordination Committee of Artists and Technicians of W.B. Film and Television (1 August 2017).
- 7 Case No. 71 of 2014 Faridabad Industries Association v Adani Gas Limited (5 July 2014).
- 8 TA (AT) (Competition) No. 33 of 2017, Adani Gas Limited v CCI and Faridabad Industries Association (5 March 2020).
- 9 Case No. 62 of 2016, XYZ v Association of Man-Made Fibre of India, Grasim Industries and Others (16 March 2020).
- 10 W.P. (C) 1714 of 2020, National Engineering Industries Limited v CCI and Another (25 February 2020).
- 11 Competition Appeal (AT) No. 84 of 2018, Uttarakhand Agricultural Marketing Board v CCI and Others (12 March 2020).
- 12 Ministry of Corporate Affairs, Notification S.O. 1034(E) (11 March 2020).
- 13 TA (AT) (Competition) No. 03 of 2017, Eli Lilly and Company v CCI (12 March 2020).
- 14 Notes to Form I (27 March 2020) (available at https://www.cci.gov.in/sites/default/files/press_release/PR492019-20.pdf).

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