



Indian Competition Law Roundup: June 2020

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

Institutional Matters

The appointment of Justice Bansi Lal Bhat as the officiating Chairperson of the National Company Law Appellate Tribunal (NCLAT) has been challenged in a petition to the Delhi High Court, essentially on the ground that more senior members of NCLAT were available to be appointed. In a hearing on 16 June, the High Court sought a response from the Central Government by the end of June. On 30 June, the High Court gave more time to the Central Government to respond and the matter has been listed for further hearing on 21 July.

NCLAT Court Work Suspended

Regrettably, at the end of June, an official in NCLAT tested positive for COVID-19 and it has been decided to allow all concerned to observe home quarantine. Court work (virtual hearings, filings, etc.) will be suspended until 10 July 2020.¹

Horizontal Agreements

No Penalty in Ball-Bearing Cartel

The CCI found that several manufacturers of bearings had discussed price increases to automotive and industrial original equipment manufacturers (OEMs) and had engaged in cartelisation.² The matter started

on the basis of a leniency application by *Schaeffler India*, and subsequently another manufacturer, *National Engineering Industries*, submitted a leniency application during the investigation by the Director General.

The CCI rejected arguments that there had been no appreciable adverse effect on competition (AAEC) since the prices quoted by the manufacturers to the OEMs differed from what had agreed between them. An actual AAEC did not need to be established; it was enough to show that the agreement was *likely* to cause an AAEC. The parties had failed to rebut the presumption of an AAEC in Section 3(3) of the Competition Act. The very fact that the parties met to decide the price changes to OEMs compromised their independence, allowing them to quote different prices than they would have quoted independently. The CCI ordered the manufacturers and a number of their officials to cease and desist from indulging in such practices. It decided that, “*in light of the peculiar facts and circumstances*”, the cease and desist order was sufficient to serve the ends of justice and that no penalty was necessary, though it warned the parties to ensure that their future conduct was strictly in accordance with the Competition Act. Unfortunately, the CCI did not explain why the facts and circumstances of the case were “peculiar”.

In this Issue

Institutional Matters

NCLAT Court Work Suspended

Horizontal Agreements

Abuse of Dominance

Damages Actions

Merger Control

Market Studies

¹ NCLAT, Notice dated 2 July 2020.

² *In Re: Cartelisation in Industrial and Automotive Bearings*, CCI, *Suo Motu* Case No. 05 of 2017 (5 June 2020).



Competition Matters

Abuse of Dominance

No Abuse in Food Deliveries

The CCI rejected a complaint that Swiggy, an app-based food ordering and delivery platform, had abused its dominant position by charging higher prices than the listed restaurants charged in their own outlets, in addition to delivery charges.³ The CCI found that there was no *prima facie* case of abuse as the restaurants made the pricing decisions and set the prices that were visible on Swiggy's platform. An intermediary like Swiggy was not liable for pricing decisions made by third parties on its platform, where the intermediary did not determine, select or modify the pricing information transmitted through its platform. The CCI observed that it would be appropriate for Swiggy to give sufficient disclosures on its platform stating that it was not involved in fixing prices to allay any misgiving in the mind of stakeholders. However, no express orders or directions were passed to this effect. Since there was no abuse, the CCI did not consider whether Swiggy was dominant or undertake a detailed relevant market assessment.

Damages Actions

Compensation Action may be launched after Supreme Court Judgment

The National Company Law Appellate Tribunal (NCLAT) admitted an application for compensation made by *Food Corporation of India (FCI)* for losses suffered as a result of bid-rigging in the supply of aluminium phosphide tablets.⁴ The CCI order establishing breach of Section 3 of the Competition Act was issued on 12 April 2012 and the appeal decided by the COMPAT (the predecessor of NCLAT) on 29 October 2013. This was appealed to the Supreme Court which upheld the CCI and NCLAT findings of breach on 8 May 2017. FCI filed its application for compensation on 11 July 2019, within two years and two months of the Supreme Court judgment. The NCLAT held that, in the absence of a statutory limitation

period, applications for compensation had to be made within a "reasonable period" of three years (which is the prescribed timeline for general money claims). It rejected arguments that an application for compensation could be made only after a CCI or COMPAT order and could not lie against a Supreme Court judgment. Time ran from the Supreme Court judgment and the application had been made well within the three-year period.

Merger Control

Approval of Strategic Public Acquisitions in the Power Sector

The CCI approved two acquisitions by NTPC of shareholdings in two companies in the power generation sector.⁵ NPTC and the two targets were all Central Public Sector Enterprises and the acquisitions resulted from a decision of the Government of India to strategically divest its shareholdings in the targets and transfer management control to NTPC as a strategic buyer. In both cases, the CCI found that the parties overlapped in the market for power generation in India, but found there was no likelihood of an AAEC as the combined market share of the parties, based on installed capacity as well as revenue, was less than 20%, with an incremental market share of less than 5%, and other players were present in the market. In the narrower markets of hydro power and renewables, the incremental market share was also less than 5%. In relation to a vertical relationship in overall consultancy services in the power sector, the CCI held that the presence of the parties was not significant and there were other players.

No AAEC where Franchisor Transfers Operational Control to Franchisee

The CCI approved a combination under which *Devyani International Limited (DIL)* proposed to acquire from *Yum Restaurants (India) Private Limited* the business of

In this Issue

Institutional Matters

NCLAT Court Work Suspended

Horizontal Agreements

Abuse of Dominance

Damages Actions

Merger Control

Market Studies

³ *Ms. Prachi Agarwal and Another v Swiggy*, CCI, Case No. 39 of 2019.

⁴ *Food Corporation of India v Excel Crop Care and Others*, NCLAT Compensation Application (AT) No. 01 of 2019 (3 June 2020).

⁵ *NTPC Limited*, CCI, Comb. Reg. No. C-2020/02/722 & 723 (24 February 2020).



running, maintaining and operating 61 KFC Restaurants.⁶ DIL would get only get operational control over these restaurants. The rights with respect to the recipe and pricing of food items would continue to be controlled by Yum Brands. The parties in this case had a franchisor-franchisee relationship. The CCI noted that the end consumer was not affected whether a franchisor operates a restaurant directly or through a franchisee. The mere transfer of operational control from a franchisor to a franchisee is unlikely to be viewed as a competition concern in cases of combinations, as there is no change in the competition dynamics in the market.

Market Studies

Telecoms Market Study

The *Indian Council for Research on International Economic Relations* (ICRIER)

is conducting a study on India's telecoms sector on behalf of the CCI.⁷ According to CCI Chairperson Ashok Kumar Gupta, this is a fact-finding exercise to develop a clear understanding of the sector and its prevailing landscape. It will consider matters such as competition strategies with the adoption of new technology, analysis of markets, assessment of levels of concentration and competition, vertical integration of access and content services, and the impact on competition of regulatory and policy developments. The stakeholder consultation has been completed and an interim report has been submitted to the CCI.

Other market studies

Apart from the telecoms market study, a study on mergers and acquisitions in the digital market is underway.

⁶ *Yum Restaurants (India) Private Limited*, CCI, Comb. Reg. No. C-2019/12/715 (3 February 2020).

⁷ Outlook, The News Scroll, *Competition Comm initiates studies on telecom sector, M&A in digital market* (8 June 2020).

In this Issue

Institutional Matters

NCLAT Court Work Suspended

Horizontal Agreements

Abuse of Dominance

Damages Actions

Merger Control

Market Studies

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