



Indian Competition Law Roundup: November 2020

In this Roundup, we highlight the main developments in Indian competition law in November 2020. We also mention a couple of important developments right at the beginning of December.

Anti-Competitive Agreements

No Evidence of Collusion in Alleged Drinks Cartel

The Competition Commission of India (CCI) dismissed allegations that three licensees for the supply of imported foreign liquor (IFL) had rigged tenders floated by the Haryana Excise and Taxation Department for the licence for supply of IFL in Haryana by way of bid rotation.¹ The Informant alleged that the three licensees were related to each other since they shared a common address, had common shareholders, had financial transactions amongst themselves and had acted in a collective way towards a common purchaser. The CCI stated that no details or documents in relation to the tenders in question had been furnished by the Informant and there was no other evidence indicating a meeting of minds or collusive behaviour by the three licensees. The CCI referred to earlier orders where it had found that commonality of directors or ownership of participating firms, or common business linkages, were, in the absence of evidence of collusion, insufficient to establish a *prima facie* case of breach of Section 3 of

the Competition Act, 2002. The CCI therefore closed the case.

Abuse of Dominant Position

CCI Directs New Investigation into Google

In an Information (complaint) made against **Alphabet Inc.** and a number of **Google** companies (together, **Google**), an anonymous Informant alleged a number of breaches of Section 4 of the Competition Act, which prohibits the abuse of a dominant position.²

The Informant argued that three relevant markets should be considered: (i) the market for licensable mobile operating system (OS) for smart mobile devices; (ii) the market for app stores for Android OS; and (iii) the market for apps facilitating payment through the United Payments Interface (UPI). The CCI agreed with these market definitions. It had defined the first two relevant markets in its April 2019 order ordering an investigation against Google,³ had *prima facie* found Google to be dominant and saw no reason to depart from its approach in the current order. It had also defined the third market in its August 2020 **WhatsApp Pay** order⁴ and continued its approach here.

The CCI considered there was a *prima facie* case that Google had abused its dominant position in three ways. First, the mandatory use of Google Play's payment system for purchasing

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1 *XYZ v Lakeforest Wines Private Limited and Others*, CCI, Case No. 36 of 2020 (17 November 2020).

2 *XYZ v Alphabet Inc. and Others*, CCI, Case No. 07 of 2020 (9 November 2020).

3 *Umar Javeed and Others v Google LLC and Others*, CCI, Case No. 39 of 2018 (16 April 2019).

4 *Harshita Chawla v WhatsApp Inc and Others*, CCI, Case No. 15 of 2020 (18 August 2020).



apps and IAPs in the Play Store appeared *prima facie* to be unfair since it appeared to restrict choices available to the app developers and to give Google an unfair advantage over its competitors. Second, it appeared that the process employed by Google Pay used “intent flow” methodology which could result in a better user experience than other UPI apps using a “collect flow” methodology. This had the potential to shift users towards Google Pay. The CCI was of the *prima facie* view that this amounted to the imposition of an unfair and discriminatory condition, denial of market access for competing apps and leveraging by Google. Third, the CCI found that the pre-installation and prominence of Google Pay on Android Smartphones could, given Google’s significant market presence in the UPI-based digital payment applications market, affect the evolving and transitory market in its favour. It also appeared that Google’s position in different streams of the smart mobile ecosystem made it an indispensable partner in that ecosystem and gave it a unique advantage over other UPI developers. The CCI considered that Google’s conduct warranted a detailed investigation. It therefore directed the Director General to investigate these matters.

It may be noted that Google challenged the confidentiality over the name of the anonymous Informant arguing that it would not be able to effectively exercise its right to defend itself without knowing this. The CCI held that the issue of confidentiality over the identity of the Informant would be determined at the appropriate stage. Relying on the National Company Law Appellate Tribunal’s (NCLAT) decision in the *Samir Agrawal* case,⁵ Google also challenged the Informant’s standing to file a complaint. Following its stance in the *WhatsApp Pay* order, the CCI, disagreeing with the NCLAT’s position, rejected Google’s challenge.

Informant is Required to Define the Relevant Market

In August 2020, the CCI had declined to order an investigation into an information (complaint) made by *SOWIL Ltd (SOWIL)* alleging abuse of a dominant position by a supplier of rolling stock mounted ground penetrating radar systems in the context of a tender notice issued by the Ministry of Railways.⁶ The CCI found that SOWIL had not defined or suggested any relevant market and that it was not necessary or feasible itself to define the relevant market in the absence of requisite data on record, particularly in light of information from the Ministry suggesting that there were at least four other global players in the market. SOWIL appealed to the NCLAT, arguing that the CCI should itself have followed a three-stage process of defining the relevant market, establishing a dominant position and establishing a *prima facie* case of abuse. In dismissing the appeal,⁷ the NCLAT found that SOWIL was wrongly trying to put the burden on the CCI to define the relevant market instead of doing so itself. The NCLAT order makes it clear that the informant must itself provide a *prima facie* definition of the relevant market in abuse of dominance cases, and that it cannot expect the CCI to do this exercise, especially where there is other evidence showing the absence of market power.

Supreme Court Stays Investigation into Flipkart

In November 2018, the CCI had rejected a complaint made by the All India Online Vendors Association that e-tailers *Flipkart India Private Limited* and *Flipkart Internet Private Limited* (together *Flipkart*) had abused their dominance, including by predatory pricing.⁸ In March 2020, the NCLAT set aside the CCI’s order closing the case at the *prima facie* stage and directed the CCI to direct an investigation into the allegations of dominance.

⁹ On 2 December, on hearing an appeal filed

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⁵ *Samir Agrawal v CCI and others*, NCLAT, Appeal No. 11 of 2019 (29 May 2020).

⁶ *SOWIL Limited v Hexagon Geosystems India Pvt. Ltd.*, CCI, Case No. 14 of 2020 (26 August 2020).

⁷ *SOWIL Limited v CCI and Others*, Competition Appeal (AT) No. 17 of 2020 (4 November 2020).

⁸ *All India Online Vendors Association v Flipkart India Private Limited and Another*, CCI, Case No. 20 of 2018 (6 November 2018).

⁹ *All India Online Vendors Association v Competition Commission of India and Others*, NCLAT, Appeal No. 16 of 2019 (4 March 2020).



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by Flipkart the Supreme Court stayed the operation of the NCLAT's decision.¹⁰

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Towards the Self-Assessment of Non-Compete Restrictions

The CCI removed the requirement to provide information on any non-compete obligations in the short Form I (used for notifying the bulk of notifiable combinations).¹¹ As noted in our April/May Roundup, the CCI published proposals on the examination of non-compete restrictions while reviewing combinations in May 2020,¹² where it noted that omitting the requirement to provide information would give parties greater flexibility in determining non-compete restrictions and reduce the information burden. However, it cautioned that parties would need to ensure that any non-compete requirements were competition compliant and that any competition concerns could be scrutinised under Sections 3 and/or 4 of the Competition Act, 2020 (respectively addressing anti-competitive agreements and abuse of dominant position). Parties to combinations will thus need to self-assess any non-compete clauses/arrangements to make sure that they will not raise concerns under these Sections.

CCI Clears Acquisition in the Ports Sector

The CCI cleared the acquisition by **Adani Ports and Special Economic Zones Limited** (Acquirer) of a majority shareholding and management control over **Krishanapatnam Port Company Limited (Target)**.¹³ The CCI found that the Acquirer and Target were engaged in activities relating to the port sector and that their services were similar in the area of port services relating to containerised cargo, coal, other dry bulk cargo and break bulk cargo.

In setting out the framework for competitive analysis, the CCI observed that ports were typically infrastructure for export and import cargo. Hinterlands served by a port could be classified as "captive", where a given port had a cost advantage vis-à-vis other ports, and "contested", where a given port competed with other ports. The scope and extent of these hinterlands varied depending on the terrain, transport costs, the proximity of ports and their charges. The competition assessment of port consolidations required a holistic appreciation of inter-port competition and the effect of the combination.

The CCI therefore looked at the effect of the proposed combination on the common areas where the parties provided port services. In relation to containerised cargo, the incremental volume to be handled by the combined entity was insignificant and raised no competition concern. In relation to break bulk cargo, the volume handled by the Acquirer was insignificant. For coal, the CCI considered that the combined entity would face competition from other ports. Finally, for other dry bulk cargo, the CCI found no competition concerns given the minimal cargo handled by the Acquirer. The CCI also considered a number of vertical relationships between the parties but found that they had a relatively limited presence in the relevant downstream operations.

The Order provides useful indications how the CCI will assess combinations in the ports and similar sectors. It should be noted that the CCI appears to have relied heavily on data provided by the Acquirer and to have sought input from other port operators.

CCI Announces Studies in Pharma and Private Equity Sectors

The CCI Chairperson, Mr. Ashok Gupta, announced a study into the pharma sector

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¹⁰ *Flipkart India Private Limited and Another v Competition Commission of India and Another*, Supreme Court, Civil Appeal No. 2770 of 2020 (2 December 2020).

¹¹ Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2020 (27 November 2020).

¹² CCI, *Inviting public comments regarding examination of non-compete restrictions under regulation of combinations* (May 2020).

¹³ *Adani Ports and Special Economic Zones Limited*, CCI, Combination Reg. No. C-2020/02/276 (22 July 2020).



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to assess whether there were distortions to competition.¹⁴ This followed the conclusion of the CCI's study on e-commerce early this year.¹⁵ The pharma study will examine discounts and margin policies at wholesale and retail levels, the role of trade associations, regulatory rationalization of trade margins and the impact of e-commerce (e-pharmacies) on price and competition.

Over the years, the CCI has looked into the pharma sector in a number of cases, largely involving the role of trade associations of retailers and distributors, often finding their practices to be anti-competitive. Apart

from penalising the trade associations, in a number of cases the CCI has also penalised pharma companies that facilitate or do not counter these practices.

The CCI Chairperson also announced that the CCI will begin a market study on private equity investment in India.¹⁶ The study will focus on cases where investors hold minority interests in several firms in the same sector. It will look at the shareholding rights given to investors and consider the extent to which these rights can give the investors the ability to influence the decisions of the firms and impact competition.

14 "After e-commerce, CCI looks at pharma sector to unlock competition", Business Standard (3 December 2020).

15 CCI, *Market Study on E-Commerce in India: Key Findings and Observations* (8 January 2020). For details, please see our January 2020 Alert.

16 "After e-commerce and pharma, CCI zeroes in on private equity for market study", The Hindu Business Line (4 December 2020).

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