Competition Matters

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For Private Circulation only | January 2021

Indian Competition Law Roundup: January 2021

In this Roundup, we highlight the main developments in Indian competition law in January 2021.

Horizontal Agreements

No Collusion where Identical Pricing

After an investigation into alleged cartelisation by two bidders in a tender for the purchase of surgical disposal items by the *All India Institute of Medical Sciences* (*AIIMS*), the Competition Commission of India (*CCI*) concluded that there was no evidence of collusion and closed the case.[1] The investigating Director General (*DG*) found that the bidders had quoted identical prices, even though one had quoted per box and the other per piece, and that this had resulted from their collusion. The CCI agreed that the bidders had quoted identical prices. However, it pointed out that identical pricing was not in itself sufficient to show collusion, and considered whether market conditions and corroborative evidence could show such collusion. Market conditions – the lack of product homogeneity and the absence of foreclosure/barriers to entry – pointed to the market not being conducive to cartelisation. There was also no corroborative evidence to establish collusion. The identical pricing was one-off and there was nothing to show that the parties intended to split quantities. There was also no evidence of communications or meetings between the two bidders. After an examination of the pricing structures, the CCI also rejected the DG's finding that the parties should have quoted different rates as they were at different locations and their costs differed (one manufactured in India and the other imported the product). It considered that the similarity of the price bid for one product could have been coincidental rather than collusive.

It should be noted that AIIMS had withdrawn its complaint before the CCI ordered investigation by the DG. The CCI rejected arguments that it should not have ordered investigation after such withdrawal and should have heard the opposite parties before doing so. It stated that it was well within its powers to order an investigation of its own motion and, following its general approach, it did not need to hear the parties at the *prima facie* stage.

Abuse of Dominant Position

No** Prima Facie **Abuse by Google in E-Mail/ Video-Conferencing Markets

The CCI rejected at *prima facie* stage a complaint that *Google LLC* and *Google India Digital Services Private Limited* (together *Google*) had abused their dominant position in the market for internet-related services and products by integrating Google's Meet app into the Gmail app,

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1 *Alleged cartelisation by two bidders/firms in procurement/tender for purchase of surgical items on two-year contract basis by AIIMS*, CCI, *Suo Moto* Case No. 01/2018 (14 January 2021).

and thereby using its dominant position in one market to enter another.[2] The CCI rejected the wide market definition given by the Informant and considered that the primary relevant product market should be the "market for providing e-mail services in India". It then defined the relevant market for assessing whether there had been a leveraging abuse as the "market for providing specialised video conferencing services in India". The CCI declined to consider whether Google was a dominant player in the first market but considered whether there was *prima facie* abuse. In relation to alleged leveraging, the CCI noted that Gmail users were not forced necessarily to use Google Meet and there were no adverse consequences for not doing so. It also noted that Google Meet was available as an independent app outside the Gmail ecosystem and that consumers were free to choose from an array of video-conferencing apps. In considering whether there was a tie-in abuse, the CCI found that, although the Meet tab had been incorporated in the Gmail App, Gmail did not coerce users to use Meet exclusively and they were free to use any video-conferencing app. Finding no *prima facie* abuse the CCI closed the case.

Refusal to Allow Purchaser of Land to Resell not Abusive

The CCI dismissed allegations that *Haryana Urban Development Authority* (*HUDA*) had abused its dominant position in the market for provision of services for development and sale of institutional plots in the State of Haryana by not allowing the owners of institutional plots to sell.[3] The CCI rejected arguments by HUDA that it was a statutory authority exercising sovereign functions of the state and hence could not be considered an "enterprise" under the Competition Act, 2002 (*Competition Act*). The CCI referred to judgments of the Supreme Court as well as its own orders in concluding that the allotment of institutional plots by HUDA was also undertaken by private developers and was not relatable to a sovereign function of the State of Haryana. Turning to the question of abuse, the CCI noted that institutional plots were allotted at prices way lower than the market rates and that HUDA did not allow allottees to transfer them to make profits. It also noted that the Informant had not placed any significant emphasis on allegations of abuse in respect of an "one-sided" arbitration clause but considered that aspects relating the appointment of an arbitrator, etc., could be suitably dealt with under the Arbitration and Conciliation Act, 1996.

Increase in Reinsurance Rates not Abusive

The CCI also rejected at *prima facie* stage a complaint by the *Automotive Tyres Manufacturers Association* (*Association*) that the *General Insurance Corporation of India* (*GIC Re*) had acted in breach of the Competition Act by significantly increasing the insurance premium to be paid by Association members.[4] Specifically, it was alleged that GIC Re, as a reinsurer, had issued a circular to all domestic general insurance companies holding their Fire Surplus Treaty with GIC Re, which exorbitantly increased the reinsurance premium charged to those companies, which was then passed on to policy-holders, and this constituted unfair/excessive pricing under Section 4 of the Competition Act. The CCI considered that the relevant market was the "market for provision of reinsurance services" in India and that, given its very high market and other factors, GIC Re was dominant in this market. However, it found no case of *prima facie* abuse. It referred to an earlier closure order in relation to the same circular, where it found that it could not be said to be anti-competitive merely because it led to an enhancement in premium, that the CCI would not look into the quantification of premiums since a pure pricing decision would be of concern only where it was a manifestation of abuse of dominant position and that general

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2 *Baglekar Akash Kumar v Google LLC and Google India Digital Services Private Limited*, CCI, Case No. 39 of 2020 (29 January 2021).

3 *Gurgaon Institutional Welfare Association v Haryana Urban Development Authority*, CCI, Case No. 94 of 2016 (19 January 2021).

4 *Automotive Tyres Manufacturers Association v General Insurance Corporation of India*, CCI, Case No. 21 of 2020 (27 January 2021).

insurance companies were free to decide their premium rates and their reinsurer irrespective of the circular. Moreover, the Association had failed to show how the alleged increase in premium rates by GIC Re amounted to "excessive pricing". The CCI also rejected allegations that GIC Re had enforced regulations denying market access to other reinsurers, that it had engaged in resale price maintenance under Section 3(4) of the Competition Act, that it had "refused to deal" by excluding the coverage of losses due to contagious diseases like COVID-19 and that GIC Re was operating a "hub and spoke" cartel between the insurance companies.

Merger Control

Sinochem and ChemChina Amalgamation Cleared, Earlier Modification to be Performed

The CCI cleared the proposed amalgamation of two Chinese companies, *Sinochem* and *ChemChina*.[5] Both companies were owned by an ad-hoc ministerial level organisation that supervised the investments of the Chinese government; however, under Chinese law, the two companies were regarded as independent economic entities with independent decision-making powers, thus belonging to two independent economic groups. Both companies had operations in India and the parties submitted that there were no plans to change the Indian operations of either.

The CCI found overlaps in relation to the sale of formulated crop protection products (*CPPs*) in India, specifically herbicides, insecticides, fungicides and bio-stimulants. Following its earlier practice, it subdivided CCPs based on crop and class of pest and distinguished between selective and non-selective herbicides. In most segments of overlap, Sinochem's market share was less than 3%; this meant that the incremental market share would be insignificant and unlikely to cause an appreciable adverse effect on competition. In other segments, where Sinochem had 2-12% market shares, the CCI noted these were fragmented markets with the presence of several other players. In relation to bio-stimulants, the CCI found that only the two parties were present in India; however, Sinochem's market share was less than 1% and insubstantial to cause material change in the market post-combination.

In approving the transaction, the CCI noted that, under a previous order,[6] two Indian subsidiaries of ChemChina were required to operate as independent competing entities in India until 3 January 2026 and it required the concerned party in that case to continue to ensure due compliance with that modification.

CCI Clearance Limited to Proposed Acquirer Notifying Combination

The CCI approved the acquisition by *Twin Star Technologies Limited* (*Twin Star*) of an approx. 90% shareholding of a number of companies in the *Videocon Group*.[7] The notification was filed pursuant to a Resolution Plan submitted by Twin Star under the Corporate Insolvency Resolution Process of the target companies. Twin Star was part of a group headed by Volcan Investments Limited (the *Acquirer Group*) and the CCI found that the Acquirer Group and target companies overlapped in the production and wholesale supply of crude oil and natural gas in the Ravva oil and gas field in Andhra Pradesh. No competition concerns arose given the low combined market shares and insignificant incremental shares. In addition, the parties' activities in Ravva were governed by a production sharing contract, involving the Government of India, prescribing shares of total production, selling prices and customers.

Twin Star had submitted that the acquiring vehicle was not yet finalised, so it was unclear whether it, or another entity, would

5 *Sinochem Group Company Limited and China National Chemical Company Limited*, CCI, Combination Reg. No. C-2020/09/776 (12 November 2020).

6 *China National Agrochemical Corporation*, CCI, Combination Reg. No. C-2016/08/424 (16 May 2017).

7 *Twin Star Technologies Limited*, CCI, Combination Reg. No. C-2020/11/786 (8 December 2020).

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be the eventual acquirer. The CCI stated that a proposed intimation of amendment of the notification – to specify a different acquirer – would not be possible under the Combination Regulations after the making of the order. The CCI also noted that, if the different acquiring entity was jointly controlled, this would require a competition analysis taking account of the joint controller not forming part of the Acquirer Group. That said, the CCI stated that notification by one enterprise and actual acquisition by another was not envisaged by the Combination Regulations, so the clearance order was limited to acquisition by Twin Star. In effect this meant that any new acquirer would have to notify afresh and, depending on its identity, a different competition analysis might be required.

CCI Clears Acquisition in Pharma Sector

The CCI also cleared the acquisition by *Tau Investment Holdings* (*Tau*) of control of *JB Chemicals and Pharmaceuticals* (JB Chemicals).[8] Tau is a portfolio entity of the KKR group. Taking account of other portfolio entities of the KKR group, the CCI examined a number of overlaps focusing on vertical relationships and complementary activities.

Since KKR group had an investment in Max Healthcare (*Max*), engaged in the provision of integrated healthcare services through hospitals including pharmacy services, the CCI considered the overlaps with the contrast media and pharmaceutical products of JB Chemicals and the healthcare services of Max. The CCI observed that the total revenue of Max was less than 5% of the total of healthcare business in India and its pharmaceutical sales were also less than 5% of the total pharmacy business in India. The value of JB Chemical's products sold in Max's hospitals was again less than 5% of its total sales. Retail distribution of pharma products was fragmented throughout India where there were many hospitals and pharmacies. Taking account of these factors, the CCI considered that complementarity between the activities of JB Chemicals and Max did not raise any competition concerns.

Finally, in relation to contrast media products supplied by JB Chemicals, the CCI observed that Max had limited operations vis-à-vis the total healthcare business in India. The parties did not appear to have an incentive to foreclose supplies to other users, so any AAEC in India was not likely.

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8 *Tau Investments Holdings Pte. Limited and JB Chemicals and Pharmaceuticals Limited*, CCI, Combination Reg. No C-2020/07/757 (26 August 2020).

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