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Indian Competition Law Roundup: March 2021

In this Roundup, we highlight some important developments in Indian competition law in March 2021. We also summarise proposed amendments to the confidentiality regime that the CCI issued in April seeking comments from the public.

Anti-Competitive Agreements

Suppliers Sewing up the Market Fined for Bid Rigging

The Competition Commission of India (CCI) found that three suppliers of sewing machines had engaged in bid rigging in respect of a tender floated by the *Pune Zilla Parishad* for the supply of sewing machines to be distributed to backward classes, women and disabled persons living in rural areas of Pune.¹ The suppliers had quoted almost identical prices. This could not have been regarded as a coincidence giving other factors indicating that there had been collusion, such as common arrangements for the payment of tender charges, the use of a single IP address for submitting bids, telephone contacts during the tender process and close coordination in other tenders. In deciding on the level of penalty, the CCI pointed to the need to take serious notice of the infringement given the social welfare objectives of the procurement but noted that the suppliers were sole proprietorship concerns and a partnership firm. It considered that the larger goal of swift market correction would be met with a penalty of INR 1 million (approx. USD 13,340) on the suppliers and INR 10,000 (approx. USD 133) on a number of individual partners.

One key aspect the CCI observed in its order is that that the partners of a partnership firm cannot escape their liability under Section 48(1) of the Competition Act, 2002 (*Competition Act*) by merely identifying one person as conversant with the tendering work undertaken by the concerned partnership firm.

Defining the Legal Contours of Trade Associations

The CCI dismissed, at *prima facie* stage, a complaint by the *Gujarat Paper Mills Association (Informant)* that certain corrugated case manufacturers' associations (OPs) had engaged in a cartel seeking to affect the supply and pricing of kraft paper.² The Informant had alleged that the OPs had formed a cartel to stop the purchase of kraft paper from members of the Informant and had collectively closed their factories to create an artificial shortage in the supply of corrugated boxes, in order to get lower prices for kraft paper and higher price for the finished boxes. The CCI distinguished between

legitimate collective activities of trade associations and activities which violated competition law and referred to an earlier decision in which it stated that the legal contours of trade association activities would be transgressed where they acted together "with the intention of limiting or controlling the production, distribution, sale or price of or trade in goods or provision of services".³ It appeared to the CCI that the OPs had acted in protest against the conduct of kraft paper mills in order to ensure an uninterrupted supply of raw material rather than enter into an agreement to determine prices or limit supplies.

The CCI also rejected allegations that a 2016 resolution by one of the OPs seeking to discourage paper mills from directly approaching the clients of the corrugated box manufacturers was in breach of Section 3(3) of the Competition Act. The CCI noted that the resolution was not binding on the paper mills or end-users/brand owners, who were free to do business with each other, and that there was no evidence of coercive action by the OPs.

In reaching its *prima facie* decision, the CCI took on board the fact that allegations had been made that the Informant and other associations of kraft paper manufacturers had engaged in cartelisation during the same time period and that an investigation on this by the Director General was under way. The CCI's decision make it clear that the actions of trade associations designed to address concerns about the pricing of raw materials will not raise competition concerns where there is no agreement to determine prices or limit supplies. Non-binding resolutions addressing concerns about the structure of the supply chain can be accepted provided there is no coercion by the association. This should give some comfort to trade associations in "fighting their corner" against aggressive suppliers.

Abuse of Dominance

Failure by Liquor Wholesaler to Supply Brands Abusive

The CCI held that that the *Uttarakhand Agricultural Product Marketing Board (the Board)* had abused its dominant position in the market for the wholesale procurement of branded alcoholic beverages in the State of Uttarakhand.⁴ The *International Spirits and Wines Association of India (ISWAI)* had argued that the Board, acting as an exclusive wholesaler of foreign alcoholic beverages (including India-made foreign liquor (*IMFL*)) in Uttarakhand and two sub-wholesalers in

1 *People's All India Anti-Corruption and Crime Prevention Society v. Usha International Limited and Others*, CCI, Case No. 90 of 2016 (17 March 2021).

2 *Gujarat Paper Mills Association v. Indian Corrugated Case Manufacturers' Association (ICCMA) and Others*, CCI, Case No. 28 of 2020 (19 March 2021).

3 See *Advertising Agencies Guild v IBF and Others*, CCI, Case No. 35 of 2013 (1 July 2013).

4 *International Spirits and Wines Association of India (ISWAI) v Uttarakhand Agricultural Produce Marketing Board*, CCI, Case No. 02 of 2016 (30 March 2020).



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different divisions of the State had discriminated against certain IMFL brands of *United Spirits Limited (USL)* and *Pernod*. The CCI found that the Board was an “enterprise” under the Competition Act as it was engaged in economic or commercial activity even if there was no profit-making motive. After a detailed review of the legal framework for the supply of liquor in Uttarakhand, the CCI found that the Board had abused its dominant position under Section 4 of the Competition Act by denying market access to the USL and Pernod brands, by limiting or restricting the wholesale procurement and distribution of IMFL, and by inserting one-sided and unfair provisions in agreements with USL and Pernod.

In deciding on the level of penalty, the CCI balanced a number of mitigating factors, including the short period during which the abuse had occurred (from April 2015 to April 2016), the short-term role of the Board in this activity and significant losses in the financial year 2020-21, and aggravating factors, including its breach of the liquor legislation, the existence of High Court proceedings and its refusal to supply on the basis of demand. It therefore imposed a penalty of INR 10 million (approx. USD 112,650) on the Board.

Interim Measures Stayed by Gujarat High Court

The CCI issued an interim order under Section 33 of the Competition Act directing *MakeMy Trip India Pvt. Ltd. (MMT)* and *Ibibo Group Private Limited (Go-Ibibo)* (together MMT-Go) to re-list properties of *FabHotels* and *Treebo* on their online hotel booking portals.⁵ This order was passed in the context of the CCI’s *prima facie* orders directing an investigation into: a) MMT-Go for abusing a dominant position; and b) commercial arrangements between MMT-Go and *Oravel Stays Private Limited (OYO)* under which MMT-Go allegedly agreed not to list the allegedly closest competitors of OYO.⁶

The CCI found that the three conditions for the grant of interim measures as set out by the Supreme Court in the 2010 *SAIL* judgment⁷ were met. First, it was satisfied (in a much higher degree than needed for the formation of the *prima facie* opinion of breach in October 2019) that an infringement of the Competition Act had been committed and continued. Second, it was necessary to issue the interim order, looking at the balance of convenience. Third, there was a definite apprehension that there would be an adverse effect on competition in the market.

OYO did not have the opportunity to be heard during the interim proceedings and filed a writ petition before the Gujarat High Court challenging the interim order. The High Court stayed the CCI’s order, holding that *prima facie* the CCI had violated the principles of natural justice in denying the opportunity for a hearing.

Procedures

Final CCI Hearings to Proceed with the Same Bench

The CCI amended the Competition Commission of India (Meeting for Transaction of Business) Regulations, 2009 to address the composition of the CCI “*coram*” (bench) in final hearings.⁸ It is now provided that, during such final hearings, the *coram* of the CCI shall remain constant and it alone will continue to hear and participate in all subsequent proceedings and write the final orders. If, for whatever reason, it becomes impossible to continue the hearings with the same *coram*, the matter will be heard afresh with a new one. This addressed natural justice concerns that the composition of a bench of CCI members should not change during the final hearing process.

Proposed Amendments to the Confidentiality Regime

The CCI announced in April that it was in the process of reviewing and revising the confidentiality regime, based on its enforcement experience over the last 10 years. It published draft amendments to the relevant provisions in the General Regulations, and has invited public comments on these (to be submitted by 12 May 2021).⁹ Some of the key amendments proposed include: (i) the setting up of ‘confidentiality rings’ by the CCI, with such rings consisting of authorised representatives (in-house and external) of the parties who would be provided access to the entire case records in unredacted form subject to appropriate undertakings against disclosure; (ii) the introduction of a “self-certification” requirement, where parties would certify that their confidentiality claims over information / documents being filed with the DG / CCI are consistent with the requirements set out under the Competition Act and General Regulations, instead of the DG/CCI assessing confidentiality claims and passing an order; and (iii) a case-by-case determination on whether the identity of the informant / complainant should be granted confidentiality, and the power subsequently to revoke confidentiality over the identity of the informant.

5 *Federation of Hotel & Restaurant Associations of India and Another v MakeMyTrip India Pvt. Ltd. and Others*, CCI, Case No. 14 of 2019, etc. (9 March 2021).

6 *Federation of Hotel & Restaurant Associations of India and Another v MakeMyTrip India Pvt. Ltd. and Others*, CCI, Case No. 14 of 2019, etc. (28 October 2019), and *Rubtub Solutions Pvt. Ltd. Vs. MakeMyTrip India Pvt. Ltd. and Others*, CCI, Case No. 01 of 2020 (24 February 2020).

7 *Competition Commission of India v Steel Authority of India* (2010) 10 SSC 744.

8 The Competition Commission of India (Meeting for Transaction of Business) Amendment Regulations, 2021 (3 March 2021).

9 A background note and the proposed amendments can be accessed at http://cci.gov.in/sites/default/files/whats_newdocument/ProposalalongwithDraftRegulation.pdf. Comments can be e-mailed to atdregistry@cci.gov.in by 12 May 2021.

COMPETITION MATTERS



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The CCI referred to the competing interest of maintaining the sanctity of commercially sensitive information and the right of parties to have full access to unredacted information in order to be able to defend themselves. It is hoped that these proposals will, when implemented, strike the appropriate balance between these competing claims and help to reduce the significant delays that addressing confidentiality issues has caused in the past.

Merger Control

CCI Clears Google Acquisition of Minority Shareholding in Jio Platforms

The CCI cleared the acquisition by *Google International LLC (Google)* of approximately 7.73% of the equity share capital in *Jio Platforms Limited (Jio Platforms)*, a subsidiary of Reliance Industries Limited (RIL).¹⁰ Google group entities also entered into a commercial agreement with Jio Platforms to collaborate and develop new low-cost smartphones and a customised operating system for such devices.

In making its competition assessment, the CCI considered horizontal overlaps of the parties, the business collaboration to launch new smartphones and the effect of the arrangements on net neutrality and data integration. The overlap in online advertisement services raised no competition concerns; as Jio Platforms had an insignificant presence in this area, there was no incentive for the parties to coordinate. In relation to the supply of apps and mobile/web services, the overlapping activities were of typical new age dynamic markets, where market share was a starting point of an inquiry, but not the only guiding parameter for competition assessment; since the combined market share was less

than 30% or the incremental share was negligible, the parties had no incentive to coordinate. In relation to mobile operating systems, the CCI noted that Reliance Retail Limited would continue to sell phones using the KaiOS.

In relation to the business collaboration to launch new smartphones, the CCI focused on its impact on the smart mobile device market and the entire mobile eco system (covering handset, operating system, apps and service ecosystem). Given the competitive nature of the smartphone market, The CCI found that the market position of the parties and the smartphones yet to be launched were not significant to raise a concern. The CCI also considered that, since Google's primary stream of revenue was from the search advertisement business, there was no incentive for Google to foreclose competition or increase rivals' cost by denying the Android OS to third party OEMs.

The CCI considered that the "net neutrality" of *Reliance Jio*, a subsidiary of Reliance Jio providing telecoms services, was not likely to be affected. As the proposed combination was a partial acquisition, non-observance of net neutrality would be prejudicial to Reliance Jio and to the investment made by Google. Net neutrality was also required under telecoms regulations. Finally, the CCI considered the potential for data sharing between the parties. In the absence of full integration, it was not necessary for an assessment to be made at this stage. However, given the incentives for the parties to engage in mutually beneficial data sharing, the CCI signalled that, irrespective of clearance, any anti-competitive conduct resulting from data-sharing or otherwise could be taken up under Section 3 of 4 of the Competition Act.

¹⁰ *Google International LLC*, CCI, Combination Reg. No. 2020/09/775 (11 November 2020).

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