Competition Matters

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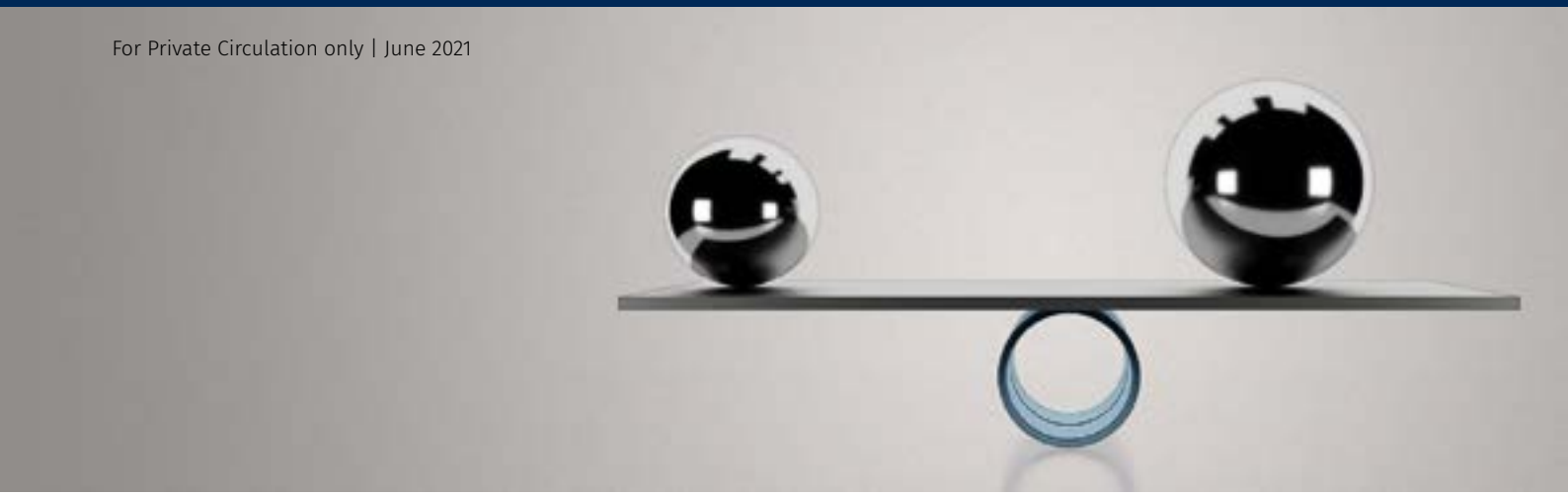

Indian Competition Law Roundup: June 2021

In this Roundup, we highlight some important developments in Indian Competition Law in June 2021.

Anti-Competitive Agreements

No Cartel to Raise Air Ticket Prices

The Competition Commission of India (*CCI*) rejected allegations that a number of domestic airlines had colluded to raise prices during the period of Jat agitation in February 2016.[1] Following the conclusions of the investigating Director General (*DG*), the CCI found there was no evidence of a cartel amongst the airlines. There was no direct evidence of a cartel – there were no incriminating e-mails or other electronic communications showing an exchange of information or collusive behaviour. A detailed analysis of 338 flights failed to reveal any price parallelism or identical pricing of tickets for flights. There was also no uniformity with regard to the total revenue, average ticket price, peak demand, classification of various fare buckets, seating capacity and opening of buckets.

The CCI pointed to the risk that the use of algorithms in determining prices could make it easier for firms to collude without any formal agreement or human interaction. However, it noted that airlines were using different software for the pricing of tickets in different fare buckets. The algorithms used by the airlines differed from each other as inputs were provided by the individual airlines to the software developers, based on the different historical behaviour of flights. This led to different types of custom-made algorithms suited to the needs of individual airlines. The CCI finally noted that the final call for allocating inventory was taken by the route analysts of the different airlines.

Abuse of Dominance

CCI Orders Investigation of Google for Alleged Abuses regarding Android TV OS

The CCI directed an investigation against *Google* for alleged abuses in relation to its TV operating system, Android TV OS.[2] The two Informants in the case alleged that Google had imposed restrictive obligations on smart TV original equipment manufacturers (*OEMs*) in breach of Section 4 of the Competition Act, 2002 (the *Competition Act*) (abuse of dominance) and Section 3(4) read with Section 3(1) (anti-competitive vertical agreements).

In considering the question of dominance, the CCI considered that the primary relevant market for the purposes of its *prima facie* assessment was the "market for licensable smart TV operating systems in India". It also defined as an associated relevant market the "market for app store for Android smart TV operating systems in India". The CCI was of the view that Google was dominant in the first market: as data on the market share of licensable smart TV operating systems was not available, the market share of smart TV OEMS

In this Issue

1 *Shikha Roy v Jet Airways (India) Limited and Others*, CCI, Case No. 32 of 2016 (3 June 2021).

2 *Kshitiz Arya and Purushottam Anand v Google LLC and Others*, CCI, Case No. 19 of 2020 (22 June 2021).

was used as proxy to arrive at an apparent market share for Android TV of almost 90%. The CCI also considered that Google was dominant in the second market, as Google's Play for Android TV was a must-have app and it was pre-installed in all Android TV based smart TVs.

In considering the question of abuse, the CCI noted that smart TV OEMs were required to sign agreements which required them to comply with compatibility standards and to preinstall the entire suite of Google apps. The CCI *prima facie* considered that developers of competing Android forked operating systems were denied market access and that OEMs were subject to obligations affecting the whole of their device portfolios and not just the devices on which the Android TV OS was installed. It also considered that the requirement to preinstall all Google apps *prima facie* entailed compulsory tying, was an unfair condition and also amounted to leveraging of Google's dominance in Play Store to protect its position in online video hosting services such as YouTube.

CCI Launches Investigation of Amateur Baseball Federation of India (and Grants Interim Injunction)

The CCI considered at *prima facie* stage allegations by the *Confederation of Professional Baseball Softball Clubs* (*CPBSC*) that the *Amateur Baseball Federation of India* (*ABFI*) had abused its dominant position by prohibiting State Baseball Associations from dealing with bodies and leagues not recognised by it and by threatening disciplinary action against players who took part in unrecognised leagues and tournaments.[3] In line with earlier orders, the CCI found that ABFI was an "enterprise" under the Competition Act as it controlled the provision of services. The CCI considered that, *prima facie*, the relevant market appeared to be the "market for the organisation of baseball leagues/events/ tournaments in India" and that the ABFI, given its apex position in the baseball ecosystem, its linkages with continental and international organisations, and its decisive role in the governance of baseball, was dominant in this market. In acting as it had, the ABFI had *prima facie* abused its dominant position by denying market access to other federations, limiting and restricting the provision of services and imposing an unfair condition on the players. The CCI also noted that the activity of ABFI, in writing to the affiliated State Baseball Associations requesting them not to entertain unrecognized bodies to conduct baseball events, could be captured under Section 3(1) together with Section 3(3) of the Competition Act, as facilitating anticompetitive horizontal agreements. Finding a *prima facie* case of breach of the Competition Act, the CCI therefore directed an investigation by the DG.

In a separate order made the same day, the CCI granted a rare interim injunction against the ABFI restraining it from issuing any communication to State Baseball Associations dissuading them from allowing their players to participate in tournaments organised by bodies not "recognised" by the ABFI and directing it not to threaten players who wished to participate in such events.[4] In the 2010 *SAIL* case,[5] the Supreme Court had made it clear that the power of the CCI to grant interim measures under Section 33 of the Competition Act had to be exercised sparingly and under compelling and exceptional circumstances and only where certain conditions had been satisfied. The CCI considered that all the ingredients for granting an interim injunction were overwhelmingly present in this case.

No Abuse by the Volleyball Federation of India

The CCI also considered allegations made by a number of volleyball players registered with the *Volleyball Federation of India* (*VFI*) that the VFI, together with *Baseline Ventures (India) Private Limited* (*Baseline*), had acted in breach of the Competition Act.[6] The Informants

In this Issue

3 *Confederation of Professional Baseball Softball Clubs v Amateur Baseball Federation of India*, CCI, Case No. 03 of 2021 (3 June 2021) (Order under Section 26(1) of the Competition Act, 2002).

4 *Confederation of Professional Baseball Softball Clubs v Amateur Baseball Federation of India*, CCI, Case No. 03 of 2021 (3 June 2021) (Order under Section 33 of the Competition Act, 2002).

5 *Competition Commission of India v Steel Authority of India* (2010) 10 SCC 744.

6 *Shravan Yadav and Others v Volleyball Federation of India and Baseline Ventures (India) Private Limited,* CCI, Case No. 01 of 2019 (3 June 2021).

alleged that the VFI, in entering into exclusive arrangements with Baseline for organising a Volleyball League in India, had restricted the market in organising such leagues and had restricted players from participating in other leagues. The investigating DG had found that the VFI was an enterprise under the Competition Act and that it had abused its dominant position in the markets for the organisation of professional volleyball tournaments/events and the market for services of volleyball players in India. The DG also found that the VFI and Baseline had acted in breach in Section 3(4) of the Competition Act prohibiting anti-competitive vertical agreements.

After hearing the parties, the CCI agreed with the DG's definition of the relevant markets and found that, having regard to the regulatory powers of the VFI under the pyramid structure of sports governance and the fact that it was the predominant buyer of professional players' services, the VFI was dominant in these markets. However, the CCI found there was no abuse of the VFI's dominant position or any anti-competitive agreement under Section 3(4). In the light of the specific facts and circumstances of the case – including the fact that professional volleyball was in its infancy relative to other sports, that the case involved limited arrangements between the VFI and Baseline and that the Volleyball League had come to an end after only one season – the CCI found that volleyball players had not been denied any effective opportunity to participate in any tournament and that the VFI had not directly or indirectly thwarted the formation of any other volleyball league or tournament.

National Stock Exchange Co-Location Services Not Abusive

The CCI dismissed at *prima facie* stage arguments that the National Stock Exchange (*NSE*) had abused its dominant position by introducing co-location services and by giving unfair preferential access to some trading members of its co-location services.[7] Co-location refers to the renting of space for servers and other computing hardware in a stock exchange's data centre - trading members who are able to place their computers in close proximity to the stock exchange servers are able to receive data quicker than others.

In defining the relevant market, the CCI noted that electronic-trading and algorithmic-trading (algo-trading) were sub-sets in trading in securities. In terms of features and characteristics (speed, sophistication, time and cost involved), algo-trading differed from normal electronic trading. The relevant market was therefore the "market for providing co-location services for algo-trading in securities to the trading members in the territory of India". The CCI considered that the NSE appeared to be dominant in this market. Turning to the question of abuse, the CCI rejected the arguments that the co-location facility was *in itself* anti-competitive. Pointing to the benefits of such facilities to investors and to the economy, and to the fact that it was offered in several major exchanges elsewhere in the world, it stated that it would be retrograde to stop the co-location facility. In relation to the argument that the NSE had failed to ensure fair access to its co-location facility, the CCI noted that the technology originally adopted by the NSE could have been prone to manipulation by unscrupulous persons. However, where the choice of technology was made in good faith and there was no fraudulent conduct, the NSE should not be found to be in breach of Section 4 of the Competition Act.

Merger Control

CCI Clears Tata Digital's Acquisition of Online B2B and B2C Suppliers

The CCI approved the acquisition by *Tata Digital Limited* (*TDL*) of up to 64.3% of the total share capital of *Supermarket Grocery Supplies Limited* (*SGS*) and a potential subsequent acquisition by SGC of sole control over *Innovative Retail Concepts Private Limited* (*IRC*).[8] TDL provides technology services related to identity & access management,

7 *Manoj K Sheth v National Stock Exchange of India Limited*, CCI, Case No. 35 of 2019 (28 June 2021).

8 *Tata Digital Limited*, CCI, Combination Reg. No. C-2021/03/822 (28 April 2021).

In this Issue

loyalty programmes, offers and payments, whilst SCG and IRC are respectively engaged in online B2B sales and online B2C sales of food & grocery, household and personal & beauty care products (*relevant products*) in India.

TDL is a wholly owned subsidiary of Tata Sons Group (*Tata Sons*) and the CCI found that another Tata Sons Group company was engaged in B2B and B2C sales of the relevant products and other companies manufactured and sold packaged food and grocery products. The CCI considered a variety of possible markets for B2B sales of the relevant products to cover all sales in India, all sales for each of the segments in India and in three overlapping cities, and organised sales in India for all the relevant products and for each of the various segments. For B2C sales of the relevant products, the CCI considered all sales in India, organised offline and online sales in India and in six overlapping cities, organised sales for each of the segments in India and the six cities, and online sales for all the relevant products and for each of the segments in India and three overlapping cities. The CCI found that there was no likelihood of an appreciable adverse effect on competition in any of these putative markets given the low incremental shares resulting from the combination and the competitive constraints from other players.

The CCI also found that existing vertical relationships between Tata Sons group entities and SGS in the B2B space posed no concerns given the limited presence of the parties and the presence of upstream and downstream players. Finally, in considering an agreement under which TDL would provide technology services to IRC, the CCI noted that TDL was a recent entrant in the digital payments space, there were other players in that space and IRC had a less than 1% market share in the downstream market.

In this Issue

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