

July 2021



## Indian Competition Law Roundup: July 2021

In this Roundup, we highlight some important developments in Indian competition law in July 2021.

### Anti-Competitive Agreements

#### *CCI Closes Case Against Stevedores*

The Competition Commission of India (CCI) dismissed allegations by the *Steel Authority of India Limited (SAIL)* and *Paradip Port Trust (PPT)* that some stevedoring contractors in Paradip Port had engaged in cartelisation in bidding for stevedoring contracts.<sup>1</sup> According to the CCI, the first impetus for the complaint arose from the charging of a partner of one of the opposite parties with the murder of a senior executive of a new entrant in the stevedoring market. The complaint was made after an enquiry by the Central Vigilance Commission (CVC) resulted in the CVC recommending that SAIL and PPT file a complaint before the CCI.

The CCI observed that the allegations were general in nature and that SAIL and PPT had not indicated the nature of the cartel, how it operated, the anti-competitive restrictions brought about by the cartel and how bids issued by SAIL had been manipulated or rigged. SAIL and PPT should have filed only after ascertaining that the facts and evidence available with them disclosed the existence of a cartel under Section 2(c) of the Competition Act, 2002 (*Competition Act*), which operated in a way which was *prima facie* in breach of Section 3(1) read with Section 3(3) of the Competition Act. Following an approach taken in many earlier *prima facie* orders, the CCI

observed that bald allegations unsupported by material/documents could not be the basis for directing an investigation. It therefore closed the case.

### Abuse of Dominance

#### *Uber Not Dominant in Delhi-NCR Radio Taxi Services Market*

The CCI closed a case against taxi-aggregator *Uber*, rejecting arguments by *Meru Travel Solutions (Meru)* that Uber had abused its dominant position under Section 4 of the Competition Act by resorting to predatory pricing and that exclusivity agreements with its driver partners had an appreciable adverse effect on competition (AAEC) under Section 3(4) of the Competition Act.<sup>2</sup>

The CCI followed the investigating Director General (DG) in defining the relevant market for the purposes of Section 4 as the “market for radio taxi services in Delhi-NCR”. It declined to accept a broader market embracing other modes of transportation such as auto-rickshaws, buses and metro as radio taxis had special features – such as point-to-point transportation, ease of booking, reliability and comfort – distinguishing them from the other modes, and the aggregators did not consider the competitive constraints posed by the others in taking their pricing or other commercial decisions. In relation to dominance, the CCI found that Uber and fellow taxi-aggregator Ola operated in a highly competitive market with fluctuating market shares and displacing each other as market leader on repeated occasions. As Uber was

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<sup>1</sup> *Steel Authority of India Limited and Paradip Port Trust v Mahimanand Mishra and Others*, CCI, Case No. 12 of 2021 (7 July 2021).

<sup>2</sup> *Meru Travel Solutions Pvt. Ltd. v Uber India Systems Pvt. Ltd. and Others*, CCI, Case No. 96 of 2015 (14 July 2021).

not able to sustain a high market share for a reasonable period, it could not be regarded as dominant.

The CCI also addressed an argument that Ola and Uber together held more than 95% of the market during most of the period under investigation and that this duopoly market situation resulted in harm to consumers given likely foreclosure effects. Stating that network effects played a pivotal role in digital economy markets, the CCI pointed out that such effects depended on the drivers and riders joining the network; the more who joined, the greater the resulting efficiencies. It reaffirmed its position that what mattered was not the number of competitors in a market but the strength of competitive constraints faced by existing players. Though Uber was not dominant, the CCI briefly touched on the question of below-cost pricing. Following its approach in an earlier case involving taxi-aggregators,<sup>3</sup> the CCI stated that the taxi-aggregators had to adopt aggressive-pricing strategies in order to compete aggressively for the market. In multi-sided markets such as the radio taxi market, firms provided discounts and incentives to attract customers on both sides of the market and reap the benefits.

Finally, the CCI considered whether alleged exclusivity arrangements between Uber and its drivers had an AAEC. The CCI considered the nature of the taxi-aggregators' model in some detail, finding that incentivization/rating schemes employed by Uber and Ola were designed to increase rides on their platforms and to attract drivers which resulted in building the networks, thereby leading to greater efficiencies. The CCI concluded that the competitive constraints that Ola and Uber imposed on each other outweighed any anti-competitive effects. It added that the legal test of an exclusionary agreement causing an AAEC had not been met. There was an ever-expanding pool of drivers, so the "locking-in" of drivers could not be seen as a bottleneck facility prohibiting the entry of new players or the expansion of existing players in the market.

## Procedures

### *CCI Relaxes Signing Rules for Pleadings*

Regulation 11 of the Competition Commission

of India (General) Regulations specify the signatories for an information or a reference to, or a reply to a notice or direction issued by, the CCI. In the case of a company, such pleadings shall be signed by the Managing Director or, in his or her absence, any Director duly authorized by the Board of Directors. The CCI relaxed this requirement in a Practice Direction,<sup>4</sup> providing that, in order to ease regulatory compliance, any employee authorised by the Board or any equivalent body could sign on behalf of the entity. A copy of the authorisation was to be enclosed with the relevant pleadings.

This new arrangement would apply not only to companies but to all other entities irrespective of their constitution. It was, however, made clear that this covered only employees of the entity concerned and not counsel and other professionals authorised to appear before the CCI (though counsel could continue to append his or her signature as well).

## Merger Control

### *Heineken/United Breweries Transaction Approved*

The CCI cleared the acquisition by *Heineken International B.V. (Heineken)* of control of *United Breweries Limited (UBL)*.<sup>5</sup> The proposed transaction involved the acquisition of a shareholding of up to 16.4% in addition to the existing 46.53%, resulting in a move from joint to sole control. In its competition assessment, the CCI considered the extent to which the parties competed before the change in control. Since Heineken mainly sold its beers in India through UBL, the proposed transaction was not likely to affect the competitive dynamics in any relevant market relating to the manufacture and sale of beer in India. It noted, however, that the Heineken Group was involved in export sales to India in the duty-free segment, but its presence in this segment was not significant to cause any change in competition dynamics.

### *CCI Clears Think and Learn (BYJU'S)/Aakash Transaction*

The CCI cleared the acquisition by *Think & Learn Private Limited (BYJU'S)* of sole control over

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3 *Fast Track Call Cab Pvt. Ltd. and Meru Travel Solutions Pvt. Ltd. v ANI Technologies Pvt. Ltd.*, CCI, Cases 6 & 74 of 2015 (19 July 2017).

4 Practice Direction dated 1 July 2021.

5 *Heineken International B.V.*, CCI, Combination Reg. No. C-2021/06/843 (21 June 2021).



*Aakash Educational Services Limited (AESL)*<sup>6</sup> This was the first transaction where the CCI assessed overlaps in the education sector (specifically, the online education sector).

In its competition assessment, the CCI noted that the parties had argued that the education sector in India could be segmented into formal and informal segments. The activities of BYJU'S and AESL overlapped in the broad non-formal education sector in India and in various sub-segments such as test preparatory coaching services for medical and engineering classes and coaching for various school classes. The CCI left the market definition open as the proposed transaction was not likely to cause an AAEC in any of the relevant markets in India. It concluded that the transaction was not likely to have any AAEC in India as: (i) the combined market share of the parties and the incremental market shares in all segments/sub segments was less than 10%; and (ii) the non-formal education sector in India was characterized by the presence of several players which would continue to pose significant competitive constraints.

## International Cooperation

### *CCI and The Japan Fair Trade Commission Sign Memorandum on Cooperation*

The CCI and the Japan Fair Trade Commission (JFTC) (*Competition Authorities*) concluded a Memorandum on Cooperation on 6 August

2021.<sup>7</sup> India and Japan had earlier entered into a Comprehensive Economic Partnership Agreement which came into force on 1 August 2011, which included provisions that each party should take measures against anti-competitive activities.

The Competition Authorities agreed to cooperate in various areas. Each would notify the other of its enforcement activities that it considered might affect the important interests of the other. They would exchange information on competition law and policy, experience in improving the legal framework and in conducting investigations, improvement of competitive conditions in markets and development of research. They would also work together in the field of technical cooperation, including training, exchanges of personnel and promoting the understanding of sound competition policy among stakeholders. The Competition Authorities would also, when investigating competition matters that were related to each other, consider coordination of their enforcement activities. They might also seek advice from each other regarding matters of enforcement of competition and competition policy, subject to safeguards on the communication and use of information. Cooperation and assistance was limited to the extent consistent with the laws and regulations of each country and their respective important interests, within their reasonably available resources.

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<sup>6</sup> *Think & Learn Private Limited and Aakash Educational Services Limited*, CCI. Combination Reg. No. C-2021/04/831 (7 June 2021).

<sup>7</sup> The Memorandum on Cooperation is available on the JFTC website (<https://www.jftc.go.jp/en/pressreleases/yearly-2021/August/21080602.pdf>).

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