



Indian Competition Law Roundup: November 2021

In this Roundup, we highlight the main developments in Indian competition law and policy in November 2021.

- The Competition Commission of India (CCI) found that a number of paper manufacturers and a trade association had participated in a cartel fixing the prices of certain types of paper. Finding information exchanges under the aegis of the association anti-competitive, the CCI also laid down reporting obligations of “innocent” bystanders witnessing anti-competitive behaviour in trade association meetings.
- The CCI considered that three associated table tennis associations were *prima facie* dominant in the market for the organisation of table tennis in India and had appeared to have abused their dominant position by preventing players from joining other associations and from playing in non-authorized tournaments. It directed the Director General (DG) to investigate the matter.
- Finally, the CCI released its Market Study on the Pharmaceutical Sector in India, focusing on the pricing of different categories of generic drugs and on issues surrounding the distribution of drugs.

Horizontal Agreements

CCI Targets Information Exchanges in Trade Association Meetings

The CCI found that a number of paper manufacturers and the *Indian Agro & Recycled Paper Association (Association)* had engaged in cartelisation in fixing the prices of writing and printing paper, had participated in meetings of the Association where they discussed prices and the roadmap for coordinated increases, and monitored the decisions taken in these meetings.¹ It noted that “*mere attendance*” in meetings where commercially sensitive information like prices was discussed “*influences and takes away the independent decision-making ability of participant competitors*” resulting in their no longer independently deciding price related policies in the market. The CCI rejected arguments that there was no appreciable adverse effect on competition (AAEC) in the absence of implementation or uniform implementation of decisions taken in the meetings. It stated that Section 3 of the Competition Act, 2002 (*Competition Act*) extended to prohibit agreements *likely* to have an AAEC. Where competitors met and discussed prices, there was likely to be an AAEC and this was sufficient for a finding of breach.

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¹ In Re: *Anti-Competitive Conduct in the Paper Manufacturing Industry*, CCI, *Suo Motu* Case No. 05 of 2016 (17 November 2021).



In deciding on the amount of penalty, the CCI noted that, as a result of the COVID-19 pandemic, most businesses were operating virtually and this had significantly impacted the paper business. As any significant penalty might render the manufacturers economically unviable, the CCI imposed “symbolic” penalties of INR 5 lakhs (approx. USD 6,600) on each of them and INR 2.5 lakhs (approx. USD 3,300) on the Association. One of the opposite parties, *Trident Limited*, had filed for leniency during the investigation by the DG and received a 100% reduction in penalty.

The CCI found no infringement by a number of the parties investigated. However, it stated that, knowing about the meetings and discussions, they should have reported the matter to the CCI. If they found themselves in meetings where activities prohibited by the Competition Act took place, they were obliged to recuse themselves from such meetings and, as responsible corporate citizens, immediately bring the matter to the attention of the CCI. As well as sounding an increasing loud bell of caution in relation to information exchanges, the CCI has also strongly signalled that trade association members cannot brush illegal behaviour by others under the carpet but must report such behaviour.

Abuse of Dominance

Director General to Investigate Alleged Abuses by Table Tennis Associations

The CCI considered at *prima facie* stage allegations that a number of table tennis associations operating at national, state and district levels had, by preventing players from joining non-affiliated organisations and from playing in non-recognised tournaments, abused their dominant position.² The CCI *prima facie* found that the relevant market for assessing

any abusive conduct was the market for the organisation of table tennis leagues/events/tournaments in India. The three associations were organised in a pyramidal structure governing and regulating the sport of table tennis in India from the district to the national level and, given their role and their interface with international associations and competitions, it appeared *prima facie* that they were dominant. The CCI considered that restricting players from joining non-affiliated organisations and threatening suspension if they did so or if they played in non-authorised tournaments was *prima facie* abusive. The CCI also considered that the conduct of some of the associations was *prima facie* in breach of Section 3(1) read with Section 3(3) of the Competition Act as it seemed to limit and control markets and the provision of services. It therefore directed the DG to investigate the matter.

Competition Advocacy

Market Study on the Pharmaceutical Sector in India

The CCI published its long-awaited *Market Study on the Pharmaceutical Sector on India*.³ The study focused on the implications for competition in two key areas: (a) the pricing of different categories of generic drugs, focusing on branded generic drugs; and (b) issues around the distribution of drugs.

Generic Drugs. The CCI identified three categories of generic drugs, distinguished from each other according to their route to market and targeted customer base. *Branded generic drugs* were marketed using the route of brand promotion through a field force of medical representatives engaging with doctors to persuade them to prescribe specific branded products. *Trade generic drugs* were generics (usually branded) supplied directly to chemists, hospital-run

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2 *TT Friendly Super League Association v The Suburban Table Tennis Association and Others*, CCI, Case No. 19 of 2021 (17 November 2021).

3 https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-Study-on-the--Pharmaceutical--Sector-in-India.pdf. (18 November 2021).



pharmacies and doctor-run pharmacies with maximum retail prices often set high to enhance retail margins and incentivize sales. Finally, *unbranded (or generic) generics* were generally unavailable in the private retail market but were supplied to public procurement agencies. The creation of dedicated retail outlets (*Janaushadhi Kendras*) to provide these generics at affordable prices had, however, provided an increasingly important route to market.

Even though the specific generics in each of these categories were not in principle distinguishable in terms of chemical composition – since they were generic versions of off-patent originator drugs – there was no effective price competition between generics in the three categories. In relation to *branded generic drugs*, the CCI pointed to their prevalence in the pharmaceutical market in India and noted that, despite the apparent homogeneity of generic drugs, branded generics commanded a significantly higher price than unbranded/generic generics. The CCI considered that the perceived variation in the quality of generic drugs posed a major barrier to effective price competition in generics as a whole. Asymmetric information about the quality of generics and a penchant for branded medicines undermined price competition. The CCI suggested a range of specific measures that could be taken to “*help move the needle on quality perception and price competition*”.

In relation to *trade generic drugs*, the CCI suggested that the practice of offering disproportionately high retail margins – which often resulted in pricing akin to that for branded generic drugs – could be countered by regulatory measures to rationalize trade margins. In the CCI’s view, an existing pilot study on the capping of trade margins for oncological medicines could pave the way for rationalization in other areas. However, recognising the risk that such rationalization could result in

competitive distortions, the CCI called for other pilot studies and implementation to be guided by regulatory impact assessments. The CCI also observed that effective competition between retailers – including by way of price discounts for consumers – could help to contain the price effects of high retail margins. In this regard, it would continue to address the collective determination of margins by the industry and any concerted attempt to fix, restrict or discourage discounting. It would also continue to address issues relating to the bundling of hospital and pharmacy services and the charging of a higher price for consumables from locked-in patients.

Trade Associations. The CCI also considered practices of trade associations which could limit competition in the pharmaceutical sector. In a long line of cases, the CCI had addressed practices such as the requirement of non-objection certificates (NOCs) for the appointment of stockists/chemists and the compulsory levying of product information service (PIS) charges for the introduction of new drugs in a particular territory. Although these practices had been widely discontinued, they remained in force in some pockets and the CCI signalled that it would continue to target such collective controls and diktats of associations. Arguments that NOC and PIC norms could help respectively to combat the supply of spurious and sub-standard drugs and to facilitate the dissemination of information of new drugs were to be addressed through appropriate regulatory mechanisms rather than by collective action. More generally, the CCI would complement enforcement action with proactive engagement with associations to create awareness and prevent violations of the Competition Act. Trade associations were encouraged to adopt effective competition compliance programmes to ensure that they and their members did not engage in prohibited activity.

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On-Line Pharmacies. Finally, the CCI considered the competition implications of on-line pharmacies. It noted that this segment was growing and the COVID-19 pandemic had provided a significant impetus to on-line purchasing. The study suggested that on-line and off-line modes of distribution would co-exist, with the on-line share of the market to increase for medicines for chronic conditions and the off-line share for medicines for acute care to be retained. A significant part of the on-line business was conducted under the marketplace model, with on-line pharmacies acting as intermediary technology platforms connecting buyers and sellers. E-pharmacy thus complemented the off-line retail network. The CCI identified two key competition concerns. First, referring to its market study on e-commerce,⁴ the CCI considered concerns of brick-and-mortar trade associations of discounting by on-line platforms. It reiterated its position that, at this stage of market development, such discounting could help build market share

and overcome the incumbency advantage of off-line distribution and that, as the market evolved, discounting could promote the welfare of consumers. However, it noted that the study did not address the competitive assessment of discounts and other conduct of e-pharmacies having implications for competition. This fact-intensive exercise would have to be addressed later on. The CCI also considered concerns that the platforms would have control over sensitive personal data of consumers. The CCI reiterated its position that Indian competition law was wide enough to enable the assessment of competitive harm that could be caused by the disproportionate collection/use of data by digital entities with market power. On-line pharmacies should adopt self-regulatory measures in the collection, use and sharing of data and on privacy. In order to safeguard patient privacy and protect sensitive personal medical data, necessary regulations should be enforced pending the adoption of data protection legislation.⁵

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⁴ CCI, *Market Study on E-Commerce in India: Key Findings and Observations* (8 January 2020).

⁵ At the end of November, the Indian Joint Parliamentary Committee issued its report on the Personal Information Protection Bill 2019. It is possible that the Report and Bill will be presented in the current Winter Session of Parliament.

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