



Indian Competition Law Roundup: June 2022

In this Roundup, we highlight some important developments in Indian competition law and policy in June 2022. In summary:

- The National Company Law Appellate Tribunal (NCLAT) dismissed appeals by Amazon.com NV Investment Holdings LLC against its December 2021 order imposing substantial penalties for failing to notify all the elements of a transaction and for failing to reveal its actual scope and purpose.
- The Competition Commission of India (CCI) found that a number of suppliers of protective tubes had cartelised in tenders to the Indian Railways.
- The CCI rejected a complaint by the operator of a B2B trade platform/marketplace that a food company had failed to supply it with biscuits. The CCI clarified the scope of the supplier's obligation to supply distributors in the context of Section 3(4) of the Competition Act, 2002 (*Competition Act*) prohibiting anti-competitive vertical agreements.
- The CCI held that the Amateur Baseball Federation of India had abused its dominant position by requesting State associations not to engage with unrecognized bodies but refrained from imposing a penalty.
- The CCI ordered the investigation of the movie ticketing portal/website

Big Tree Entertainment Pvt. Ltd. (*BookMyShow*) for alleged abuses of its dominant position, including by entering into exclusive and restrictive agreements with cinemas.

- Coal India was exonerated of allegations by a power distribution company that it had abused its dominant position by failing to supply the required grade of coal, tampering with samples and insisting on a no objection certificate for resuming supply.
- The CCI also rejected a complaint that a pharmaceutical company had abused its dominant position by hiking the price of an anti-viral drug used to treat COVID-19.
- The Rajya Sabha's Parliamentary Standing Committee on Commerce published a wide-ranging report on the "Promotion and Regulation of E-Commerce in India", including a number of recommendations relating to competition law and the promotion of competition in e-commerce markets.

Horizontal Agreements

CCI Finds Cartelisation in Supply of Protective Tubes to Indian Railways

The CCI found that several vendors had engaged in cartelisation on the supply of protective tubes to the Indian Railways.¹ The CCI found there was an understanding

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¹ *Cartelisation in the supply of Protective Tubes to Indian Railways*, CCI, *Suo Motu* Case No. 06 of 2020 (9 June 2022).



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between the vendors with regard to pricing for tenders, actions by the vendors controlling supply and market sharing through the allocation of tenders. The CCI rejected arguments that the vendors had been forced to indulge in these activities due to the market structure and the monopsonist position of the Indian Railways. In view of the nature of the cartel arrangements, mitigating factors and the fact that some of the vendors were micro, small or medium enterprises (MSMEs), the CCI imposed a penalty on the vendors of 5% of the average of their turnover in the relevant product for the last three preceding financial years. The CCI imposed the same level of penalty on certain individuals of the companies; however, it decided not to impose penalties on several other individuals who had already been penalized in an earlier matter involving a different product, as the period covered was similar and they were associated with MSMEs. One of the vendors, *Jai Polypan Pvt. Ltd.*, had sought leniency at the start of the process and was granted a 100% reduction in penalty.

Vertical Agreements

CCI Clarifies Scope of Obligation of Supplier to Supply Distributor

The CCI considered a complaint by *Hiveloop Technology Pvt. Ltd. (Hiveloop)*, operating *Udaan*, a B2B trade platform/market place, that food company *Britannia Industries Ltd.* had abused its dominant position in the “market for mid-premium segment biscuits in India” by failing to give it the “right mix” of products.² In considering the matter at *prima facie* stage, the CCI first noted that Hiveloop had failed to disclose that a group entity, *Granary Wholesale Pvt. Ltd. (Granary)*, was procuring Britannia’s biscuits and listing them on Udaan as an exclusive seller. It rejected Britannia’s arguments that Hiveloop had no standing to make the complaint but pointed out that the latter should have disclosed the role of Granary up front.

In looking at the substance of the matter, the CCI took the *prima facie* view that the market could be broadly stated as the market for biscuits in India. Given Britannia’s market share of approximately 32%, its leading competitor’s share of approximately 27%, intense competition from that competitor, other manufacturers (including new entrants), the presence of a vast network of distributors and Britannia’s reach throughout India, the CCI stated that it could not be said that Britannia did not have market power.

However, the CCI found no evidence that vertical restraints had been imposed. Britannia had stated that it had imposed no restriction of distributors on dealing with any B2B platform including Udaan. In any event, the CCI *prima facie* considered that there was no market foreclosure given Britannia’s large distribution network and the presence of other players in the online B2B segment. The CCI observed that, in considering the respective positions of Hiveloop and Britannia, any refusal to deal had to be seen in the context of overall market conditions. In the absence of foreclosure, there was no likely appreciable adverse effect on competition (AAEC). The CCI pointed to the need for Britannia to enjoy some autonomy in dealing with its products in the way it wished and rejected arguments that there were any “must stock” Britannia products that Hiveloop had to have in order to remain in business. It also rejected arguments that Britannia had discriminated against Hiveloop as it possessed no inherent right to claim parity with Britannia’s other distributors. In any case, there was no AAEC or likelihood of an AAEC. Given market conditions, there were no competition-based reasons for curtailing the autonomy of Britannia. It could not be compelled to supply on the basis of Hiveloop’s supply projections, especially where, as here, it had engaged with Hiveloop only on a pilot basis.

Taking the *prima facie* view that Hiveloop

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² *Hiveloop Technology Pvt. Ltd. v. Britannia Industries Ltd.*, CCI, Case No. 18 of 2021 (16 June 2022).



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had not demonstrated any exclusionary practice by Britannia which might hinder the development of a competing supply chain for its products, the CCI ordered that the matter be closed.

Abuse of Dominant Position

Baseball Body Found Guilty of Abuse – But Escapes Penalty

The CCI found that the *Amateur Baseball Federation of India (ABFI)* had abused its dominant position in the market for the organization of baseball leagues/events/tournaments in India by requesting State Baseball Associations not to entertain any unrecognized body and not to allow players to participate in tournaments organised by these bodies, as well as by stating that strict action would be taken against players participating in such tournaments.³ The CCI refrained from imposing any monetary penalty on the ABFI as it had withdrawn the offending letter and the complainant *Confederation of Professional Softball Clubs* had successfully organised a tournament in early 2022. However, it warned that any future abuse by ABFI would be treated as recidivism with aggravated consequences for it and its office bearers.

CCI Orders Investigation of BookMyShow for Alleged Abuses

The CCI considered at *prima facie* stage a complaint that BookMyShow, a movie ticketing portal/website, had abused its dominant position in various ways, including by entering into exclusive and restrictive agreements with certain cinemas, thereby limiting access by other portals.⁴ The CCI *prima facie* defined the relevant market as the “market for online intermediation services for booking of movie tickets in India” and found that BookMyShow was dominant. Its apparently high market share was to be seen “in

conjunction with its reach, scale and the network effects that work in its favour, leading to huge consumer footfalls thereby making presence on the platform critical for visibility and competitive ability of cinema theatres”. The CCI considered that the ability of BookMyShow to enter into certain exclusive agreements further corroborated its position of strength and various provisions in its agreements with cinemas indicated its superior bargaining power in deciding contractual terms.

The CCI considered that the exclusive and restrictive agreements, taken together, *prima facie* had the potential of denying access to competing platforms and potential entrants. Cinemas and cinemagoers were thus restricted in their choice of alternate booking platforms. It also expressed *prima facie* concerns regarding the ability of single cinema theatres themselves to sell tickets, on BookMyShow’s exclusivity relating to data ownership (which could increase the bargaining power of the platform over time) and the charging of high convenience fees. The CCI therefore directed investigation by the Director General.

Coal India Exonerated of Abuse Allegations

The CCI rejected a complaint by *Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO)* that *Coal India Limited* and certain of its subsidiaries (together *Coal India*) had abused their dominant position by failing to supply the declared grade of coal, tampering with samples and insisting on a no objection certificate (NOC) for resuming supply.⁵ The CCI rejected arguments that the complaint should not be entertained as various cases regarding the application of the Competition Act to Coal India were before the Supreme Court which had directed that proceedings before the NCLAT be stayed. The CCI considered that the Supreme Court’s direction was

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3 *Confederation of Professional Baseball Softball Clubs v. Amateur Baseball Federation of India*, CCI, Case No. 03 of 2021 (3 June 2022).

4 *Vijay Gopal v. Big Tree Entertainment Pvt. Ltd. (BookMyShow) and Others*, CCI, Case No. 46 of 2021 (16 June 2022).

5 *Tamil Nadu Generation and Distribution Corporation Limited v. Eastern Coalfields Limited and Others*, CCI, Case No. 02 of 2022 (30 June 2022).



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limited to *existing* proceedings pending before the NCLAT and did not cover cases before the CCI and future cases relating to Coal India.

The CCI *prima facie* found that Coal India was dominant in the relevant market for the “production and sale of non-coking coal to thermal power generators in India” but found that there was no abuse. In relation to the allegation of grade slippage, the CCI stated that the Office of the Coal Controller was a suitable and independent mechanism to redress such grievances. On the question of alleged sample tampering, the CCI noted that new third-party sampling procedures replacing sampling by Coal India were in place and, if tampering were suspected, remedies would lie elsewhere. Finally, the CCI considered that the insistence on a NOC was commercially prudent, in view of disputes on the alleged non-payment of dues by TANGEDCO. Finding that there was no abuse by Coal India, the CCI ordered the matter to be closed.

CCI Rejects Complaint of Abuse Relating to An Anti-Viral Drug

The CCI rejected a complaint that *Sun Pharmaceutical Industries Limited (Sun)* had abused its dominant position in hiking the price of FluGuard 400, an anti-viral medicine used to treat COVID-19, by attaching an adhesive sticker to the medicine strip.⁶ The CCI found that more than 40 substitutes of FluGuard 400 mg were available in the market and several manufacturers manufactured and supplied these substitutes. The markets for these medicines appeared to be competitive and there was nothing on record suggesting that Sun could have operated independently of its competitors. The CCI decided not to delve into the issue whether attaching a new sticker was lawful as Sun did not seem

to have market power. It was open to the Informant to raise any grievance with regard to violations of relevant non-competition laws with the appropriate forum/authority. Since there was no *prima facie* case of breach of Section 4 of the Competition Act, the CCI closed the case.

Merger Control

NCLAT Rejects Amazon Appeal

In a lengthy judgment,⁷ the NCLAT rejected a number of appeals against the CCI’s December 2021 order imposing penalties on *Amazon.com NV Investment Holdings LLC (Amazon)* for various failures in its 2019 notification of the acquisition of a 49% shareholding in *Future Coupons Private Limited (FCPL)*.⁸ The CCI had found that FCPL was a vehicle for Amazon to acquire an interest in India retail giant *Future Retail Limited (FRL)* and that Amazon had failed to notify a relevant agreement and other commercial arrangements and that it had suppressed the actual purpose and particulars of the combination. It imposed penalties of INR 200 crores (approx. USD 26.9 million) under Section 43A of the Competition Act for the failure to notify and INR 2 crores (approx. USD 270,000) under Sections 44 and 45 in respect of “the deliberate design on the part of Amazon to suppress the actual scope and purpose of the Combination”. It also required Amazon to make a new notification, using Form II, within 60 days of receipt of its order, with the earlier approval remaining in abeyance.

After a detailed analysis of the factual background and applicable law, the NCLAT stated its “complete agreement” with the CCI’s views that Amazon had intentionally not made known the “real ambit and purpose” of the FCPL combination and found that Amazon was in breach of

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6 *Mr. Ashwani Kumar Singla v. Sun Pharmaceutical Industries Limited and Another*, CCI, Case No 17 of 2022 (10 June 2022).

7 *Amazon.com NV Investment Holdings LLC v. Competition Commission of India and Others*, NCLAT, Competition Appeal (AT) No. 01 of 2022, etc. (13 June 2022).

8 *Proceedings against Amazon.com NV Investment Holdings LLC under Sections 43A, 44 and 45 of the Competition Act, 2002*, CCI (17 December 2021).



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Sections 43A, 44 and 45 of the Competition Act. It considered that the penalty imposed under Section 43A was a “fair and sensible” one. However, it found the penalty imposed under Sections 44 and 45 “slightly on the higher side/excessive” and reduced this to INR 1 crore.

The NCLAT also found that the CCI possessed an incidental/residuary power to pass an order keeping the 2019 approval in abeyance. It made it clear that the one-year limitation period under Section 20(1) of the Competition Act for reviewing combinations did not apply to a case where a combination had been notified and approved. Finally, the NCLAT rejected arguments that the absence of a Judicial Member in the CCI meant that the December 2021 order was “bad in law”.

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Parliamentary Committee Issues Wide-Ranging E-Commerce Report

The *Rajya Sabha’s Parliamentary Standing Committee on Commerce (Committee)* published a wide-ranging report on the “Promotion and Regulation of E-Commerce in India”.⁹ It is not clear how many of its recommendations will be taken up in forthcoming legislation on e-commerce, but the Report is an important contribution to the debate. Its detailed recommendations cannot be addressed in detail here. However, a number of recommendations relating to competition law and the promotion of competition in e-commerce markets are briefly addressed below:

- *Competition Issues in the E-Commerce Marketplace:* The Committee addressed issues on platform neutrality and recommended a range of measures applying to platforms operating under marketplace and inventory models. These included: a prohibition on marketplace platforms having

relationships with sellers on those platforms; non-discrimination in relation to incentives/discounts; clear and transparent policies on data collection and use; publication of criteria for determining rankings of goods and sellers; disclosure of complete terms and conditions for selling on websites; and unbundling of services in the supply chain.

- *Foreign Direct Investment (FDI) Policy and Competition:* The Committee considered that the current FDI framework was inadequate to address anti-competitive practices in the e-marketplace and recommended working out a comprehensive framework regulating e-commerce and strengthening the FDI enforcement mechanism to tackle anti-competitive practices. The Committee further considered that a holistic framework addressing the anti-competitive issues, irrespective of the marketplace being funded by foreign or domestic entities, was needed.
- *Consumer Protection and Competition:* The Committee referred to the Consumer Protection (E-Commerce) Rules and draft Rules aimed at promoting competition by prohibiting anti-competitive conduct. The Committee considered that such conduct fell within the Competition Act and recommended a clear division of responsibilities between regulators to avoid overlaps and a robust mechanism for cooperation between various ministries/regulators and the CCI.
- *Amendments to the Competition Act:* The Committee recommended that, in line with the 2019 recommendations of the Competition Law Review Committee (CLRC), the factors set out in Section 19(3) of the Competition Act on AAEC should be updated. In relation to abuse of dominance, following the position taken by the CLRC, Section

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⁹ Parliament of India/Rajya Sabha Department Related Parliamentary Standing Committee on Commerce, 172nd Report, *Promotion and Regulation of E-Commerce in India* (15 June 2022).



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19(6) and (7) of the Competition Act should be amended to incorporate additional factors for defining the relevant market to account for new-age digital markets and guidance issued by the CCI. In relation to merger control, the Committee called for enactment of the Draft Competition (Amendment) Bill which included provisions enabling the Central Government to notify additional criteria to extend the ambit of merger scrutiny to significant transactions in digital markets currently escaping merger control.

- **Enforcement Gaps in the Current Regulatory Regime:** The Committee pointed to the fragmented governance of e-commerce involving a number of different authorities. It called for a framework to enable periodic interaction and information exchange between the CCI and other regulatory bodies/Ministries and the creation of a Digital Market Division within the CCI to be tasked with regulation of digital markets with the participation of the other regulators/Ministries.
- **Gaps in the Current Regulatory Regime:** The Committee pointed to shortcomings with *ex-post*

enforcement, especially with regard to “gatekeepers”. It recommended the revamping and strengthening of India’s *ex-ante* regulatory framework and setting a threshold for qualifying as “gatekeeper”. The Competition Act should prescribe additional quantitative criteria to identify such “gatekeepers” who should notify the regulator once the threshold was met. The Committee also recommended that the CCI should formulate a mandatory code of conduct to cover relations between e-marketplace operators and business users/consumers. Certain practices could be prohibited and positive obligations – including on data – imposed in such a code.

- **Information and Communications Technology Infrastructure and Cyber Security:** The Committee noted that large amounts of data were generated on e-commerce platforms. It called for the prompt enactment of the Personal Data Protection Bill 2019 and clear guidelines on the use of sharing of data. It also recommended separate regulatory frameworks for the treatment of personal and non-personal data.

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