



Indian Competition Law Roundup: July and August 2022

In this Roundup, we highlight some developments in Indian competition law and policy in July and August 2022. During this period:

- The Government of India introduced the Competition (Amendment) Bill, 2022 (*Bill*) before the Lok Sabha (the Lower House of Parliament). This Bill, which proposes several significant amendments to the Competition Act, 2002 (*Competition Act*), was sent to the Parliamentary Standing Committee on Finance for further examination.
- The Supreme Court of India (*Supreme Court*) disposed of an appeal against a judgment of the former Competition Appellate Tribunal (*COMPAT*) upholding a 2011 decision of the Competition Commission of India (*CCI*) finding bid rigging in a tender for medical equipment.
- The National Company Law Appellate Tribunal (*NCLAT*) upheld the CCI's decision that signage suppliers had engaged in bid rigging and market allocation in tenders floated by the State Bank of India.
- The CCI found that a number of trailer owners' associations in Chennai had fixed prices and restricted the number of trailers plied by container freight operators. It issued a cease-and-desist order but imposed no penalties.
- The NCLAT upheld a 2017 CCI decision

rejecting allegations that *WhatsApp LLC* had abused its dominant position in relation to its 2016 update to its Terms of Service and Privacy Policy. Separately, the High Court of Delhi (*Delhi High Court*) dismissed writ petitions challenging the CCI's jurisdiction to investigate WhatsApp's 2021 update to its Terms of Service and Privacy Policy.

- The Delhi High Court held that the CCI's jurisdiction under the Competition Act was not ousted merely because a complaint related to the licensing of patents under the Patents Act, 1970.
- The NCLAT disposed of an appeal against a refusal by the CCI to grant interim relief to a dealer against Tata Motors.
- The CCI imposed penalties on *SABIC International Holdings* for failure to notify an acquisition of shares in Clariant AG and, in respect of a later acquisition notified to the CCI, for crediting shares into an escrow account prior to CCI approval.

Competition (Amendment) Bill, 2022

On 5 August, the Government of India introduced the Competition (Amendment) Bill, 2022 before the Lok Sabha. The Bill proposes several significant amendments to the Competition Act.¹ These include, in relation to merger control, the introduction

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¹ See our 5 August Briefing, *Competition Amendment Bill – A Modern Law for Modern Markets*, available at <https://www.amsshardul.com/insight/competition-amendment-bill-a-modern-law-for-modern-markets/>.



of deal value thresholds, expedited merger review timelines, the codification of “material influence” as the standard of control, a derogation of standstill provisions for open market purchases and expanding the scope of gun jumping provisions. In relation to enforcement, the proposals include introducing a framework for making settlements and commitments, fixing liability on facilitators of cartels as well as participants in “hub and spoke” arrangements, updating the leniency regime (including the introduction of “leniency plus”) and expanding the powers of the Director General (proposed to be appointed by the CCI itself rather than, as now, by the Government).

The Speaker of the Lok Sabha has referred the Bill to the Parliamentary Standing Committee on Finance for examination and report within 3 months. It is possible that the Bill will be taken up in the forthcoming Winter Session of the Parliament.

Anti-Competitive Agreements

Supreme Court Upholds Finding of Bid Rigging

The Supreme Court disposed of an appeal by *PES Installation Private Limited (PES)* against a 2013 judgment of the COMPAT² upholding a CCI order finding that PES and others had engaged in bid rigging in a tender for supply of certain medical equipment.³ In a short order, the Supreme Court noted that the COMPAT had reduced the penalty amount from 5% to 3% (of the average turnover for the relevant past 3 years) and that this penalty had since been deposited. Any concerns that PES might suffer impediments like blacklisting or debarring by any authority could be

challenged in independent proceedings before an appropriate forum.

NCLAT Upholds CCI Signage Order

The NCLAT upheld the CCI’s February 2022 order⁴ imposing penalties on various signage suppliers for bid rigging and allocation of geographic markets with respect to tenders floated by the State Bank of India.⁵ The NCLAT observed that the CCI’s order was well-reasoned and dealt with each aspect in detail, and there was no reason for it to interfere.

CCI Finds Trailer Owners’ Associations in Breach of Section 3 of the Competition Act

Following a complaint by the *National Association of Container Freight Stations, Chennai Chapter (Informant)*, the CCI found that a number of trailer owners’ associations in Chennai had fixed the prices for container trailer services and had decided to restrict the number of trailers plied/operated by the members of the Informant and their sister concerns.⁶ One of the opposite parties argued that there was no appreciable adverse on competition (AAEC) as there had been an increase in price of fuel and other inputs, members had suffered hardship as a result of the actions of members of the Informant and the members of the Informant and the Chennai Port Trust had been actively involved in the impugned decisions. The CCI considered that the presumption of an AAEC had not been rebutted and that the “thin line” between legitimate and prohibited activities of trade associations had been transgressed. The collective action by the associations had manipulated market forces and narrowed the scope of competition. Finding the opposite parties to be in breach of Section

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² *MDD Medical Systems India Private Limited v. Foundation for Common Cause & People Awareness and Others*, Competition Appellate Tribunal, Appeal No. 93 of 2012 (25 February 2013).

³ *PES Installation Private Limited v. MDD Medical Systems Private Limited & Others*, Supreme Court of India, Civil Appeal No. 4040 of 2014 (29 July 2022).

⁴ *In Re: Alleged anti-competitive conduct by various bidders in supply and installation of signages at specified locations of State Bank of India across India*, CCI, *Suo Moto* Case No. 02 of 2020 (3 February 2022).

⁵ *Naresh Kumar Dasari v. Competition Commission of India*, NCLAT, Competition Appeal (AT) No. 24 of 2022 (27 July 2022).

⁶ *National Association of Container Freight Stations, Chennai Chapter v. Trailer Owners Association and Others*, CCI, Case No. 04 of 2018 (20 July 2022).



Competition Matters

3 of the Competition Act, the CCI issued a cease-and-desist order. It considered that this would serve the ends of justice and no penalties were imposed.

Abuse of Dominance

WhatsApp Privacy Policy

The NCLAT dismissed an appeal against a 2017 CCI decision⁷ rejecting, at the threshold stage, allegations that *WhatsApp LLC* had abused its dominant position in relation to its 2016 update to its Terms of Service and Privacy Policy.⁸ The NCLAT found that, although WhatsApp was in a dominant position in the market for consumer communication apps, there was no abuse. It concluded that simply updating terms and conditions, and the users consenting or not consenting, did not amount to an abuse in the relevant market where WhatsApp and multiple messaging providers were operating. In the digital age this had become a common practice.

Separately, the Division Bench of the Delhi High Court rejected WhatsApp/Meta's appeal against the April 2021 order of a Single Judge⁹ dismissing writ petitions filed by them challenging the CCI's jurisdiction to investigate WhatsApp's 2021 Update to its Terms of Service and Privacy Policy (2021 Update).¹⁰ The Delhi High Court thus allowed the investigation to continue despite a number of challenges to the 2021 Update itself, pending before the Supreme Court and the Delhi High Court.

Jurisdictional Issues

Delhi High Court Maintains CCI's Jurisdiction in a Case Involving Patents

The Delhi High Court disposed of a writ

petition by *Vifor International Ltd.* (*Vifor*) challenging a CCI order seeking information in relation to Vifor's patents on the ground that the CCI had no jurisdiction to consider a case involving the rights of a patent holder under the Patents Act, 1970 (*Patents Act*).¹¹ The Delhi High Court held that such a case would fall outside the jurisdiction of the CCI only if it exclusively dealt with rights and liabilities arising out of the Patents Act and did not pertain to an issue falling within the ambit of the Competition Act. Following the approach of the Supreme Court in the *Bharti Airtel* case¹² and the Delhi High Court in the *Monsanto* case,¹³ it held that the jurisdiction of the CCI was not ousted just because the complaint related to the subject of patents. It also held, in line with the *Monsanto* case, that Section 3(5) of the Competition Act (which provides that nothing in Section 3 shall restrict the right of persons to restrain any infringement of, or impose reasonable restrictions, necessary to protect rights under specified Indian legislation (including the Patents Act)) could not be read to exclude the CCI's jurisdiction completely. The High Court also rejected concerns around the disclosure of commercially sensitive information, pointing to the safeguards contained in the recently amended Regulation 35 of the CCI (General Regulations), 2009.

Vifor had also argued that disclosure of the information sought by the CCI would expose it to criminal proceedings under Article 271 of the Swiss Criminal Code. The High Court held that entities operating in multiple jurisdictions could not claim immunity or exemption from laws not shown to be in breach of the international treaty obligations of nations.

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⁷ *Vinod Kumar Gupta v. WhatsApp Inc.*, CCI, Case No. 99 of 2016 (1 June 2017).

⁸ *Vinod Kumar Gupta v. Competition Commission of India and WhatsApp LLC*, NCLAT, Competition Appeal (AT) No. 13 of 2017 (2 August 2022).

⁹ *WhatsApp LLC v Competition Commission of India*, Delhi High Court, W.P.(C) No. 4378 of 2021, etc. (22 April 2021).

¹⁰ *WhatsApp LLC v Competition Commission of India and Another*, Delhi High Court, LPA No. 163 of 2021, etc. (25 August 2022).

¹¹ *Vifor International Ltd. v. Competition Commission of India*, Delhi High Court, W.P.(C) No. 11263 of 2022 (28 July 2022).

¹² *Competition Commission of India v. Bharti Airtel*, Supreme Court, Civil Appeal No. 11843 of 2018 (5 December 2018).

¹³ *Monsanto Holdings Private Limited and Others v. Competition Commission of India and Others*, Delhi High Court, W.P.(C) No. 1776 of 2016 (20 May 2020).



The High Court further observed that the writ petition was premature and found that there was nothing to suggest that the CCI would refuse to consider the objections raised by Vifor. It disposed of the writ petition with the observation that the CCI should duly consider Vifor's objections. It also took on board Vifor's statement that it would attend to and comply with the CCI's directions to provide information in a time bound manner.

Procedures

NCLAT Directs Speedy Decision by CCI

The NCLAT disposed of an appeal filed against a December 2021 CCI order¹⁴ dismissing an application by a vehicle dealer for interim relief against *Tata Motors*.¹⁵ The CCI investigation in the matter was ongoing. The NCLAT did not examine the appeal on its merits but considered that the CCI proceedings should not be delayed further. It directed the CCI to take a final decision on the matter expeditiously, preferably within three months from the date of receipt/production of a copy of the NCLAT order.

Merger Control

CCI Imposes Penalties for Failure to Notify and Gun Jumping

In two connected orders, the CCI found that SABIC International Holdings BV (*SABIC*) had failed to notify a combination to the CCI and, in relation to a later combination that was notified, had engaged in gun jumping.¹⁶ The orders concerned two consecutive transactions. First, the acquisition by SABIC of an equity stake of 24.99% in Clariant AG (the *Target*) (the *First Transaction*). Second, the acquisition by SABIC of an additional 6.51% shareholding in the *Target* (the *Second Transaction*).

The First Transaction was not notified to the

CCI on the grounds that it was done "solely as an investment" or "in the ordinary course of business" and was thus covered by the exemption from notification in Item 1 of Schedule 1 of the Combination Regulations (*Item 1*). In summary, this exemption applies where the acquirer will hold less than 25% of the total shareholding and there is no acquisition of control over the target. Further, according to the Explanation to Item 1, an investment of less than 10% will be treated solely as an investment, provided the acquirer is able to exercise only such rights as are exercisable by ordinary shareholders of the target, is not a member of the target's board and has no right or intention to nominate a director on the target's board, and does not intend to participate in the affairs or management of the target. In Section 43A proceedings, the CCI held that it was clear that SABIC intended to participate in the affairs and management of the *Target* (which was corroborated by the fact that it was vested with the right to appoint up to 4 persons for election as directors in the *Target*), and that it could not rule out the possibility that it may have had an understanding with the *Target*. It rejected arguments that the First Transaction was not notifiable in India as it was a purely offshore transaction. The CCI noted that, once the thresholds prescribed under Section 5 of the Competition Act are met, the CCI, under Section 32 of the Competition Act, can inquire into combinations taking place outside India which will or are likely to cause an AAEC in India, with the residential status of the parties to the transaction being immaterial. Finding that there was a failure to notify the First Transaction, the CCI took account of mitigating and aggravating factors and imposed a penalty of INR 4,000,000 (approx. USD 50,000).

In relation to the Second Transaction, SABIC acquired a 6.51% shareholding via an escrow

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¹⁴ *Nishant P. Bhutada v. Tata Motors Ltd*, CCI, Case No. 16 of 2020 (21 December 2021).

¹⁵ *Nishant Bhutada v. Competition Commission of India*, NCLAT, Competition Appeal (AT) No. 11 of 2022 (26 July 2022).

¹⁶ *Proceedings against SABIC International Holdings BV under Section 43A of the Competition Act, 2002*, CCI (15 and 19 July 2022).



mechanism, under which the shares were credited into an escrow account before notification to the CCI, with the shares to be released to SABIC on receipt of merger clearances. The use of such a mechanism was regarded as gun jumping by the CCI in the *SCM Solifert* case¹⁷ and this position was endorsed by the Supreme Court.¹⁸ The CCI rejected arguments that this transaction differed from that in the *SCM Solifert* case in that the escrow shares did not carry voting rights and did not qualify as “shares”

and, in the light of applicable Swiss laws, SABIC was not a recognised shareholder of the escrow shares. Holding that SABIC was vested with the legal and beneficial ownership of the escrow shares, the CCI found that SABIC should have obtained approval before acquiring the shares via the escrow mechanism. Taking account of a number of mitigating factors, the CCI imposed a token penalty of INR 500,000 (approx. USD 6,250).

¹⁷ *SCM Solifert Limited*, CCI, Combination Registration No. C-2014/05/175 (10 February 2015).

¹⁸ *SCM Solifert and Another v. Competition Commission of India*, Supreme Court of India, Civil Appeal No. 10678 of 2016 (17 April 2018).

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