



ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS

Competition Law & Policy Update

Volume 1 of 2018

CONTENTS

PREFACE2

ADVOCACY UPDATE.....3

CCI designs Diagnostic Tool for Procurement Officers3

MERGER CONTROL UPDATE.....4

Ease of doing business extended to the Oil and Gas sector – CPSE exempt from filing notice with the CCI4

MAMA Catering and others penalized for delayed notification4

INVESTIGATIONS INITIATED BY THE CCI UNDER SECTION 26(1) OF THE ACT5

CCI orders probe into unfair practices of Honda Motorcycle.....5

Jurisdiction of the CCI to entertain complaints for abuse of dominance cannot be ousted6

ALLEGATIONS DISMISSED BY THE CCI UNDER SECTION 26(2) OF THE ACT.....8

No *prima facie* conclusion of collusion can be drawn on the basis of bald allegations by the Informant.....8

CCI dismisses allegations of abuse of dominance against Coal India and Ministry of Coal8

CCI upholds right of the Airports Authority of India and Power Grid to choose their service providers based on objective criterion.....9

ALLEGATIONS DISMISSED BY THE CCI UNDER SECTION 26(6) OF THE ACT.....10

CCI dismisses allegations of a buyers cartel10

RECENT PENALTIES IMPOSED BY THE CCI UNDER SECTION 27 OF THE ACT11

CCI penalizes Google for contravention of Section 4 of the Act.....11

CCI imposes penalty on Ghaziabad Development Authority for contravention of Section 4 of the Act13

CCI re-imposes penalty on domestic airlines for contravention of Section 3 of the Act14

CCI finds MAHAGENCO and parties in contravention of Section 3 and 4 of the Act15

CCI imposes a penalty yet again for issuance of NOC and PIS charges in the pharmaceutical distribution market.....17

OTHER ORDERS.....19

Non-compliance of the CCI’s directions attracts penalty19

INTERVENTION BY THE NCLAT20

NCLAT sets aside penalty imposed by the CCI on an individual for non – compliance20

INTERVENTION BY THE HIGH COURTS21

Delhi High Court narrows the scope of CCI’s powers to review / recall its orders21

INTERVENTIONS BY THE SUPREME COURT22

Objective justification attracts no penalty22

PREFACE

Dear Reader,

The January – March 2018 quarter has seen some hectic activity in the Indian competition law space. During this period, the Competition Commission of India (“CCI”) passed five orders under Section 27 of the Competition Act, 2002 (“Act”), a higher than usual number. Further, the CCI also ordered investigations by the Director General (“DG”) under Section 26(1) of the Act in two complaints while dismissing eight cases under Section 26 (2) of the Act, finding no prima facie case of contravention of the provisions of the Act. During this period, the CCI also imposed a fine of INR 1.17 Crore (USD 179.8 Thousand approx.)* under Section 42 of the Act for non-compliance of its orders and has also closed, after investigation, a rather unusual case involving a buyers’ cartel.

Notably, in order to make procurement systems more effective, the CCI has designed and issued a “Diagnostic Tool for Procurement Officers” i.e., a guide for procurement officers in various departments and organization to help them review their tender process to ensure competitive outcomes.

The 17th Annual ICN Conference was hosted by the CCI in New Delhi from 21 March 2018 to 23 March 2018. The event witnessed the participation of more than 500 delegates from various agencies and jurisdictions. The event saw discussions on issues relevant to international competition regulators, such as, the role of competition regulators in the digital economy, increased coordination between agencies, reliance on digital tools to help uncover cartels etc.

The CCI also saw a change in the composition of its quorum with Shri. S. L. Bunker, Member, retiring from the CCI on 31 January 2018.

We hope you find this update useful.

Warm Regards,

Competition Law and Policy Team



Our Achievements

Competition & Antitrust Law Firm of the Year
- India Business Law Journal's Indian Law Firm Awards 2013 to 2018

Best Competition/Antitrust Law Firm of the Year - LegalEra Awards 2016

Top Tier for Antitrust & Competition – The Legal 500 Asia-Pacific 2017 & 2018

Band 2 for Competition/Antitrust - Chambers Global & Chambers Asia-Pacific 2016 to 2018

Highly Recommended for Competition/Antitrust - Asialaw Profiles 2014 to 2018

* 1 USD = INR 65.06

ADVOCACY UPDATE

CCI DESIGNS DIAGNOSTIC TOOL FOR PROCUREMENT OFFICERS

The CCI recently issued a 'Diagnostic Tool for Procurement Officers', which has been developed to help departments / organizations review their tendering processes in order to ensure competitiveness of procurement process and to assist in taking appropriate remedial actions. The Tool aims to function as a practical guide, providing assessment criterion, for the procuring agencies such as central government, state governments, municipalities, public sector units (PSUs) and other statutory authorities.

The Tool also explains the leniency programme of the CCI for the convenience of the procurement officer and further explains how an information, under the Act, can be filed before the CCI, in the event that any anti-competitive practices come to the knowledge of the procurement agency. The Tool, also provides Dos and Don'ts, which can assist the procurement agency in submitting an information along with supporting documents. The Tool, being one of the many initiatives undertaken by the CCI under its competition advisory role, has drawn inferences / influence from national and international policy documents, and from its own experience in dealing with the competition cases.

The Tool is available here:

http://www.cci.gov.in/sites/default/files/whats_newdocument/Final%20Diagnostic%20Tool%2019032018-1.pdf

MERGER CONTROL UPDATE

In this quarter, about twenty combination notifications were filed before the CCI *inter alia* in the hospitality, telecom, and e-commerce sectors. Of these notifications, the CCI has so far approved approximately two combinations including two notifications flowing from the Insolvency and Bankruptcy Code, 2016.

EASE OF DOING BUSINESS EXTENDED TO THE OIL AND GAS SECTOR – CPSE EXEMPT FROM FILING NOTICE WITH THE CCI

To streamline the consolidation process in the Oil and Gas Sector in India, the Government of India (“**Gol**”) *vide* a notification dated 22 November 2017, exempted combinations under Section 5 of the Act involving Central Public-Sector Enterprises (“**CPSE**”) operating in the Oil and Gas Sectors under the Petroleum Act, 1934 and its relevant regulations, from the application of provisions of Sections 5 and 6 of the Act. This exemption is applicable for a period of five (5) years, i.e., until 22 November 2022 and can also be availed by wholly or partly owned subsidiaries of the CPSEs operating in the Oil and Gas Sectors in India.

The Notification is available here: <http://cci.gov.in/sites/default/files/notification/Notification-22.112017.pdf>

MAMA CATERING AND OTHERS PENALIZED FOR DELAYED NOTIFICATION

The CCI imposed a penalty of INR 1 Lac (**USD 1,560 approx.**) on Claridges Hospitality Private Limited (“**Claridges**”), Akira Marketing Private Limited (“**Akira**”) and Azure Hospitality Private Limited (“**Azure**”) for belated notification of a merger. The merger of Claridges and Akira with and into Azure, with Azure being the resultant entity, was approved by the CCI on 29 June 2017.

Although the Gol has now removed the obligation of seeking approval of transactions within 30 days from the trigger event, this exemption was not available when the board resolution for the present amalgamation was signed on 28 September 2016. As the parties filed the notification on 12 May 2017 after a pre – filing consultation with the CCI, the delay was considered substantial.

While justifying the nominal penalty imposed on the parties, the CCI reasoned that the penalty imposed must be commensurate with the gravity of the misconduct and with due consideration of the circumstances, viz. voluntary filing of notice, admission of delay etc.

The CCI’s order is available here:

http://cci.gov.in/sites/default/files/Notice_order_document/Order%20under%20Section%2043A%20in%20C-2017-05-508.pdf



INVESTIGATIONS INITIATED BY THE CCI UNDER SECTION 26(1) OF THE ACT

CCI ORDERS PROBE INTO UNFAIR PRACTICES OF HONDA MOTORCYCLE

In yet another instance of a probe in the automotive sector, the CCI has directed investigation against Honda Motorcycle and Scooter India Private Limited (“OP”). An information was filed before the CCI by Mr. Vishal Pande (“Informant”) against OP alleging the contravention of Sections 3 and 4 of the Act. The Informant alleged that the OP perpetuated tie-in arrangements by (i) insistence on purchase of spare parts, accessories and lubricants from certain recommended vendors; (ii) imposing resale price maintenance; (iii) maintaining a discount control mechanism; (iv) imposing exclusivity and geographical limits of operation, through the standard form Dealership Agreement. These practices were contended to be in contravention of Section 3(4) of the Act. In addition to these anti-competitive arrangements, the OP was alleged to have abused its dominant position and imposed unfair conditions in the purchase or sale of goods thereby harming the interest of dealers. These included illegal termination and refusal to buy-back the unsold stock.

The CCI observed that to determine a violation of Section 4 of the Act, it was necessary to show that the OP had a dominant position. Taking into consideration the information provided by the Informant, the CCI determined the relevant markets to be the “market for manufacture and sale of motorcycles in India” and “market for manufacture and sale of scooters in India”. The CCI divided the markets accordingly and found that the OP held third position in the relevant market for manufacture and sale of motorcycles in India, with a market share varying between 7.14 percent and 12.63 percent. However, in the relevant market for manufacture and sale of scooters in India, as per Industrial Outlook and CMIE Database 2016 – 2017, the OP consistently had a high market share between 43.30 percent and 56.82 percent followed by TVS Motor Co. Ltd. Further, the CCI noted that the market appeared to exhibit high entry barriers due to huge capital investment involved in setting up a manufacturing industry. Thus, the CCI *prima facie* determined that the OP had a dominant position in the market for manufacture and sale of scooters in India.

The CCI then observed that the dealership agreement, particularly clauses requiring exclusive sale of parts supplied by OP only, compulsory deduction of advertising expenses, and insisting on sale and use of accessories, oils, batteries and financial facilities prescribed by the OP, were *prima facie* unfair and in contravention of Section 4(2)(a)(i) and Section 4(2)(d) of the Act. Additionally, termination of dealership without prior notice and refusal for stock buyback, was also found to be *prima facie* unfair and suggested a *prima facie* contravention of Section 4(2)(a)(i) of the Act.

With respect to Section 3(4) of the Act, the CCI opined that the requirement to source oil & lubricants, batteries, accessories, merchandise items, and insurance and finance services only from designated sources were in the nature of an exclusive supply agreement along with an element of refusal to deal. The CCI also found a *prima facie* case of contravention of Section 3(4)(b) and (d) of the Act against the OP. The CCI also noted that the compulsion on the dealers to avail exclusive advertising services from a designated agency to *prima facie* be an exclusive agreement amounting to refusal to deal and thus in contravention of Section 3(4)(b) of the Act.

The CCI further noted that the maintenance of resale price, of two-wheelers through the discount control mechanism was not likely to accrue any benefit to the consumers but would forfeit the benefits to consumers in terms of lesser price variability and was *prima facie* in contravention of Section 3(4)(e) of the Act. Lastly, the CCI observed that the fixation of the geographical operation by the OP on the Informant was a ‘territorial restriction’, and *prima facie* in contravention of Section 3(4) as envisaged under the Act. However, when it came to refusal to deal with competing products, the CCI

observed that *prima facie*, standard clauses that required dealers to take prior permission of the manufacturer before undertaking other dealerships, were meant to keep resources of dealers dedicated to the business of the manufacturer. Such clauses, the CCI noted, could not be faulted unless there is material to suggest *de facto* exclusivity. Thus, no *prima facie* contravention of Section 3(4) of the Act was established in this context.

Keeping in mind the above, the CCI established that there existed a *prima facie* case against the OP under Section 4 and Section 3(4) of the Act and directed the DG to initiate an investigation into the matter under Section 26(1) of the Act.

This investigation is the third such matter, pertaining to the automotive sector and allegations raised herein are similar to those raised against Hyundai Motor India Limited in an earlier case.

The CCI's order is available here: <http://www.cci.gov.in/sites/default/files/Case%20No.17%20of%202017.pdf>

JURISDICTION OF THE CCI TO ENTERTAIN COMPLAINTS FOR ABUSE OF DOMINANCE CANNOT BE OUSTED

In a recent case, the CCI's jurisdiction was challenged by opposite parties (collectively "OPs") on the issue of open access (i.e. an option of choosing their electricity supplier at competitive rates) which according to them fell under the sole domain of the electricity regulator. However, the CCI while assuming jurisdiction over the matter, held that just because there is a specific provision in Electricity Act, 2003 ("EA03") for an Appropriate Commission to issue directions on agreements and abuse of dominance by a licensee or a power generating company, the jurisdiction of the CCI cannot be ousted. The CCI distinguished this case from a previous one where it did not exercise its jurisdiction on issues pertaining to electricity tariff.

CCI's decision was based on the information filed by an industrial consumer of electricity ("Informant") against its electricity supplier, Paschim Gujarat Vij Company Limited, designated as one of the four 'Distribution Licensees' ("OP – 3") under EA03 in the State of Gujarat. Informant contended that industrial units that could avail regular supply of electricity should be given open access. The Informant was aggrieved by the alleged abusive conduct of State Load Dispatch Centre, GETCO, Gujarat ("OP – 2") for disallowing open access permission to use transmission infrastructure of Gujarat Energy Transmission Corporation Limited ("OP – 1"), an electric power transmission power company recognized as a State Transmission Utility in the state of Gujarat. OP – 2, a wholly-owned subsidiary of OP – 1, is a statutory body involved in generation scheduling, monitoring power system network, managing line and unit outages as well as assets of OP – 1.

The CCI defined the relevant market as the "market for services relating to use of transmission facility for availing open access electricity in the State of Gujarat". On the issue of dominance, the CCI noted that the statute bestows OP – 2 with absolute power to decide on open access applications and therefore it enjoys a dominant position. On the question of whether denial of open access amounts to a contravention of the provisions of Section 4 of the Act, the CCI held as under:

- i. Prima facie contravention of Section 4(2)(b)(i) of the Act: By denying open access to the Informant and possibly other consumers, OP – 2 appears to have curtailed or discouraged the demand for open access

electricity. Thus, *prima facie* the CCI found OP – 2 to limit and restrict production of electricity and the provision of supply of open access electricity in contravention of Section 4(2)(b)(i) of the Act.

- ii. *Prima facie* contravention of Section 4(2)(c) of the Act: Informant applied for open access on 12 different occasions, however, most of these requests were denied by OP – 2 citing upstream network constraints. The CCI *prima facie* found denial of market access due to exclusion of the potential electricity supplier through which the Informant was planning to access its power requirement in violation of Section 4(2)(c) of the Act.
- iii. *Prima facie* contravention of Section 4(2)(e) of the Act: The CCI *prima facie* found OP – 2 to have leveraged its dominant position in the relevant market to adversely affect competition in the downstream market where it was present through its group entity OP – 3 in violation of Section 4(2)(e) of the Act.

The CCI observed that structural linkages between the OPs pointed towards conflict of interest. Such conflict indicated anti-competitive motive behind denial of open access to the Informant. Based on its observations, the CCI directed the DG to carry out a detailed investigation into the matter under Section 26(1) of the Act.

The CCI's Order is available here: <http://www.cci.gov.in/sites/default/files/39%20of%202017.pdf>



ALLEGATIONS DISMISSED BY THE CCI UNDER SECTION 26(2) OF THE ACT

NO *PRIMA FACIE* CONCLUSION OF COLLUSION CAN BE DRAWN ON THE BASIS OF BALD ALLEGATIONS BY THE INFORMANT

An individual (“**Informant**”) filed an information against the state electricity department; their officials and thirteen power generating companies (collectively “**OPs**”) alleging that the OPs indulged in bid rigging in contravention of Section 3(3)(d) of the Act. It was alleged that the bidders colluded with each other and with the officials of the Uttar Pradesh State Government in a tender floated by Uttar Pradesh Power Corporation, to not match the lower tariff, as demanded by the state electricity regulators. Notably, the bidders adjudged as L-1 to L-4, were not arraigned as parties to the collusion. The colluding bidders eventually entered into a power purchase agreement with the authorities at a tariff higher than what was accepted in the previous bid and around 15% higher than the bid offered by L-4.

The CCI dismissed the information on the following grounds:

- a) No case of collusion was made out in terms of Section 3(3)(d) of the Act, between the bidders and the government officials, since all the OPs are not engaged in the same trade and are not horizontally placed;
- b) No evidence was adduced by the Informant to indicate collusion between bidders themselves.

Interestingly, the CCI, for the second time in this quarter, has ruled that Electricity Act, 2003 (“**EA03**”) does not take away the jurisdiction of the CCI. It was argued that CCI had no jurisdiction to decide the matter as the tariff and bidding process is regulated by the provisions of the EA03 being a self-contained code. The CCI noted that both legislations contain a *non – obstante* clause and relying on the jurisprudence and principle of harmonious construction, it held that in view of the specific object and purpose underlying both legislations, the CCI has jurisdiction to rule on the present matter. Highlighting the difference in their roles, the CCI observed that sectoral regulators focus on the dynamics of specific sectors, whereas the CCI regulates the functioning of the markets by *inter alia* promoting and sustaining competition.

The CCI’s order is available here: http://cci.gov.in/sites/default/files/43%20of%202017_0.pdf

CCI DISMISSES ALLEGATIONS OF ABUSE OF DOMINANCE AGAINST COAL INDIA AND MINISTRY OF COAL

On 06 February 2018, in a welcome order for Coal India Limited (“**CIL**”), the CCI dismissed an information filed by an association of traders of hard coke, against CIL, Bharat Coking Coal Limited and the Ministry of Coal (“**MoC**”) finding no conduct in contravention of the provisions of the Act.

The informant – Industries and Commerce Association, challenged various clauses of their existing Fuel Supply Agreement (“**FSA**”) which was due to expire in 2018. The CCI observed that the information had been filed at a very belated stage, i.e. when the FSAs were about to expire, and no reasons whatsoever had been assigned for approaching the CCI at this stage. The CCI also noted that the information appeared to have been filed in view of the decision of the

Inter-Ministerial Committee to procure coal through e – auction. The CCI however dismissed the allegation of procurement through ‘only competitive bidding’, being unfair to the informant and leading to excessive pricing, as envisaged in Section 4 (2)(a) of the Act. The challenge to the policy was also dismissed as the CCI found that formulation of policies by the MoC does not fall in the realm of commercial or economic activity provided in Section 2(h) of the Act, which defines an ‘enterprise’ and therefore cannot be assessed under Section 4 of the Act. Further, the challenge to the Model FSA issued by the MoC was found to be speculative and premature.

The CCI’s order is available here: <http://cci.gov.in/sites/default/files/60%20of%202017.pdf>

CCI UPHOLDS RIGHT OF THE AIRPORTS AUTHORITY OF INDIA AND POWER GRID TO CHOOSE THEIR SERVICE PROVIDERS BASED ON OBJECTIVE CRITERION

On 27 February 2018, the CCI dismissed an information filed by an individual against Airports Authority of India and Power Grid Corporation of India Limited (collectively “OPs”) finding no conduct in contravention of Section 4 of the Act.

It was alleged that policy of the OPs, regarding testing of construction materials only in laboratories which are accredited by agencies having full membership of certain international industry bodies, was abusive in terms of Section 4 of the Act. The informant’s lab was not accredited by any of the bodies designated by the OPs and this was alleged to be an abuse of dominance.

To establish a relevant market, the CCI relied on an order of the erstwhile Competition Appellate Tribunal (“COMPAT”) passed in a case with similar facts, to hold that the OPs and the informant did not operate in the same market since the informant provided laboratory services while the OPs were consumers of specific laboratory services. Accordingly, the CCI established a broader relevant market of ‘*market for laboratory services for testing construction materials in India*’ which would encompass both the OPs and the informant. The CCI held that the OPs, as consumers, are not in a dominant position and have the right to choose from various available laboratory services to meet their requirement.

CCI’s observations in this case are in line with its past orders on similar facts, wherein they held that obtaining services from certain service providers based on objective criterion such as accreditation by a specified body does not constitute violation of the Act. CCI’s reasoning in these types of cases had been endorsed by the COMPAT in Accreditation Commission vs. Quality Council of India and Ors.

The CCI’s order is available here: <http://cci.gov.in/sites/default/files/75%20of%202017.pdf>



ALLEGATIONS DISMISSED BY THE CCI UNDER SECTION 26(6) OF THE ACT

CCI DISMISSES ALLEGATIONS OF A BUYERS CARTEL

The CCI while agreeing with the investigation report submitted by the DG, closed the investigation against M/s. Wave Distilleries and other liquor manufacturing entities (collectively “OPs”) running in the state of Uttar Pradesh. The informant, M/s. Dwarikesh Sugar Industries Ltd. (“Informant”), had alleged that the OPs were purchasing the reserved molasses as required under the policy of the Government of the State of Uttar Pradesh. The policy of the Government of the State of Uttar Pradesh required the sugar manufacturing entities to sell a part of their molasses production mandatorily to the liquor manufacturing units in the state of Uttar Pradesh. The Informant had alleged that the OPs being in a dominant position, given that the reserved molasses were mandatorily required to be sold to the liquor manufacturing entities, were abusing their position to obtain molasses at very low prices.

The DG in its investigation report had indicated that there was no evidence of any agreement between the OPs, indicating that they had agreed to keep the prices of the reserved molasses at a certain rate. The CCI observed that the purchase of reserved molasses was made by the liquor manufacturing entities through negotiations between themselves and the sugar manufacturers. It was further noted by the CCI that the prices of the reserved molasses were affected by the policy of the Government of the State of Uttar Pradesh. The CCI, based on the data collected by the DG, noted that the purchase price of each OP differed during the same month and did not indicate any price parallelism. The CCI therefore concluded that the prices, based on the analysis of the data available, was determined by the market and not under any agreement between the OPs. It further noted that the evidence collected by the DG also indicated that the Informant had not sold the reserved molasses at the rates offered by the OPs and had rather further negotiated the rates before the final sale. The CCI therefore closed the information with a note that the molasses policy of the Government needed reconsideration. Interestingly, this was the first ever case of a buyer cartel in India.

The CCI’s Order is available here: <http://www.cci.gov.in/sites/default/files/47%20of%202014.pdf>



RECENT PENALTIES IMPOSED BY THE CCI UNDER SECTION 27 OF THE ACT

CCI PENALIZES GOOGLE FOR CONTRAVENTION OF SECTION 4 OF THE ACT

Based on separate information filed by each of Matrimony.com Limited and Consumer Unity & Trust Society (“CUTS”) in 2012 (“Informants”) against Google India Private Limited, Google LLC and Google Ireland Limited (collectively “Google”), the CCI in its order dated 08 February 2018 imposed a penalty of INR 135.86 Crore (**USD 21 Million approx.**) on Google India for abuse of dominant position relating to search bias. The CCI found Google to be dominant in the relevant markets of ‘online general web search’ and ‘web search advertising services in India’ owing to consistently high market shares and other advantages, such as scale of operations. While Google contended that the search services offered by it are free, hence, there was no commercial relationship with users, the CCI took into account the nature and role of big data in a multi-sided market. In this context, the CCI defined big data as an aggregate of eyeballs/choices provided by users while availing the search services offered by a search engine.

By holding that a commercial relationship exists between Google and its users, the CCI examined Google’s conduct under Section 4 of the Act. CCI found Google to have abused its dominant position on three counts:

- i. Ranking of ‘Universal Results’ (i.e. groups of search results for a specific category of information such as news, images or local businesses) prior to 2010 was fixed to trigger only in the 1st, 4th or 10th position on the ‘Search Engine Result Page’ rather than being determined purely by relevance. Such practice of Google was found to be unfair to users (who believe that ranking is strictly determined by relevance) and therefore in contravention of Section 4(2)(a)(i) of the Act.
- ii. Prominent display and placement of the ‘Flights Unit’ with a link to Google’s specialised search service for flights amounts to an unfair imposition on users of search services as it deprives them of additional choices and thereby contravenes the provisions of Section 4(2)(a)(i) of the Act.
- iii. Imposition of *de-facto* exclusivity on website publishers who have negotiated search intermediation agreements with Google by preventing them from using “same or substantially similar” search services provided by competing search engines. Such unfair imposition was found to be violative of Section 4(2)(a)(i) of the Act. The CCI observed that the unfair imposition on website publishers is a result of Google’s dominant position in the market of online general web search services. Such conduct as per the CCI amounted to leveraging its dominance to strengthen its position in the market for online syndicate search services, thereby violating Section 4(2)(e) of the Act and, also, denying market access to competitors in contravention of Section 4(2)(c) of the Act.

To address the contravention caused by historical fixed positions, the CCI noted that since October 2010 Google displays Universal Results on free floating basis and hence its anti-competitive conduct is no longer subsisting. However, the CCI directed Google to desist from indulging in such conduct in the future. With respect to the ‘Flights Unit’, the CCI issued a labelling remedy directing Google to display a disclaimer indicating clearly that the ‘search flights’ link placed at the bottom of the ‘Flights Unit’ leads to Google’s Flights page and not to third-party results so that users are not misled. With respect to the direct search intermediation agreements with Indian partners, the CCI ordered Google not to enforce the ‘same or substantially similar’ clause with immediate effect.

Other than the afore-mentioned three counts, CCI did not find any contravention in respect of Google's specialised results designs like 'Maps', 'OneBoxes' and 'Shopping Unit'. No search bias was found in case of the 'more results' link associated with Universal Results. Claims made by the Informants with respect to Google's AdWords programme, Keyword Bidding Policy, Ad Text Policy, AdWords API T&Cs were not found to have raised any competition concerns. Other than the direct search intermediation agreement, none of the other agreements entered by Google were found to have violated the provisions of the Act.

On calculation of penalty, the CCI noted that the concept of relevant turnover cannot be applied in case of two-sided platforms such as Google because that would accord virtual immunity from monetary penalty to abuse of one side, in this case search, which is free. As per the CCI, to extend the application of relevant turnover from a conventional multi-product company to a two-sided technological platform could not have been the intent of the legislature or the judicial pronouncements. Based on this reasoning, the CCI calculated penalty at the rate of 5% of Google's average total revenue generated from India operations for financial years 2013, 2014 and 2015 and imposed a penalty of INR 135.86 Crore (**USD 21 Million approx.**) on Google.

The final order was passed by a majority of 4 members ("**Majority**"), with two members dissenting ("**Minority**"). In their dissent note, the Minority disagreed with the Majority on the contraventions found on the aforementioned three counts arguing lack of evidence to establish such violations. Specifically, with respect to a contravention of Section 4(2)(a)(i), the Minority noted that such a finding cannot be in abstract. They noted that the onus was on the CCI to establish, based on facts and evidence on record, that the impugned practice of a dominant enterprise (in this case the prominent display of the Flights Unit with a link to Google Flights) is an unfair imposition on its consumer. On this point, the Minority concluded by saying that the Majority has "*woven a narrative of hypothetical anti-competitive foreclosure.*" The dissent note further states that the application of law is "*not amenable to hypothetical frameworks built on perceived premises.*" Taking the CCI's argument to its logical conclusion according to the Minority, would mean that premium real estate on the search engine results page ("**SERP**") should be bereft of any advertisements, lest they mislead the users, even though the click through rate ("**CTR**") data on record corroborates that users are discerning, and they do not blindly click on the advertisements that appear on the top.

With respect to search intermediation, the Minority observed that the legal requirement of defining 'online search intermediation/syndication services' as a relevant market, has not been met. Minority further stated that dominance was inferred by the DG and the CCI in this market. The Minority concluded by stating that in the absence of any testimony from direct partners with whom Google had negotiated search agreements in India during the period under investigation and without the effect of the 'same or substantially similar' clause on competition, no contravention of the Act can be made out against Google.

With respect to Universal Results, the Minority held that Google cannot be held liable for imposition of unfair conditions on account of its historic use of fixed positions for Universal Results on the SERP in contravention of Section 4(2)(a)(i) of the Act. The Minority noted that Google shifted to a fully-floating regime i.e. to display Universal results at any position on the SERP based on relevance well before the information was filed before the CCI in June 2012. The proactive change in its system brought about by Google obviates the need for any regulatory intervention.

The CCI's order is available here: <http://www.cci.gov.in/sites/default/files/07%20%26%20%2030%20of%202012.pdf>

CCI IMPOSES PENALTY ON GHAZIABAD DEVELOPMENT AUTHORITY FOR CONTRAVENTION OF SECTION 4 OF THE ACT

Satyendra Singh (“**Informant**”), an allottee of a low cost residential apartment under the Pratap Vihar (Ghaziabad) residential housing scheme announced by Ghaziabad Development Authority (“**OP**”) in 2008 for Economically Weaker Sections (“**EWS**”), filed an information against the OP for violation of Section 4 of the Act. The Informant alleged that the OP arbitrarily increased the sale price of the flat from INR 2 Lac (**USD 3,075 approx.**) to INR 7 Lac (**USD 10,760 approx.**) despite knowing that the allottees of the Scheme belong to EWS who are not in a position to challenge the OP for its unfair and arbitrary conduct.

On the issue of whether the CCI has jurisdiction over conduct carried out in a period prior to the Act coming into effect (i.e. prior to 20 May 2009), the CCI *inter alia* noted that since the possession of the apartments is yet to be given to the allottees and they are not being compensated for the delay, the conduct is still subsisting and hence the CCI had jurisdiction over the matter. Further, with respect to the issue of whether OP is an enterprise under Section 2(h) of the Act, the CCI observed that the OP performs economic activities such as rendering services for development and sale of EWS flats for a charge which are not inalienable functions. Accordingly, OP was held to be an enterprise under Section 2(h) of the Act.

While delineating the relevant market, the CCI distinguished EWS flats from that of private developers and others by stating that even if there was a 5% increase in the price of EWS flats in Ghaziabad, the consumer’s preference would not change since there were other external factors such as distance, transportation cost etc. which influenced the decision of the consumers while purchasing these flats. The CCI found the OP to be dominant in the relevant market primarily for the following reasons viz., (i) consumers were largely dependent on the OP for low cost residential flats; (ii) OP was solely responsible for planning, controlling, managing and developing housing societies and related infrastructure in the relevant geographic market under the Urban Planning and Development Act, 1973 of the State of Uttar Pradesh; and (iii) no developer can construct any property in the relevant geographic market without OP’s approval.

The OP raised the price of EWS flats by 3.5 times the original price without any enabling provision, on the pretext of miscalculation of cost of the project and increase in the cost of project over the years. Such conduct, according to the CCI, was tantamount to unilateral modification of the terms of allotment amounting to imposition of an unfair condition in the sale of services provided by the OP in the relevant market thereby violating Section 4(2)(a)(i) of the Act. The OP stipulated penal interest of 10.5% per annum if there is delay in payment of the quarterly instalment by the allottees whereas no such corresponding provision was made for the OP in case of delay in giving possession of the flats. The OP did not deliver possession of the flats to the allottees even after a lapse of almost 10 years. Therefore, the CCI held such terms and conditions of the allotment letter as being unfair and one-sided thereby being abusive and in violation of Section 4(2)(a)(i) of the Act.

CCI issued a cease and desist order against the OP. A penalty of INR 1,00,60,794 (**USD 154.6 Thousand approx.**) calculated at the rate of 5% of the OP’s average turnover generated from the provision of services for development and sale of EWS flats for the last three financial years was imposed.

The CCI’s order is available here: <http://www.cci.gov.in/sites/default/files/Case%20No.%2086%20of%202016.pdf>

CCI RE-IMPOSES PENALTY ON DOMESTIC AIRLINES FOR CONTRAVENTION OF SECTION 3 OF THE ACT

Express Industry Council of India (“**Informant**”) filed an information against Jet Airways, IndiGo, SpiceJet, Air India and Go Airlines (“**OPs**”) alleging, *inter alia*, collusion in fixing of Fuel Surcharge (“**FSC**”) rates for cargo transportation and thereby contravening the provisions of Section 3 of the Act. While the DG pursuant to its investigation found no proof of the allegations levelled by the Informant, the CCI, however, *vide* its order dated 17 November 2015 noted that Jet Airways, IndiGo and SpiceJet had colluded in fixing FSC rates. No penalty was imposed on Air India as its conduct was not found to be parallel with the other 3 airlines. Similarly, no contravention was recorded against Go Airlines as it leased its cargo belly space to third party vendors with no control on the commercial aspects of cargo operations done by vendors including imposition of FSC.

In appeal filed by the OPs, the erstwhile COMPAT *vide* a common order dated 18 April 2016 had set aside the CCI’s 17 November 2015 order on the ground of violation of the principles of natural justice. It was noted that the CCI’s failure to (a) give notice to the appellants incorporating the reasons of its disagreement with the findings and conclusions of the DG and (b) give them an effective opportunity to show that they had not formed any cartel for jacking-up FSC from time to time not only resulted in gross violation of principles of natural justice, but has also caused prejudice to them. On this basis, the matter was remanded back to the CCI.

The CCI upon a re-consideration of the DG’s report, in an order dated 07 March 2018, again found the 3 airlines to have acted in a concerted manner in fixing and revising FSC rates thereby violating the provisions of Section 3(1) read with Section 3(3)(a) of the Act. Air India and Go Airlines were found to not have contravened the provisions of the Act for the same reasons recorded by the CCI in its 17 November 2015 order. In recording reasons for contravention with respect to the 3 airlines, the CCI noted that the parties have not been able to justify as to why their coordinated behaviour should spill over into FSC rates as the fuel consumption would vary not only based on the cargo handled but also based on passenger miles handled by the 3 airlines. Further, the CCI observed that the airlines were unable to furnish any data/calculation/methodology or costing of any kind whatsoever to support of the determination of FSC rates. Moreover, it was admitted by the airlines that they have common agents and these agents act as a conduit for exchange of information with respect to rates levied on cargo handled and changes in FSC proposed to be implemented. On this point, the CCI observed parallel conduct is legal only when the adaptation to oligopolistic market conditions are done independently and not based on information exchanged between the competitors, the object of which is to influence the market.

Finally, in dealing with the fact that FSC was introduced to counter the volatility in ATF prices, the CCI noted that far from being a cushion to hedge the volatility in ATF prices, FSC has become a tool to seek rent from the potential users of cargo services in the garb of various reasons which have nothing to do with the stated objective. In view of the reasons recorded, the CCI issued a cease and desist order. Penalty was imposed at the rate of 3% of the average turnover of the 3 airlines earned from levy of FSC on the volume of cargo handled by them during the last 3 financial years. Accordingly, penalties of INR 39.81 Crore (**USD 6.1 Million approx.**), INR 9.45 Crore (**USD 1.5 Million approx.**) and INR 5.10 Crore (**USD 784 Thousand approx.**) were imposed on Jet Airways, IndiGo and SpiceJet respectively.

The CCI’s order is available here: <http://www.cci.gov.in/sites/default/files/30%20of%202013.pdf>

CCI FINDS MAHAGENCO AND PARTIES IN CONTRAVENTION OF SECTION 3 AND 4 OF THE ACT

An information was filed by Shri Surendra Prasad (“**Informant**”) under Section 19(1)(a) of the Act, against Maharashtra State Power Generation Co. Ltd i.e. MAHAGENCO (“**OP – 1**”), Nair Coal Services Pvt. Ltd. (“**OP – 2**”), Karam Chand Thapar & Bros. (CS) Ltd. (“**OP – 3**”) and Naresh Kumar & Co. Pvt. Ltd. (“**OP – 4**”) alleging, *inter alia*, contravention of the provisions of Sections 3 and 4 of the Act.

As per the information, the allegations are broadly as under:

- i) OP – 2, OP – 3 and OP – 4 in collusion with OP – 1 divided the seven Thermal Power Stations (“**TPSSs**”) amongst themselves for doing liaison work and therefore excluded any other existing company from participating in the tender process for provision of raw coal.
- ii) Cancellation of such tenders by OP – 1, resulted in OP – 2 to OP – 4 becoming beneficiaries of the stop – gap arrangement
- iii) OP – 2 to OP – 4 have violated Section 3(3)(d) of the Act since they engaged in collusive bidding for projects with OP – 1
- iv) As market access was denied to the other players who wanted to participate in the bidding process, the OPs had contravened Section 4(2)(c) of the Act

The CCI accordingly directed the DG to investigate the allegations under Section 26(1) of the Act.

The DG found that the OPs had been indulging in geographically dividing the tender areas. The practice of giving their quotations to carry out the geographical division, was found to be in violation of Section 3(3) read with Section 3(1) of the Act. Further, the DG also found that OP – 2, OP – 3 and OP – 4 had indulged in bid rigging in violation of Section 3(3)(d) of the Act. The CCI took into consideration the findings of the DG, and the information received from the parties and made its observations.

Preliminary Objections

The CCI dismissed the contention of the OPs challenging the authority of the DG to investigate into the matter, by stating that the COMPAT *vide* its order dated September 15, 2015 had dismissed the CCI’s initial order under Section 26(2) of the Act and had directed the DG to investigate into the matter. Thus, DG’s act of non - compliance of the COMPAT’s order would have been an act of judicial indiscipline. On the contention of principles of natural justice being violated by the DG by relying on the testimonies of various parties, without giving a chance to the OPs to cross examine, the CCI held that the power to allow cross – examination is *solely* a discretionary power and the same cannot be claimed as a matter of right. However, in the instant case, the CCI observed that the DG had indeed given the OPs a chance to request for cross examination, in lieu of the two applications of the OPs requesting for cross examination – the application of OP – 3 was dismissed by the CCI as OP – 3 did not give a cogent reason for cross examination; and the application made by OP -2 for cross examination of two witnesses was allowed. Thus, the OPs have no ground of claiming that no chance was accorded to them for cross examination.

With respect to the findings recorded by the DG, the CCI observed as following:

- i. Firstly, the CCI observed from the data provided that the concerted actions of OP – 2 to OP – 4 started from the tender in 2005. Moreover, the depositions of the OPs did not reveal any justification for quotation of such identical rates during the investigated period. It was observed that OP – 2 to OP – 4 could not give any basis of working of the costing carried out by them before quoting such identical rates. It was also noted that OP – 2 to OP – 4 did not give any valid justification for quoting lower rates for the chosen TPSs as compared to other TPSs where the two other respective bidders had quoted higher rates. The CCI noted that such conduct of OP – 2 to OP – 4 culminated into a concerted action in geographically sharing the markets.
- ii. The CCI also noted that serial number of receipts issued by MAHAGENCO for the tender document issued to OP – 2 to OP – 4 is also in sequence. From this, it was inferred by the DG that either all these OPs purchased the tender document after discussion with each other or only one person went to purchase the tender documents at MAHAGENCO Office. On an examination by the DG with respect to the purchase of tender documents, the representatives of these OPs admitted that purchasing of tender documents on the same day in sequential serial number was possible. In fact, these OPs also gave their authorization to each other for purchasing of tender documents. As per the CCI, this behaviour clearly reflects a concerted practice by these OPs. It added that such behaviour coupled with other factors (geographical allocation, identical price quoting), reflected the close coordination amongst these OPs whereas they were expected to compete to secure maximum business for their firms. Thus, the CCI observed that it was not the case of the OPs that these activities were done to increase efficiency in providing services.
- iii. The CCI also considered the statement from Deputy General Manager for OP – 3, wherein he admitted that whenever OP – 1 had sought the consent of the bidders for extension of tender time, he on behalf of OP – 3 and local officials of OP – 4 and OP – 2 would exchange their proposed response with OP – 1. The said fact showed that there was exchange or communication between OP – 2 to OP – 4 in the tenders floated by MAHAGENCO for coal liasoning.
- iv. As per the CCI, in the normal process of competitive bidding, it is considered highly unusual that competitors would enter into any communication or exchange their proposed responses to the procurer or exchange letters seeking clarifications/ queries prior to pre-bid meeting. The meeting of mind between the bidders prior to even pre-bid meetings clearly reflected a concerted arrangement amongst the bidders.
- v. Finally, the CCI dismissed the claims of the OPs of suffering loss, as the money was exchanged because of profit sharing between these OPs for different tenders. Moreover, no loss could be determined if there was concerted action between the OPs.

Considering the observations above, the CCI held that there is little, or no documentary evidence/ evidence may be quite fragmentary when it comes to cartel cases that are hidden. The evidence in cartel cases may also be wholly circumstantial and considering the same, it was necessary to reconstitute certain details by deduction. In most cases, the existence of an anticompetitive practice or agreement had to be inferred from a number of coincidences which in the absence of any other explanation, would constitute an infringement of the Act. The CCI observed, that the findings of the DG demonstrated a parallel conduct in quoting similar basic rates, besides market allocation amongst the bidders, through a detailed analysis of the various tenders issued by OP – 1. The CCI determined that by acting in a collusive and concerted manner, OP – 2, OP – 3 and OP – 4, had violated the provisions of Section 3(3)(c) and Section 3(3)(d) read with Section 3(1) of the Act.

Conclusively, the CCI took into consideration the relevant turnover (as observed by the Supreme Court in *Excel Crop*) and imposed a penalty of INR 7.16 Crore (**USD 1.1 Million approx.**) on OP – 2; a penalty of INR 111.60 Crore (**USD 17.2**

Million approx.) on OP – 3 and a penalty of INR 16.92 Crore (**USD 2.6 Million approx.**) on OP – 4 at the rate of twice their profits during the continuance of the cartel between 2010 – 2013.

CCI IMPOSES A PENALTY YET AGAIN FOR ISSUANCE OF NOC AND PIS CHARGES IN THE PHARMACEUTICAL DISTRIBUTION MARKET

In a recent case, an information was filed by M/s Reliance Agency (“**Informant**”) against the Chemists & Druggists Association of Baroda i.e., the CDAB (“**OP – 1**”), Abbott India Ltd. (“**OP – 2**”), Shri V.T. Shah, President of CDAB (“**OP – 3**”), Shri Alpesh Z. Patel, Secretary of CDAB (“**OP – 4**”) and Shri Jasvantbhai P. Patel, President, Federation of Gujarat State Chemists and Druggists Association (“**OP – 5**”), (collectively the ‘**OPs**’), alleging contravention of the provisions of Section 3 of the Act. The Informant alleged that the OPs had collectively controlled the supply of drugs and medicines in the market by mandating a No Objection Certificate (“**NOC/LOC**”). In specific, the Informant alleged that the OPs had insisted that an NOC was required from OP – 1 and OP – 5 for the procurement of drugs for treatment of diabetes, which was manufactured particularly by M/s Nova Nordisk India Private Limited, and available with OP – 2.

The information further stated that OPs had disregarded the CCI’s order dated 05 September 2012 passed in MRTP Case No. C-87/2009/DGIR *Vedant Bio Sciences v. CDAB and Ors.*, by continuing their anti-competitive conduct. Additionally, it was alleged that despite the CCI’s order that the payment of Product Information Charges (“**PIS**”) cannot be made mandatory, pressure was exerted by OP – 1 whereby pharma companies could not introduce new products in the market without making a PIS payment to OP – 1 itself. Further, pharma companies could not introduce new products unless they agreed to give margins as per diktats of OP – 1.

The CCI was convinced that there existed a *prima facie* case of violation of Section 3(3) of the Act, and accordingly directed the DG to investigate into the matter. The DG found that despite the CCI’s orders in the case of *Vedant Bio Sciences*, OP – 1 and the Federation of Gujarat Chemists and Druggists Association (“**Federation**”) had continued to indulge in the activities of limiting and controlling the supply of drugs in Vadodara and thus, had contravened the provisions of Sec 3 (3) (b) of the Act. With respect to PIS charges, the DG found that the Federation had, by mandating a price publication prior to the launch of new drugs/products in Gujarat, violated Section 3(3)(b) of the Act. The DG further found OP – 3 and OP – 5 to be liable under Section 48 of the Act. However, the DG concluded that the allegations against OP – 4 could not be proved. Given the mounting evidence against the Federation, the CCI impleaded the Federation as OP – 6 into the investigation by the DG.

Based on the findings of the DG and the information provided by the parties, CCI observed as under:

- i. In view of a letter filed by M/s Medicure Agencies (a stockist for AIMIL Pharmaceuticals India Limited) with the CCI, it was evident that OP – 1 through OP – 3 and OP – 4, was forcing AIMIL to coerce its stockists and retailers to not purchase AIMIL’s products from Medicure Agencies. AIMIL had not disputed the authenticity of this directive implemented via correspondence between Medicure Agencies, and the Regional Sales Manager of AIMIL. The CCI found that under the garb of furthering legitimate interests, the associations (such as OP – 1) imposed restraints upon pharma companies in the appointment of new stockists, by threatening to stop the sale/purchase of pharmaceutical products by existing stockists. Such practices amounted to limiting and controlling supplies in the market. Accordingly, the CCI held that OP – 1 had contravened the provisions of Section 3 (3) (b) r/w Section 3 (1) of the Act.

- ii. Further, the CCI found that OP – 5 had objected to the appointment of a stockist by Astrum Healthcare Private Limited (OP – 5 was an official for the same) and directed the company to stop supplies and recall the goods delivered to the said stockist, failing which the business of the said company would stop in Gujarat and the company would be penalized. OP – 5 had also directed Astrum Healthcare Private Limited not to give the stockist anything in writing that indicated that OP – 6 had restricted supply of drugs. Thus, OP – 6 was carrying on the practice of mandating NOC/ LOC from OP – 6 for the purposes of appointment of new stockists. It was held that, OP – 6 was fully aware of the legal position and had violated the provisions of Section 3(3) (b) of the Act.
- iii. With respect to the PIS charges by OP – 1 and OP – 5, the CCI acknowledged DG’s findings that showed that the publication, besides disclosing prices of new drugs had also disclosed details of the price at which drugs were sold to the stockists. The CCI and the DG noted, that under Form V of the Drug Price Control Order of 2013, only price to retailer or MRP is required to be disclosed. The CCI concurred with the finding of the DG that that the advertisement/ publication of prices by OP – 1 leads to disclosure of margins payable on new products. Moreover, emails analysed by the DG showed that the PIS charge was mandatory in the State of Gujarat and it was not possible for the pharmaceutical companies to launch their products in the market without paying for the publication of their products to OP – 6 being PIS charges. The statements of the officials of pharmaceutical companies re-confirmed that such practice was mandated by OP – 5/OP – 6. Thus OP – 6, was held to be in contravention of Section 3(3)(b) of the Act.

Separately, the CCI also found OP – 3 and OP – 5 to be liable under Section 48(1) and Section 48(2) of the Act for being in control / being office bearers or individuals aware of the activities of OP – 1 and OP – 6.

The CCI ordered the contravening parties to cease and desist from indulging in anti - competitive behaviour and imposed a penalty of INR 12,20,137 (**USD 18.8 Thousand approx.**) collectively on OP – 1 and OP – 6 at 10% of their average income and collectively penalty of INR 96,192 (**USD 1,480 approx.**) on OP – 3 and OP – 5 under Section 27(b) of the Act.



OTHER ORDERS

NON-COMPLIANCE OF THE CCI'S DIRECTIONS ATTRACTS PENALTY

The CCI, *vide* its order under Section 42 of the Act, imposed a penalty of INR 1.17 Crore (**USD 179.8 Thousand approx.**) on Dumper Owners Association (“OP”) and of INR 29.35 Lacs (**USD 45.1 Thousand approx.**) each on the office bearers of the OP for non-compliance of the directions of the CCI for 587 days. The CCI, during various dates of hearing had allowed OP and its office bearers ample opportunities to file their response to the report of the DG, which the OPs failed to comply with. The OPs in the pretext of pendency of the Writ Petition, pertaining to the matter, before the High Court of Odisha had sought adjournments and time for filing their response to the DG’s investigation Report. The CCI had noted that the High Court had not granted any stay on the proceedings before the CCI and therefore the OP and its office bearers were required to comply with the directions of the CCI.

The CCI further noted that the OPs were evasive and had adopted dilatory tactics even during the proceedings before the DG. The CCI had further afforded an opportunity to the counsel for the OPs to make oral submissions on behalf of the OP, but the counsel made no submissions. The CCI while finding the conduct of the OP to be dilatory, also noted that the conduct was adopted by the OP and the office bearers, as the evidence against them had clearly established the violation of the provisions of the Act. The CCI, *vide* its previous order had found the OP and its office bearers in contravention of the provisions of the Act and for the continued non-compliance with its directions, the CCI imposed a penalty on the OPs and its office bearers.

The CCI’s order is available here: <http://www.cci.gov.in/sites/default/files/42%20of%202012.pdf>



INTERVENTION BY THE NCLAT

NCLAT SETS ASIDE PENALTY IMPOSED BY THE CCI ON AN INDIVIDUAL FOR NON – COMPLIANCE

On 29 January 2018, the NCLAT set aside the CCI's order under Section 43 of the Act, imposing a penalty of INR 5 Lac (**USD 7,685 approx.**) on the Managing Director of an enterprise ("**Appellant**") under investigation by the DG. The CCI had initiated proceedings under Section 43 of the Act as the Appellant did not comply with the directions of the DG, viz. not responding to information notices, not providing information, etc.

When approached, the NCLAT directed the Appellant to file an affidavit agreeing to cooperate during in the process of investigation. The Appellant complied with the NCLAT's direction, affirming that the he will cooperate with the DG and provide all requisite documents. However, as the DG had submitted his investigation report during the proceedings before the NCLAT, the NCLAT directed that, if required, the DG may submit a supplementary report based on the additional documents received from the Appellant.

The NCLAT's order is available here:

http://nclat.gov.in/final_orders/Principal_Bench/2018/competition/29012018AT072017.pdf



INTERVENTION BY THE HIGH COURTS

DELHI HIGH COURT NARROWS THE SCOPE OF CCI'S POWERS TO REVIEW / RECALL ITS ORDERS

Vide its order dated 09 March 2018, the Delhi High Court dismissed an application filed by Cadila Healthcare Limited (“Cadila”), challenging:

- (i) CCI's order directing investigation against various pharmaceutical companies under Section 26(1) of the Act (“Prima Facie Order”); and
- (ii) CCI's order rejecting Cadila's application seeking review/ recall of the Prima Facie Order.

Relying on the Delhi High Court's order in *Google Inc. v. CCI* (“Google Order”), Cadila argued *inter alia* that as the CCI had failed to form a *prima facie* opinion against each party in the information, the CCI has abdicated its function to the DG and passed an open-ended order. The Delhi High Court, while placing reliance on the order passed by the Supreme Court of India in *Excel Crop v. CCI*, held that even if the CCI did not direct investigation against Cadila specifically, the DG would be within its powers to investigate Cadila's conduct.

The Delhi High Court relied on jurisprudence from the Supreme Court to hold that the directions in the Google Order cannot be applied to the instant case (*here, the DG has concluded his investigation and submitted a detailed investigation report for final adjudication to the CCI*) as a review application can be filed during investigation and not after the submission of the report by the DG. The Court explained that once the DG's investigation report has been submitted, the only remedy is to argue the investigation report on merits before the CCI, as the matter no longer remains in the realm of Section 26 (1) or 26 (2) of the Act.

Finally, the Delhi High Court also noted that Cadila had the liberty to present its allegations of fraud and *mala fide* during their hearing before the CCI and cautioned that proceedings before the CCI should not be constantly interdicted.

The Delhi High Court's order is available here:

<http://lobis.nic.in/ddir/dhc/VKR/judgement/09-03-2018/VKR09032018CW21062018.pdf>



INTERVENTIONS BY THE SUPREME COURT

OBJECTIVE JUSTIFICATION ATTRACTS NO PENALTY

The Supreme Court in its first decision on the issue of abuse of dominance, *vide* its judgement dated 24 January 2018, has set aside the determination of the erstwhile COMPAT in the case of Fast Way Transmission Pvt (“OP – 1”). Ltd. While upholding the order of the CCI however, the Supreme Court set aside the penalty of INR 8.04 Crore (**USD 1.2 Million approx.**) imposed by the CCI on OP – 1. and two allied multi system operators (“MSO”) (collectively “OPs”). The Supreme Court reasoned that, though the act of termination of the agreement by OPs were in contravention of Section 4 of the Act, the decision of termination was objectively justified and therefore no penalty should have been imposed by the CCI. The CCI had found OPs to have acted in contravention of Section 4(2)(c) of the Act and had imposed a penalty of 6% on the average turnover of the preceding 3 years on each of three OPs. The COMPAT, on the other hand, had reversed the finding of the CCI on the ground that the reading of Section 4(2)(c) indicated that the denial of market access could only be with respect to a competitor, and OP – 1 and the Informant (being M/s. Kansan News) before the CCI, could not be treated as competitors. Whereas, OP – 1 is an MSO, the Informant in the matter before CCI was a broadcaster. The COMPAT had further observed that the term “practice” indicates a continuing action by the parties and does not include an ‘one off instance’.

The Informant had alleged that OPs, operating in the state of Punjab had illegally and simultaneously terminated their agreement for broadcasting of channels of the Informant in violation of Section 3 and 4 of the Act. The CCI had observed that the OPs in the matter were part of the same group and therefore cannot be considered to have entered into an agreement within the provisions of Section 3 of the Act. The CCI while rejecting the allegations concerning violation of other provisions of Section 4 of the Act, held that the conduct of OPs was in violation of Section 4(2)(c) of the Act in as much as OPs had used their market power to deny an opportunity of re-transmission of the Informant’s channel. The CCI rejected the argument of OPs that due to limited availability of spectrum space and lower target rating point (“TRP”) ratings of the Informant’s news channel, the agreement for broadcasting was terminated. The CCI with the above finding had passed an order under Section 27 of the Act and had imposed a penalty of 6% on the average turnover of the preceding 3 years on the OPs.

The Supreme Court noted that the COMPAT had erred in its assessment and reading of Section 4(2)(c) of the Act, as the words “*in any manner*” included in the provision, were of wide import and had to be given its natural meaning. It held that once it was established that the firm is dominant, the fact that whether the parties were in competition or not, did not hold much relevance. It explained that Section 4(2)(c) of the Act becomes applicable by the virtue of the fact that the broadcaster was denied market access by the OPs, due to unlawful termination of the agreement for broadcasting. The Supreme Court, however, held that though there was a contravention of Section 4(2)(c) by the OPs, no penalty should have been imposed as they were “*otherwise*” justified in terminating the agreement for broadcasting, in the light of the low TRP ratings of the Informant’s news channel.

The Supreme Court’s order is available here: http://sci.gov.in/supremecourt/2014/22445/22445_2014_Order_24-Jan-2018.pdf





MUMBAI

109 A,
Dalamal Towers
Free Press Journal Road
Nariman Point
Mumbai 400 021
T: +91 22 6636 7000
F: +91 22 6636 7172
E: mumbai@elp-in.com

PUNE

202, 2nd Floor
Vascon Eco Tower
Baner Pashan Road
Pune 411 045
T: +91 20 4912 7400
E: pune@elp-in.com

NEW DELHI

801 A, 8th Floor
Konnectus Tower
Bhavbhuti Marg
Opp. Ajmeri Gate Railway Station
Nr. Minto Bridge
New Delhi 110 001
T: +91 11 4354 8400
F: +91 11 4354 8436
E: delhi@elp-in.com

BENGALURU

6th Floor, Rockline Centre
54, Richmond Road
Bangalore 560 025
T: +91 80 4168 5530/1
E: bengaluru@elp-in.com

AHMEDABAD

801, 8th Floor
Abhijeet III
Mithakali Six Road, Ellisbridge
Ahmedabad 380 006
T: +91 79 6605 4480/8
F: +91 79 6605 4482
E: ahmedabad@elp-in.com

CHENNAI

No. 6, 4th Lane
Nungambakkam High Road
Chennai 600 034
T: +91 44 4210 4863
E: chennai@elp-in.com

Disclaimer:

The information contained in this document is intended for informational purposes only and does not constitute legal opinion or advice. This document is not intended to address the circumstances of any particular individual or corporate body. Readers should not act on the information provided herein without appropriate professional advice after a thorough examination of the facts and circumstances of a particular situation. There can be no assurance that the judicial/quasi-judicial authorities may not take a position contrary to the views mentioned herein.

© Economic Laws Practice 2018