



ECONOMIC  
LAWS  
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# Competition Law Update

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Volume 2 of 2018

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## PREFACE

Dear Reader,

The April – June 2018 quarter witnessed some interesting developments in the Indian competition law space. During this period, the Competition Commission of India (“CCI”) issued four orders under Section 27 of the Competition Act, 2002 (“Act”), all of which pertained to complaints of cartelisation. Certain parties, in these orders, were granted reduction in penalty under Section 46 of the Act and the Competition Commission of India (Lesser Penalty) Regulations, 2009 (“Lesser Penalty Regulations”) on account of providing full and vital information for establishing the cartel by the CCI. During this period, the CCI also ordered investigation by the Director General, CCI (“DG”), under Section 26(1) of the Act in four instances, while dismissing seven cases under Section 26 (2) of the Act, finding no prima facie case of contravention of the provisions of the Act. Collectively, during this period, the CCI imposed a fine of INR 218.33 crores (~USD 32.81 million) on contravening parties.

The National Company Law Appellate Tribunal (“NCLAT”), during this period, stayed the operation of six orders passed by the CCI under Section 27 of the Act with the stay granted being contingent on the appealing party/parties depositing a certain amount of penalty imposed by the CCI, during the pendency of appeal.

In the coming days, the CCI will witness a change in the composition of its quorum with the Chairperson, Mr. D.K. Sikri, retiring from the CCI in the next quarter of this year. The Ministry of Corporate Affairs, vide notice dated 18 May 2018, has already initiated the process of inviting applications for filing up the post of Chairperson, CCI, while the process of appointing two Members, CCI, is also on-going.

In this update, we have summarized some of the recent developments in the sphere of competition law in India and we hope that you find this update useful.

Warm Regards,

**Competition Law and Policy Team**



### Our Achievements

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\* 1 USD = INR 66.52

## MERGER CONTROL UPDATE

In this quarter, about fifteen combination notifications were filed before the CCI in *inter alia* hospitality, telecom, e-commerce and pharmaceutical sectors etc.. The CCI, of these notifications, has so far approved only four combinations. The CCI, continuing with its quick assessment of notifications flowing from the Insolvency and Bankruptcy Code, 2016 (“IBC”), has approved three such combinations in this quarter.<sup>1</sup>

### CCI ACCORDS STRICT INTERPRETATION TO ‘TURNOVER IN INDIA’

The CCI, vide order dated 07 May 2018, imposed a penalty of INR 10 Lac (~ USD 14,720) on Intellect Design Arena Limited (“IDAL”) for non – notification of its acquisition of certain assets of Polaris Financial Technologies Limited (“PFTL”).

While assessing the combination notice filed by Virtusa Consulting Services Private Limited, for acquisition of certain percentage of PFTL’s shares, the CCI noted that a portion of PFTL’s product business was subsequently acquired by IDAL. The CCI vide a notice directed IDAL to show cause for the non-notification of this acquisition. IDAL contended that the acquisition was exempt from notification as PFTL’s (i.e. target business) turnover in India was within the *de minimis* exemption thresholds applicable at that relevant point of time.<sup>2</sup> It was also contended by IDAL that as more than one year had passed since IDAL completed the transaction in question, the CCI could not have initiated an inquiry in accordance with the proviso to Section 20 (1) of the Act.

Since, the proviso to Section 20(1) of the Act bars CCI from inquiring into combinations after lapse of a period of one year from the date when the combination was given effect to, the CCI noted that while it could not assess the combination against the touchstone of whether the combination is likely to cause appreciable adverse effect on competition (“AAEC”), nothing bars it from initiating proceedings for non-notification of combination under Section 43 A of the Act.

On issue of applicability of the *de minimis* exemption, the CCI noted that the assets and turnover relevant for the assessment of a combination notification would be, the assets and turnover as appearing in the books of account of the enterprise, even if they did not accrue or arise *in India*. It observed that the geographic demarcation of ‘turnover’ was not relevant for the assessment of a combination notification, as the definition of turnover provided under Section 2(y) of the Act is bereft of any geographic requirement. The CCI in the light of the above concluded that as PFTL’s turnover on its book of accounts had exceeded the thresholds limits of the *de minimis* exemption, the transaction was a notifiable combination.

The CCI’s order is available here:

[https://www.cci.gov.in/sites/default/files/Notice\\_order\\_document/01%20Order%20-%2007.05.2018\\_Confidential%20-%20for%20uploading.pdf](https://www.cci.gov.in/sites/default/files/Notice_order_document/01%20Order%20-%2007.05.2018_Confidential%20-%20for%20uploading.pdf)

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<sup>1</sup> These are the acquisition of Bhushan Steel by Tata Steel; acquisition of Monnet Ispat by JSW and acquisition of Electrosteel by Vedanta

<sup>2</sup> As per corrigendum to S.O No. 482 (E) dated 27 May 2011, target entities being acquired with assets of value not more than INR 250 crores *in India* or turnover of not more than INR 750 crores *in India* are exempt from notification.

## CCI APPROVES BAYER/MONSANTO ACQUISITION, SUBJECT TO REMEDIES AND MODIFICATIONS

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In what would mark as the end of the three big merger/consolidations in the agricultural sector, the CCI, *vide* its order dated 14 June 2018 approved the acquisition of Monsanto by the German life sciences company, Bayer Aktiengesellschaft (“**Bayer**”).

In a detailed phase II investigation lasting over several months, and after due consideration of the submissions by Bayer and other third parties, the CCI observed that there was a likelihood of AAEC concerns in the markets for (i) non – selective herbicides, (ii) licensing of herbicide tolerant trait for seeds in India, (iii) upstream and downstream market for Bt. Cotton seeds in India, (iv) licensing of parental lines or hybrids for corn seeds in India, (v) commercialization of hybrid rice and hybrid millet seed in India, and (vi) various vegetable hybrid seeds in India. Moreover, the CCI also found that the proposed combination was likely to result in portfolio effect due to the parties’ presence in closely related markets. The CCI observed that this would also reduce the rate of innovation at which new products would be launched both globally and in India, and which could further aggravate the potential AAEC.

In view of the above, the CCI conditionally approved the combination under Section 31(7) of the Act, subject to remedies mentioned below, which had to be implemented by the parties:

1. Divestment of businesses of Bayer with respect to Glufosinate ammonium, crop traits of cotton and corn and hybrid vegetables, to an independent entity;
2. Divestment of shareholding of Monsanto in Maharashtra Hybrid Seed Company Limited i.e. 26 percent to an independent entity;
3. Divestiture of the Vegetable Seeds Divestment Business (which consist of Bayer’s global vegetable seeds business without carve – outs), by the end of the First Divestiture Period; and
4. Bayer through Monsanto would divest Mahyco Divestment Assets by the end of the First Divestiture Period.

In addition to the above, the CCI also imposed the following commitments on the combined entity, to be adhered to for a tenure of 7 years, from the closing of the Proposed Combination:

1. The Combined Entity would follow a policy of broad based, non – exclusive licensing of Genetically Modified (“**GM**”) as well as non - GM traits present in India or to be introduced in India, on a fair reasonable and non - discriminatory term.
2. Th Combined Entity would, on a fair reasonable and non - discriminatory basis, grant access through non – exclusive royalty bearing licenses, to existing Indian agro - climatic data (i.e. soil climate, environmental, weather, moisture data, growing degree day and temperature data) and to the commercialized Digital farming platform in India for supply or selling agricultural inputs.
3. The Combined Entity would facilitate potential licensees to enter into licensing agreements with third party data providers.
4. The Combined Entity would not offer its clients/farmers/distribution channels/commercial partners two or more products as a bundle which may have an effect of excluding any competitor.
5. The Combined Entity is barred from imposing directly or indirectly commercial dealings which would cause exclusivity in the sales channels for supply of agricultural products.

Separately, the CCI also directed that in the event the Combined Entity offers better commercial terms to a new licensee for any of the above licenses, then it would be bound to offer the same terms to all existing licensees within a period of 60 days. Bayer was also directed to disclose all contact details on its website, to ensure implementation of the remedies ordered by the CCI.

The CCI's approval follows the approval granted by the European Commission, subject to a divestment of a sizeable part of Bayer's business. With approvals received from all major jurisdiction across the globe, this merger was completed on 07 June 2018.

The CCI's order is available here:

[https://www.cci.gov.in/sites/default/files/Notice\\_order\\_document/Order\\_14.06.2018.pdf](https://www.cci.gov.in/sites/default/files/Notice_order_document/Order_14.06.2018.pdf)

## **CCI FINDS NO AAEC IN TATA STEEL'S ACQUISITION OF DEBT RIDDEN BHUSHAN STEEL**

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On 25 April 2018, the CCI approved Tata Steel Limited's ("TSL") acquisition of the controlling stake in the total equity share capital of Bhushan Steel Limited ("BSL") and found no AAEC arising out of the transaction. In accordance with the corporate insolvency resolution process, prescribed under the IBC, the Committee of Creditors had declared TSL as the successful resolution applicant for BSL.

As both TSL and BSL are integrated steel producers and are active across the value chain in the flat steel products, the CCI assessed the transaction across both the horizontal and vertical levels, finding horizontal overlaps in four separate relevant markets between the two. The CCI, however considering the low combined market shares, availability of alternatives from viable competitors and through imports, held that the horizontal overlaps are not likely to result in an AAEC.

On the vertically related markets, the CCI noted that both parties used the semi-finished slabs for captive consumption, and post-combination there would be no change in the competitive dynamics. It was noted by the CCI that as the market is characterized by the presence of other integrated players like Essar etc., the acquisition is not likely to foreclose the market.

With the approval from the CCI and the National Company Law Tribunal, TSL on 18 May 2018 announced that it had completed the acquisition of controlling stake of 72.65 percent in BSL, in accordance with the approved resolution plan under the corporate insolvency resolution process of the IBC.

The CCI's order is available here:

[https://www.cci.gov.in/sites/default/files/Notice\\_order\\_document/Order%20-%2025.04.2018.pdf](https://www.cci.gov.in/sites/default/files/Notice_order_document/Order%20-%2025.04.2018.pdf)



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

### CCI ORDERS INVESTIGATION AGAINST GRASIM INDUSTRIES LIMITED

Separate informations, which were subsequently clubbed together, were filed by Informant No. 1, Informant No. 2, and Informant No. 3 (collectively referred to as “**Informants**”) against Grasim Industries Private Limited (“**Grasim**”) alleging that it had abused its dominant position thereby violating Section 4 of the Act. Informants are or were purchasers of Viscose Stable Fibre (“**VSF**”) manufactured by Grasim for resale or other manufacturing purposes.

The Informants had alleged that the Grasim did not disclose its discount policies and provided differential treatment to different customers with respect to discounts offered. It was also alleged that Grasim made the availability of discounts subject to the trader/customer providing details of their consumption, production and sales, and by collating this information, regulated and influenced the price of VSF in the market. The Informants further alleged that Grasim unilaterally withdrew the sales terms, and ultimately the supply of VSF to the traders/customers which did not comply with the directions of providing the above data, thus abusing their monopoly in the market. Informant No. 2 adopted the relevant market determined in the CCI *vide* its previous order dated 10 November 2016, to indicate that the Grasim was dominant in the market for ‘*provision for sale of Viscose Stable Fibre in India*’.

The CCI, after considering the information, was of a *prima facie* view that the market dynamics with respect to Grasim had not changed significantly since CCI’s order dated 10 November 2016, and that Grasim continues to hold a dominant position in the relevant market. The CCI, based on the allegations levelled against Grasim and on the assessment of its dominance in the relevant market, observed Grasim to *prima facie* be in violation of Section 4(2)(a)(i), 4(2)(a)(ii), 4(2)(c) and 4(2)(d) of the Act and therefore directed the DG to cause investigation into the allegations levelled in the informations.

The CCI’s order is available here:

<https://www.cci.gov.in/sites/default/files/Case%20No.%2051%20of%202017%2C%20Case%20No.%2054%20of%202017%20and%20Case%20No.%2056%20of%202017.pdf>

### CCI DIRECTS INVESTIGATION INTO THE CHARTER HIRE AGREEMENT OF ONGC

Based on the information filed by the Indian National Shipowners’ Association (“**INSA**”), the CCI *vide* order dated 12 June 2018, directed investigation into the allegations of abuse of dominance by Oil and Natural Gas Corporation Limited (“**ONGC**”) in relation to availing services of offshore support vessels (“**OSV**”). The members of INSA have alleged that the charter hire agreement prepared for this purpose of obtaining services of the OSVs, contained clauses which were unfair and one-sided such as, unilateral right to terminate agreement, unilateral termination in case of force majeure and onerous clauses pertaining to appointment of an arbitrator.

While delineating the relevant product market, the CCI noted that in cases concerning dominant buyer's power, it is the procurement market and not the supply market which has to be defined. The CCI noted that the inverse of the demand-side oriented market concept was required to be applied in such cases and the market is required to be defined from the supplier's point of view, i.e. the market definition is required to be based on the supplier's ability to switch to alternative sales opportunities. Further, the CCI noted that since exploration services, for which services were required by ONGC from the OSVs, extended beyond the territorial waters of India, the relevant geographic market would be the Exclusive Economic Zone ("EEZ") of India. The CCI, accordingly defined the relevant market as 'market for charter hire of OSVs in the Indian EEZ'. It was also noted by the CCI that ONGC is a major consumer of services of charter hire of OSV's. Due to the presence of few players in the relevant market and ONGC having possession of economic power being a government undertaking, the CCI was of the *prima facie* view that ONGC held a dominant position in the relevant market.

The CCI, while assessing the allegations pertaining to the unilateral termination clause in the charter hire agreements being violative of Section 4(2)(a)(i) of the Act, held that inclusion of the clause appears to give ONGC an unfettered right to use the clause in its favour without giving any reciprocal right to INSA. The CCI held that the manner in which ONGC had, in the past, invoked the termination clause and then rescinded upon receiving discounted offers from members of INSA, appears to show ONGC's abusive conduct. The CCI however did not find the clauses pertaining to force majeure and appointment of arbitrators to be *prima facie* abusive, as they included sufficient safeguards to protect the OSV players.

The CCI's order is available here: <https://www.cci.gov.in/sites/default/files/Case%20No.%2001%20of%202018.pdf>

## **CCI DIRECTS INVESTIGATION AGAINST BCCI FOR ITS EXCLUSIONARY PRACTICES**

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Based on information filed by Pan India Infra Projects Private Limited ("PIIPPL"), the CCI, vide order dated 01 June 2018, directed investigation into the alleged exclusionary conduct of the Board of Control for Cricket in India ("BCCI"). It was alleged by PIIPPL that BCCI had abused its status as a sole regulator of cricket in India to blacklist PIIPPL's group company, from participating in the tender process for grant of broadcasting rights for cricketing events organized by BCCI. It was further alleged that BCCI had systematically excluded PIIPPL from organising a private professional cricket league in India (the Indian Cricket League ("ICL")).

The CCI, while relying on its earlier decision in *Surinder Barmi v. BCCI*, delineated the relevant market as the 'market for organization of professional domestic cricket leagues/ events in India' and noted that it was already established that BCCI was dominant in the relevant market. On the allegation of exclusionary conduct, the CCI noted that even though the exclusionary actions of BCCI (by not making stadiums available, threatening players from participating in ICL etc.) started prior to 2009, i.e. prior to the enforcement of the Act, such actions continued thereafter. The CCI held that the above conduct of the BCCI appeared to be in violation of Section 4(2)(c) of the Act.

On the allegation of barring PIIPPL's group company from bidding for media rights of India Premier League, the CCI observed that the inclusion of the clause in the tender document which automatically barred companies in litigation



with BCCI from participating in the bids, was specifically targeted towards to PIIPPL. The CCI held that the fact that similar clauses are included in the media rights tender documents issued by the BCCI, is suggestive of exclusion of PIIPPL from the downstream market and hence, *prima facie* appears to be in violation of Section 4(2)(c) of the Act.

The CCI's order is available here: <https://www.cci.gov.in/sites/default/files/Case%20no.%2091%20of%202013.pdf>



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

### CCI DISMISSES COMPLAINT AGAINST BMW INDIA

An information filed by Parsoli Motor Works Private Limited (“**Parsoli Motors**”) against BMW India Private Limited (“**BMW Motors**”) and BMW India Financial Services Private Limited (“**BMW Financial**”) (collectively referred to as “**BMW**”) alleged that by allowing customers based in Gujarat to buy their cars from States other than Gujarat, BMW had contravened Section 4 of the Act.

Parsoli Motors, a dealer of BMW based in Ahmedabad, contended that BMW was abusing its dominant position by contravening its own policies in allowing customers, resident in Gujarat to purchase its products from outside the State of Gujarat. It was further alleged that these transactions cheated the exchequer, as no entry tax on these vehicles is paid by these customers. Parsoli Motors was also aggrieved by the fact that BMW Motors had given it a notice stating that its dealership would not be renewed after the expiry of the term of the present contract.

Taking into consideration the facts and the allegations made by Parsoli Motors, the CCI observed that no *prima facie* case was made out against BMW. It was highlighted by the CCI that the market share of BMW in the passenger car market was negligible in comparison to its competitors and BMW Motors was, therefore *prima facie* not dominant in the market for passenger cars in India. Further, the CCI observed that Parsoli Motors could not provide any documents or data to establish the dominance of BMW Motors. The CCI, in relation to non-renewal of the dealership agreement, noted that in the absence of any terms of the agreement being challenged, non-renewal of an existing dealership agreement expiring due to efflux of time, could not be considered as contravening the provisions of the Act. The CCI also brushed aside the issue of the alleged tax evasion, noting that it was not a competition concern. Accordingly, the CCI dismissed the information under Section 26(2) of the Act.

The CCI’s order is available here: [https://www.cci.gov.in/sites/default/files/No.11of2018Order\\_0.pdf](https://www.cci.gov.in/sites/default/files/No.11of2018Order_0.pdf)

### CCI REJECTS ALLEGATION OF ABUSE OF DOMINANT POSITION BY UTTAR PRADESH AVAS AVAM VIKAS PARISHAD

In an information filed by Mr. Masood Raza (“**Mr. Raza**”), an allottee of a flat in Ghaziabad district of Uttar Pradesh, it was alleged that Uttar Pradesh Avas Avam Vikas Paridhad (“**UPAAVP**”) the developer of the housing project, had abused its dominant position thereby contravening Section 4 of the Act.

It was submitted by Mr. Raza that despite regularly depositing the amounts demanded by UPAAVP against the allotted flat, he was subsequently informed *vide* a letter, that the price of the flat had been increased and that failure to pay the additional amount would result in a penal interest on the said amount. Mr. Raza alleged that UPAAVP had through the above conduct indulged in arbitrary and unfair practices, and therefore had abused its dominant position.

In view of these submissions, the CCI observed that, in so far as UPAAVP was engaged in an economic activity, it was an enterprise, as defined under Section 2(h) of the Act and the CCI delineated the relevant market to be the market for “*provision of services of development and sale of residential flats in Ghaziabad district of Uttar Pradesh.*” The CCI while assessing the allegations noted that in the relevant market there were several competitors of the UPAAVP including, the Ghaziabad Development Authority, which had a greater presence as well as an exclusive power to carry out developmental work in the relevant market. The CCI in the light of the same held that UPAAVP as such, could not be considered to be dominant in the market and consequently, the conduct of the UPAAVP could not be considered to be an abuse of dominant position. The CCI concluded that as the allotment letter issued to Mr. Raza did not state that the initial offered price was final, and the fact that Mr. Raza could not provide any material evidence indicating that the initial demand price could not be altered, the increase in price could not be considered to be an abuse of dominant position. Accordingly, the CCI found no *prima facie* case against the UPAAVP and dismissed the information.

The CCI’s order is available here: <https://www.cci.gov.in/sites/default/files/Case%20No.%2009%20of%202018.pdf>

### **CCI FINDS NO ANTI – COMPETITIVE CONDUCT BY THE MAKERS OF “PADMAN” AND “PADMAVAT”**

An information was filed by Mr. Kshitiz Arya and Mr. Purushottam Anand (“**Informants**”) under Section 19(1)(a) of the Act against seven entities, namely, Viacom 18 Media Pvt. Ltd (“**OP – 1**”), Bhansali Productions (“**OP – 2**”), Ms. Twinkle Khanna (“**OP – 3**”), Kriarj Entertainment Private Limited (“**OP – 4**”), Side Films India Limited (“**OP – 5**”), Cape of Good Films Private Limited (“**OP – 6**”) and Hope Productions Private Limited (“**OP – 7**”) (collectively referred to as “**OPs**”), being producers of two different Bollywood movies (“Padman” and “Padmavat”), alleging violation of Section 3(3) of the Act. OP – 1 and OP – 2 are the producers of the movie “Padmavat” and OP – 3 to OP – 7 are the producers of the movie “Padman”

The Informants had alleged that the producers of the two movies i.e. the OPs, had colluded to share the market amongst themselves by allocating different time for release of their movies, thereby controlling the supply of these movies to the end consumer.

The CCI observed that releasing of a movie on a particular date is a strategic and tactical business decision taken by the producers, based on getting the maximum number of screens for release of the movie. The CCI further observed that the potential revenue generated by the movie for the producer, is directly proportional to the availability of the number of screens for the release of the movie and therefore the strategy of production houses regarding the date of release of their mega budgeted movie, appears to be a legitimate business decision rather than an anti-competitive practice. The CCI therefore, dismissed the allegation of collusion against the OPs observing that the evidence supplied in the information did not indicate any concerted action by the OPs and the facts at hand did not raise any competition concern.

The CCI’s order is available here: <https://www.cci.gov.in/sites/default/files/Case%20No.%2003%20of%202018.pdf>

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## CCI TO KEEP “CLOSE WATCH” ON THE CONDUCT OF OLA & UBER

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Four separate informations were filed by Meru Travel Solutions Private Limited (“Meru”) under Section 19(1)(a) of the Act against ANI Technologies Pvt. Ltd. (“OP-1”), Uber India Systems Pvt. Ltd (“OP-2”), Uber BV (“OP-3”), Uber Technologies International Inc. (“OP-4”) (collectively referred to as “OPs”), alleging contravention of Section 3 and 4 of the Act. The informations identified four different geographical areas wherein the OPs had allegedly violated the provisions of the Act viz., Chennai, Hyderabad, Mumbai and Kolkata.

Meru had alleged that the OPs entered into anti-competitive agreements with their drivers by providing a lucrative incentive model, such that the drivers are locked-in into their network. It was alleged that this incentive model of providing unrealistic incentives to the drivers and discounts to customers in addition to low fares, was collectively aimed at gaining a high market share and foreclosing competition in the market by creating entry barriers. Meru, while referring to the previous decisions of the CCI where the informations were closed by considering Ola as imposing effective competitive constraints on Uber, contended that Section 4 of the Act contemplates analysis based on ‘competitors’ and not a single competitor. Meru raised two alternate arguments viz., - (a) both Ola and Uber are independently as well as collectively dominant in the relevant market and both are abusing their dominant position; and (b) Ola and Uber are dominant as a ‘Group’ owing to common investors and are abusing their dominant position.

The CCI considered the submissions advanced by Meru and at the outset noted that Meru had not placed on record any written agreement to demonstrate the exclusivity - based restrictions imposed on drivers by the OPs. The CCI further noted that Meru had failed to show that there was any oral agreement between the OPs and the drivers. The CCI, in the light of the above held that an agreement/understanding/arrangement between parties is a pre-requisite to attract the provisions of Section 3 of the Act. The CCI indicated that the agreement referred to by Meru, in case at hand, consisted of incentives availed by the drivers out of their own choice and merely giving incentives to their prospective drivers could not be held to be anti-competitive agreement

With regard to the allegations of abuse of dominant position, the CCI noted that facts and issues raised in the informations under consideration were similar to those made in earlier decided cases and therefore the CCI adopted the same relevant markets as delineated in its previous orders. The CCI for the present case delineated the relevant markets as ‘market for radio taxi services in Hyderabad’, ‘market for radio taxi services in Mumbai’, ‘market for radio taxi and yellow taxi services in Kolkata’ and ‘market for radio taxi services in Chennai’.

In relation to dominant position, the CCI observed, that even though market share is an important indicator for lack of competitive constraints, it is not a conclusive indicator of dominance. It further observed that there cannot be any objective criteria for determining market share thresholds and a standard time-period as indicator of dominance to apply in all cases. The CCI, therefore brushed aside the contention of Meru that market share of more than 50 percent leads to a presumption of dominance and while reasserting its previous position, the CCI concluded that since both Ola and Uber exercised significant competitive constraints on each other, neither of them was in a dominant position.

With respect to Meru’s allegations that the OPs are dominant as a ‘group’ owing to common investors, the CCI observed that while common ownership could reduce incentive for firms to compete and thereby giving rise to both unilateral and coordinated effects, in the present case there was no evidence on record to establish that any anti-competitive effects had been observed in the market on account of such common ownership

While noting that that an investigation under the Act could not be ordered solely based on conjectures and apprehensions, the CCI concluded with a caveat that it will keep a close watch on whether OPs, by virtue of the presence of common investors, indulged in any conduct in violation of the provisions of the Act.

The CCI's order is available here: <https://www.cci.gov.in/sites/default/files/25%20-%2028%20of%202017.pdf>



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

### CCI FINDS NO CARTELISATION AMONGST BANKS, CHARACTERIZES THE INDIAN BANKING SECTOR AS A 'COZY OLIGOPOLY'

The CCI while closing its *suo moto* investigation into the parallel behaviour of banks in India in offering similar Savings Bank interest rates (“**SBIRs**”) and levying similar service charges, as well as the role played by Indian Banks’ Association (“**IBA**”) in determination of the said rate or charges held that the SBIRs were an outcome of the banks’ independent assessment of market conditions and not resultant of any collusive arrangement. The CCI observed that Scheduled Commercial Banks (“**SCBs**”) had no incentive to collude for determining SBIRs due to the following reasons:

- (i) SCBs seemed to be competing rigorously on Term Deposit rates and the interest outgo on Saving Bank Account (“**SB Account**”) deposits is substantially lesser than interest paid on Term Deposits;
- (ii) All banks are working on the Core Banking System, in which a sweeping facility can be availed by SB Account customers whereby excess funds in SB Accounts shift to Term Deposits and start earning higher interest rate;
- (iii) SB Account customers appear to be less price sensitive and are more concerned with the service, convenience and other ancillary facilities offered to them.

On the issue of similarity in service charges, the CCI found no similarity/collusion amongst SCBs for determining service charges. As regards the role of the IBA, in allowing the use of its platform or being instrumental in determining similar SBIRs or coordinating service charges, the CCI noted two key facts in favour of IBA:

- (i) With respect to SBIRs, private SCBs such as Yes Bank, Kotak, IndusInd Bank are offering higher SBIRs despite being members of IBA.
- (ii) With respect to service charges it was observed that even on the recommendation of the Banking Codes and Standards Board of India (“**BCSBI**”) to the IBA for issuance of guidelines on certain service charges, the IBA took the stance that it will not prescribe any standard service charges and the same should be determined by individual banks having due regard to their costs and other relevant factors.

In view of the above, the CCI concluded that the evidence on record does not suggest any cartelization amongst banks and/or the IBA to determine SBIRs or service charges between 2011 to 2016 in contravention of Section 3(3) of the Act. However, the CCI analysed the market structure of the Indian Banking Sector and characterized it as a ‘Cozy Oligopoly’ owing to the presence of large Public-Sector Banks having access to a wide base, unmatched by competitors and with little incentive for price competition in saving deposits.

The CCI’s Order is available here: <https://www.cci.gov.in/sites/default/files/Suo-%20Moto%2001-2015.pdf>

## **CCI HOLDS THAT IT CANNOT SIT IN APPEAL OVER GOVERNMENT POLICIES, UNLESS SUCH POLICIES CONTRAVENE PROVISIONS OF THE ACT**

India Glycols Ltd. (“**India Glycols**”), a company engaged in the business of manufacturing and marketing ethanol-based chemicals approached the CCI alleging contravention of Sections 3 and 4 of the Act by Indian Sugar Mills Association (“**ISMA**”), National Federation of Cooperative Sugar Factories Ltd. (“**NFCSF**”) and public-sector oil marketing companies (“**PSU OMCs**”). India Glycols had submitted that ISMA and NFCSF held the entire market for sugar mills in India and supplied ethanol to chemical industries and to the PSU OMCs. The Informant also submitted that ethanol is made from molasses which is a by-product of the sugar industry and therefore, the Informant is dependent upon the sugar mills for running its business.

Against this background, the Informant made the following allegations:

- (i) The mandatory Ethanol Blending Programme (“**EBP**”) issued by the Ministry of Petroleum and Natural Gas (“**MoPNG**”) vide its notification dated 02 January 2013, whereby the OMCs were directed to only sell petrol blended with up to 10 percent ethanol, created anti-competitive conditions in the market for supply of ethanol by encouraging sugar mills to rig bids and to artificially increase the prices of ethanol;
- (ii) ISMA creates artificial scarcity of ethanol and forces PSU OMCs to purchase ethanol at an artificially higher price in violation of Section 4 of the Act;
- (iii) NFCSF colluded with ISMA by artificially creating scarcity and raising the price of ethanol in contravention of the provisions of Section 3(3)(a) of the Act;
- (iv) ISMA and NFCSF have been consistently demanding higher prices for ethanol in complete disregard of MoPNG’s order dated 12 May 2014 directing the sugar industry to benchmark the price of ethanol;
- (v) Various joint tenders issued by the OMCs failed or had to be cancelled as ISMA and NFCSF colluded to restrict the production and supply to artificially raise the prices of ethanol in contravention of Section 3(3)(b) of the Act; and
- (vi) The process of joint tendering by the OMCs for procurement of ethanol breaches the observance of principle of competitive neutrality. The Informant sought that the joint tender mechanism of PSU OMCs be scrapped and replaced by independent tendering by all OMCs including private OMCs for procurement of ethanol at market driven prices.

Based on these allegations, the CCI identified the three issues for determination listed below and reserved its decision with regard to the overlapping allegations of joint tendering by OMCs and bid rigging by sugar mills in respect of joint tender dated 02 January 2013 floated by the OMCs, to be dealt with in the cases under investigation on those issues.

- I. Whether the process of mandatory EBP notified by the MoPNG as well as procurement of ethanol by the PSU OMCs at fixed notified prices, contravenes any provision of the Act?
- II. Whether ISMA abused its dominant position in the market for supply of ethanol to the PSU OMCs in violation of the provisions of Section 4 of the Act?

III. Whether ISMA and NFCFS acted in collusion to create an artificial scarcity of ethanol by limiting production and supply of ethanol to force the PSU OMCs to purchase ethanol at an artificially higher price in contravention of the provisions of Section 3 of the Act?

On the first issue, the CCI strongly stated that it cannot consider the relative merits of different economic policies or the pricing mechanisms of the Government and decide as to whether a wiser or a better alternative could be evolved. The CCI noted that since formulation of policies falls in the domain of the Executive, the CCI is not the appropriate forum to sit in appeal over such decisions unless such policies contravene any provision of the Act and can be examined within the existing regulatory framework.

On the second issue, the CCI held that ISMA is not undertaking any economic or commercial activity pertaining to production or supply of ethanol and, therefore, ISMA cannot be considered to be an 'enterprise' within the meaning of the term as defined in Section 2(h) of the Act. The CCI therefore held that the issue of abuse of dominant position by ISMA in respect of production or supply of ethanol in accordance with the Act could not arise.

On the third issue, the CCI while agreeing with the investigation of the DG, noted that availability and supply of sugarcane molasses, which is required to produce ethanol, in the country is dependent upon the production of sugarcane and therefore, ISMA and NFCFS cannot be said to be in any collusion to create an artificial scarcity of ethanol which may force the PSU OMCs to purchase ethanol at an artificially higher price. The CCI took the view that no contravention of the provisions of Section 3(3)(a) and 3(3)(b) of the Act could be made out against ISMA and NFCFS.

The CCI's Order is available here: [https://www.cci.gov.in/sites/default/files/C.%20No.%2094%20of%202014\\_0.pdf](https://www.cci.gov.in/sites/default/files/C.%20No.%2094%20of%202014_0.pdf)





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

### NO SIGNIFICANT VALUE ADDITION MERITS NO REDUCTION OF PENALTY

In three connected matters relating to tenders floated by Pune Municipal Corporation, the CCI set out the requirements for reduction of penalty for applicants under Section 46 of the Act read with provisions of the Lesser Penalty Regulations (collectively “**Leniency Provisions**”). The CCI held that as some of the applicants under Leniency Provisions had made no significant disclosure, and all information disclosed by them was already with the CCI, no reduction of penalty could be granted.

Nagrik Chetna Manch (“**NCM**”) had, under Section 19 of the Act filed information with the CCI alleging cartelisation and bid-rigging by 3 bidding parties, with cooperation from the Pune Municipal Corporation. The DG, during the course of investigation, included three other bidding parties as opposite parties (the six opposite parties collectively “**Opposite Parties**”) to the investigation. It was alleged by the NCM that in certain tenders floated by Pune Municipal Corporation during December 2014 to March 2015, the Opposite Parties had indulged in practices which were in contravention of Section 3 of the Act.

Subsequently, the Opposite Parties filed their respective applications under Leniency Provisions, disclosing evidences in the form of e-mails, bank statements to show demand drafts made for the proxy bidders, etc. The CCI, after consideration of the evidences submitted by the Opposite Parties, the submissions made by the Opposite Parties and the investigation report of the DG, concluded the existence of cartelisation and bid-rigging amongst the Opposite Parties and imposed a penalty of 10 percent of the average turnover of three years on the Opposite Parties and the concerned individuals of the respective Opposite Parties.

With respect to the applications for lesser penalty under the Leniency Provisions, the CCI, while assessing the applications on the basis of the stage at which the party had approached the CCI and the value addition made by the applicant in establishing the existence of the cartel, allowed 50 percent, 50 percent, 40 percent and 25 percent to four opposite parties even though all six Opposite Parties had applied for lesser penalty. The CCI clarified that unless there was substantial value addition in the information for establishment of a contravention of the provisions of the Act, the privilege of a lesser penalty cannot be granted.

The CCI’s Order is available here: <https://www.cci.gov.in/sites/default/files/50%20of%202015.pdf>

### CCI GRANTS 100 PERCENT EXEMPTION FROM PENALTY UNDER LENIENCY PROVISIONS

The CCI recently awarded 100 percent exemption from payment of penalty, under the Leniency Provisions to M/s. Panasonic Energy India Co. Ltd. (“**Panasonic**”) while allowing a 30 percent and a 20 percent reduction respectively to Eveready Industries India Ltd. (“**Eveready**”) and Indo National Ltd. (“**Nippo**”) from paying the penalty imposed on them for colluding to fix prices of zinc-carbon dry cell batteries in India.

The CCI, upon receipt of the application under the Leniency Provisions from Panasonic, initiated a *suo-moto* investigation into the allegations of existence of a cartel amongst Eveready, Nippo and Panasonic, to control the distribution and price

of zinc-carbon dry cell batteries in India. The DG, during the course of investigation, carried out search and seizure operations at the premises of the three dry cell battery manufacturers and discovered & seized documents and material indicating the existence of a cartel. The CCI subsequently also received applications from Eveready and Nippo under the Leniency Provisions.

On the basis of the evidence collected by the DG, the CCI found that the unregistered association of the dry cell battery manufacturers, viz., the Association of Indian Dry Cell Manufacturers (“AIDCM”) was being used by Eveready, Nippo and Panasonic to carry out anticompetitive practices. The CCI noted that the three battery manufacturers had coordinated at all levels in the supply chain and distribution and had agreed to allocate the market on the basis of the geographical area and types of batteries. The CCI found the conduct of the three dry cell battery manufacturers to be in contravention of Sections 3(3)(a), 3(3)(b) and 3(3)(c) read with Section 3(1) of the Act and imposed a penalty at the rate of 1.25 times of their profit for the period 2009 - 2017 amounting to INR 245.07 crore (~ USD 56.9 million) on Eveready, INR 52.82 crore (~ USD 7.95 million) on Nippo and INR 74.68 crore (~ USD 11.24 million) on Panasonic. Further, a penalty of INR 1.85 Lakh (~ USD 2,785) was levied on AIDCM at the rate of 10 percent of the average of its receipts for preceding three years. The CCI also imposed penalties on individual officials/ office bearers of the three manufacturers and AIDCM at the rate of 10 percent of the average of their income for the last three preceding financial years.

The CCI while examining the application filed by the three battery manufacturers took into consideration the stage at which the applications were filed, the nature and quality of disclosure, the extent of cooperation extended during the investigation and the priority status of the applicants in determining the amount of reduction in penalty. As Panasonic was the first applicant and had made full disclosure identifying names, locations and email accounts of key persons of all parties involved in the cartel, the CCI reduced its penalty by 100 percent. The penalty for Eveready which was second applicant was reduced by 30 percent and the penalty for Nippo, the third applicant under the Leniency Provisions, was reduced by 20 percent. The above reduction rates in penalty were also applied to the relevant individuals/ officials of the three battery manufacturers.

The CCI’s Order is available here: [https://www.cci.gov.in/sites/default/files/Suo\\_Moto\\_02\\_of\\_2016.pdf](https://www.cci.gov.in/sites/default/files/Suo_Moto_02_of_2016.pdf)



## OTHER ORDERS

### CCI HOLDS, INDEPENDENT ACTIONS HAVING COMMERCIAL RATIONALE AND JUSTIFICATIONS MAY NOT AMOUNT TO COLLUSION

Certain cement dealers (“**Informants**”) had approached the CCI with allegations of anti-competitive conduct against the Kerala Cement Dealers’ Association (“**KCDA**”), Ramco Cements Limited (“**Ramco**”) and Dalmia Cements (Bharat) Limited (“**Dalmia**”). Specifically, the Informants made two allegations *viz.*, - (i) that KCDA was limiting/controlling the supply of cement to dealers in contravention of Section 3(3)(b) of the Act; and (ii) that the prices of cement being sold by the dealers were fixed in contravention of Section 3(3)(a) of the Act.

On the first allegation, the CCI noted that the investigation conducted by the DG’s could not find any material to suggest that KCDA had any role in the award or termination of dealership, or that KCDA urged the cement manufacturers to stop supplies to certain cement dealers. It further noted that, on the contrary, the investigation found that there are several cement dealers in Kerala who were not members of KCDA but were able to carry on with their business without any hassle. The CCI therefore concluded that there was no contravention of Section 3(3)(b) of the Act by KCDA.

On the second allegation of price fixation, while disagreeing with the conclusions of the DG, held that the facts on record did not suggest any collusion amongst the KCDA, Dalmia and Ramco for fixing the prices of the cement, rather the survey conducted by the DG had revealed that the price of Ramco cement during October to December 2013, were different across the state of Kerala.

The CCI observed that while it was undisputed that officials of KCDA and representatives of Ramco as well as Dalmia had addressed the cement dealers and asked them not to sell cement below the invoice price, the dealers could compete by adopting any price between their respective invoice price and the MRP. The CCI while accepting the submission of the opposite parties that sales by dealers below the invoice price and post-sale discounting by cement manufacturers leads to double payment of taxes on the same amount observed that there can be a commercial rationale for a manufacturer asking its dealers to price the product in a certain way. The CCI on the limited concern of two competitors jointly withdrawing post-sale discounts, held that a one-off instance of only two among many competitors withdrawing post-sale discounts is not sufficient to establish an anti-competitive agreement, more so when a commercial rationale for the same exists. The CCI while condemning the act of issuing common statements by KCDA, Ramco and Dalmia as being against the spirit of competition, held that there was no case of contravention of Section 3(3) of the Act

The CCI’s Order is available here:

<https://www.cci.gov.in/sites/default/files/75%20of%202012%2C%2056%20of%202013%20and%20106%20of%202013.pdf>



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## INTERVENTION BY THE NCLAT

### **PENALTY IMPOSED ON GOOGLE, STAYED**

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The National Company Law Appellate Tribunal (“NCLAT”) vide its order dated 27 April 2018, stayed the penalty and the directions with respect to the Flights Unit imposed on Google LLC, Google Ireland Limited and Google India Private Limited (collectively “Google”) vide CCI’s order dated 31 January 2018.

The CCI had found Google, in contravention of Section 4(2)(a)(i) and 4(2)(c) of the Act and had imposed a penalty of INR 135.96 crores (~ USD 20.4 million). The CCI had, under its order, also directed Google to display a disclaimer indicating clearly that the “search flights” link placed at the bottom of the Unit leads to Google’s Flights page. Aggrieved by the CCI’s order, Google had approached the NCLAT in appeal and sought a stay on operation of the CCI’s directions.

The NCLAT heard the preliminary submissions on behalf of Google in relation to its grounds of appeal, including on the issue that the penalty imposed by the CCI was not on the relevant turnover of Google. The NCLAT after considering the submissions on behalf of Google and perusing the order of the CCI as well as the dissenting opinion of two members of the CCI in the matter admitted the appeal for hearing and ordered that the operation of the impugned directions in the CCI’s order with respect to the Flights Unit disclaimer shall remain stayed. The NCLAT directed that the penalty imposed by the CCI would be stayed, provided Google deposits 10 percent of the penalty imposed on it vide the CCI’s order, within four weeks with the Registrar, NCLAT.

The matter would be listed for hearing by the NCLAT during the course of the following months.

The NCLAT’s order is available here: [http://nclat.nic.in/interim\\_orders/Apr2018/27042018AT182018.pdf](http://nclat.nic.in/interim_orders/Apr2018/27042018AT182018.pdf)



## INTERVENTION BY THE HIGH COURTS

### ADVOCATES MAY ACCOMPANY PARTIES DURING DEPOSITIONS BEFORE THE DG

A Division Bench of the Delhi High Court (“**Division Bench**”) in its recent decision held that the Advocates may accompany the parties for deposition/statements being recorded before the DG. The CCI being aggrieved by the decision of the Single Bench of the Delhi High Court (“**Single Bench**”) had preferred an appeal before the Division Bench, submitting that presence of an Advocate during the recording of statement before the DG, may cause the investigations by the DG to be impeded.

The DG had, during the investigation of an allegation of existence of a bid-rigging cartel in the Conveyor Belt Sector in India, sought information from M/s. Oriental Rubber Industries Private Limited (“**Oriental Rubber**”). Being unaware of the complete allegations and evidence against it, Oriental Rubber had sought inspection of public record before the CCI, which request was rejected by the CCI citing that the documents/information was confidential and hence could not be shared at this stage. Subsequently, the DG issued summons to an employee of Oriental Rubber for recording of his statement and Oriental Rubber by way of writ petition approached the Delhi High Court seeking directions to the CCI and the DG for allowing inspection of the documents on the file of the CCI and to allow the employee to be accompanied by a counsel.

The CCI, before the Single Bench, agreed to allow cross-examination of the witnesses and to supply copies of the documents to be used against the parties. However, the CCI argued that advocates should not be permitted to accompany their clients for recording of statements before the DG. The CCI in its support had argued that the Advocates during the recording of statements may through verbal or non-verbal communication hinder the process of receiving full and accurate information from the parties. The Single Bench while dismissing the reservations of the CCI, directed the CCI and DG to allow the parties to be accompanied by the Advocates, for deposition / recording of statement before the DG.

The Division Bench, while dismissing the submissions of the CCI that the Act does not provide for legal representation at the stage of investigation by the DG, held that Section 30 of the Advocates Act, 1961 (“**Advocates Act**”) provides that an Advocate registered under the Advocates Act has a right to practice, amongst others, ‘*before any tribunal or person legally authorised to take evidence*’. The Division Bench held that as DG is recording statements of the parties, which may form the basis of the decision of the CCI, the statements recorded are evidence and the DG a person legally authorised to take evidence, as provided under Section 30 of the Advocates Act. The Division Bench in the light of the above and the practices adopted in other jurisdictions held that an Advocate may accompany his/her client for deposition / recording of statement before the DG. However, agreeing with the arguments of the CCI on the possibility of the investigation being impeded, the Division Bench, directed the DG to ensure that the Advocate does not sit in-front of the witness and is at a distance so that the witness cannot consult him/her during the recording of the statement.

The Delhi High Court’s Order is available here: <http://lobis.nic.in/dhir/dhc/SRB/judgement/24-05-2018/SRB24052018LPA6072016.pdf>



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## INTERVENTIONS BY THE SUPREME COURT

### NON-COMPLIANCE OF CONDITIONS OF STAY MERITS VACATION, NOT DISMISSAL OF APPEAL

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The Supreme Court vide its order dated 18 May 2018 reversed an order of the NCLAT, whereby the NCLAT had dismissed an appeal filed by M/s. B. Himmatlal Agrawal, on the grounds of non-compliance with the conditions of the stay granted by the NCLAT.

In this case, the Western Coal Fields Limited, a subsidiary of Coal India Limited, had informed the CCI of alleged cartelisation by bidding transportation companies, in four tenders floated by it. Western Coal Fields had alleged that the bidding transportation companies had colluded to quote higher bid amounts in general, and some of the companies had even quoted identical bid amounts. The CCI, after due consideration of the investigation report of the DG and the contentions of the bidding companies, imposed penalty, at the rate of 4 percent of the average relevant turnover for the last three financial years, on the bidding companies and the concerned individuals of those companies.

Aggrieved by the order of the CCI, M/s. B. Himmatlal Agrawal had preferred an appeal before the NCLAT and was granted a stay on the operation of the order of the CCI, on the condition that 10 percent of amount of penalty imposed on it by the order of the CCI, be deposited with the Registrar, NCLAT within 2 weeks from the date of grant of stay. M/s. B. Himmatlal Agrawal however failed to comply with the directions of the NCLAT, even after grant of extension of time. The NCLAT while dismissing the request of M/s. B. Himmatlal Agrawal for modification of the conditions of stay, also dismissed the Appeal filed under Section 53B of the Act.

The Supreme Court held that the right to appeal is granted by the Act and it does not prescribe a pre-condition of depositing a certain amount, on the appellant. It held that Section 53B of the Act requires that the appeal is heard on merits and decided accordingly. It further held that consequence of non-compliance of a condition for grant of stay, would be limited to vacation of the order of stay and would have no bearing on the main appeal.

The Supreme Court's Order is available here: [https://sci.gov.in/supremecourt/2018/8187/8187\\_2018\\_Judgement\\_18-May-2018.pdf](https://sci.gov.in/supremecourt/2018/8187/8187_2018_Judgement_18-May-2018.pdf)





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