



ECONOMIC
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CONTENTS

PREFACE	3
MERGER CONTROL UPDATE.....	4
CCI proposes amendments to the Combination Regulations.....	4
CCI approves Flipkart’s acquisition by Walmart with significant observations on the impact of behavioural conduct on merger assessment	4
CCI allows Linde - Praxair merger with divestment.....	5
CCI holds that spectrum trading amounts to acquisition of assets and is therefore notifiable	6
INVESTIGATIONS INITIATED BY THE CCI UNDER SECTION 26(1) OF THE ACT	8
CCI orders probe into practices of Star India Pvt. Ltd. & Sony Pictures Network Pvt. Ltd. & potentially other broadcasters.....	8
CCI orders investigation into discriminatory procurement of country liquor by beverage companies	8
CASES DISMISSED BY THE CCI UNDER SECTION 26(2) OF THE ACT	10
CCI dismisses information against Timex	10
No competition concern in the market for chocolates in India.....	10
CCI recognises procurer’s right to lay down conditions in a bid document	11
CCI dismisses information against three leading oil companies.....	12
CASES CLOSED BY THE CCI UNDER SECTION 26(6) OF THE ACT.....	14
CCI agrees with DG’s report and closes case against Haryana State Public Works Unit	14
DLF is dominant no more: Dynamic market calls for assessing relevant time period for dominance.....	14
RECENT PENALTIES IMPOSED BY THE CCI UNDER SECTION 27 OF THE ACT	16
CCI grants 100% leniency to first and 30% to second leniency applicant.....	16
One stray instance of violation, CCI grants remission of penalty by 40%.....	16
Panasonic gets 100% reduction in penalty for ancillary cartel.....	17
Sugar manufacturers penalised for bid-rigging in tenders for Ethanol	18
Conduct of All India Chess Federation violates Sections 3 & 4.....	19
Definition of relevant market would not change the competition assessment where there is only one player in the market.....	20
KFCC & others penalised for anti-competitive conduct	21
OTHER ORDERS.....	22
Super Speciality Hospitals in Delhi under investigation for charging exploitative prices for consumables from in-patients.....	22
Proof of non-implementation of abusive decision saves the Athletics Federation of India.....	22
No case of contravention by Google in the remote technology support services sector.....	23
INTERVENTIONS BY THE NCLAT.....	24
Interest can be charged for penalty not deposited due to stay order	24
NCLAT upholds CCI’s order imposing penalties on cement companies and trade associations for cartelization	24
NCLAT sets aside penalty imposed on Hyundai for CCI’s failure to apply its mind	25
INTERVENTIONS BY THE HIGH COURTS	26

Contradictory decisions by the Madras and Delhi High Court, common result – CCI cannot be crippled on technical ground.....26

INTERVENTIONS BY THE SUPREME COURT27

Supreme Court issues clarifications on determination of relevant market for anti-competitive agreements.....27

PREFACE

Dear Reader,

The July–September 2018 quarter witnessed some interesting developments and activity in the Indian competition law space. Given the pending retirement of the Chairperson in July 2018, there were a large number of orders published. As opposed to just four orders under Section 27 of the Competition Act, 2002 (**Act**), in the previous quarter, this quarter saw the Competition Commission of India (**CCI**) issuing seven orders under Section 27 of the Act, two of which were cases initiated on receipt of leniency applications under the Competition Commission of India (Lesser Penalty) Regulations, 2009 (**Lesser Penalty Regulations**). This takes the total number of final orders passed in cases where a leniency application has been filed to seven. The increasing number of leniency applications being filed, and orders being passed on them marks a significant achievement for the CCI as it points towards the growing robustness of its enforcement activities. In line with its practice, the CCI also carried out a closer scrutiny of information filed, dismissing fifteen cases under Section 26 (2) of the Act, as it did not find any prima facie contravention of the provisions of the Act. In only two instances, investigations were directed into allegations of abuse of dominance

The National Company Law Appellate Tribunal (**NCLAT**), also saw some activity on the competition front and two significant judgements were passed by the NCLAT providing some insight into the direction in which the jurisprudence by the appellate body is likely to move.

The quarter also saw the retirement of Chairperson CCI, Mr. D.K. Sikri, and long-time member Mr. Sudhir Mittal taking over as the Acting Chairperson. Another member, Justice (Retd.) G.P. Mittal demitted office at the regulator during this period. These retirements have resulted in the current quorum of the CCI being reduced to three members. Fresh appointments in the coming months will bring in a significant change in the overall composition of the CCI.

In this update, we have summarised 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



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* 1 USD = INR 71.90

MERGER CONTROL UPDATE

CCI PROPOSES AMENDMENTS TO THE COMBINATION REGULATIONS

In August this year, the CCI proposed certain amendments to the Competition Commission of India (Procedure in Regard to the Transactions of Business Relating to Combinations) Regulations, 2011 (**Combination Regulations**) and sought public opinion on them. As per the proposed amendments following possible changes to the existing Combination Regulations may be carried out:

- a. **Withdrawal and refiling of notice** – The Parties would be allowed to approach the CCI, with a request to withdraw and refile their notice, any time before the initiation of a Phase II review.
- b. **Modification can be offered by parties before and after issuance of a show cause notice** – The inclusion of this sub-regulation formalises the practice of offering voluntary modifications by the parties both before and after the issuance of a show cause notice by the CCI.
- c. **Redefining of ‘solely as an investment’ thresholds:** The proposed amendment also considerably waters down the scope of Item 1 of Schedule I exemption. The proposed amendment stipulates that acquisition of 5% or more of shares or voting rights by a ‘pooled investment vehicle’ will need to be notified to the CCI, if the investment vehicle already has an interest in another entity competing with the target or is vertically related to the target.

The reports suggest that the proposed amendments are likely to be brought into force by end-October 2018. The proposed amendment to Item 1 of Schedule I has caught a lot of attention from private equity funds, who may now be required to notify the acquisition of even a small non-controlling stake, if they already have investments in a related sector.

The draft proposed amendments can be accessed [here](#).

CCI APPROVES FLIPKART’S ACQUISITION BY WALMART WITH SIGNIFICANT OBSERVATIONS ON THE IMPACT OF BEHAVIOURAL CONDUCT ON MERGER ASSESSMENT

In a significant ruling, setting out the nature and scope of its inquiry for mergers, the CCI on August 08, 2018, approved the much-debated acquisition of 51-77% of the outstanding shares of Flipkart Private Limited (**Flipkart**) by Wal-Mart International Holdings Inc. (**Walmart**).

Before delving into any detailed assessment, the CCI, conscious of the attention that the merger had received, set out in clear terms its legal mandate while assessing a combination. The CCI clarified that it had a limited role of assessing the extent to which the combination, if permitted, would hamper competition in the market. It noted that the purpose of merger assessment is to analyse two counterfactual market scenarios, i.e., with and without the combination. The CCI stated that in doing so, its endeavour is to address potential adverse implications resulting from the combination. Further, it also stated that the competition assessment is not aimed at addressing pre-existing conditions that are not attributable to the proposed combination or problems in the market.

Responding to the representations received from the trade associations, traders/ retailers etc. who had expressed concerns on predatory practices of deep discounting and preferential treatment to certain sellers on Flipkart's online marketplace, the CCI again drew reference to its role in merger assessments. In its assessment of the present transaction, the CCI highlighted that its legal mandate while assessing a combination is different as opposed to assessment of behavioural conduct and held that so long as the behavioural issues have no nexus to the proposed combination, they cannot be assessed under Section 5 of the Act. Noting that issues of deep discounting and preferential treatment had no nexus to the proposed combination, the CCI refused to look into them, while at the same time observing that there would be no bar on examining such issues under sections 3(4) and 4 the Act. The CCI also clarified, that any issues of alleged violation of the Foreign Direct Investment (**FDI**) policy, on account of deep discounting, would not be looked into by the CCI and would be within the domain the relevant authorities.

While assessing the proposed combination, the CCI noted that both Walmart and Flipkart were present in business to business (**B2B**) sales and were therefore aligned *horizontally*. However, the CCI held that no appreciable adverse effect on competition (**AAEC**) is likely to be caused in the market for B2B sales due to – (i) the presence of large number of competitors; (ii) the boundaries of B2B sales being set by the FDI policy; (iii) less than 5% market share after the proposed combination; and (iv) the strength of the parties in different categories of the products sold. The CCI found no vertical overlaps between the B2B business of Walmart and the online marketplaces of Flipkart (business to customer (**B2C**) market) as Walmart is restricted from engaging in B2C sales under the FDI policy and is currently not engaged in any online marketplace for B2C sales. Accordingly, CCI observed that even post acquisition, the ecommerce platform will be preserved and would enable the combined entity to compete effectively with competitors in a dynamic e-commerce market characterised with network effects.

The Order of the CCI can be accessed [here](#).

CCI ALLOWS LINDE - PRAXAIR MERGER WITH DIVESTMENT

CCI *vide* its order dated September 06, 2018, approved the proposed merger between Linde Aktiengesellschaft (**Linde**) and Praxair, Inc. (**Praxair**), subject to divestiture of 3 on-site plants of Praxair, Praxair's cylinder filling stations located in Kolkata and Asansol, Linde's stake in Belloxy, one on-site plant of Linde and Linde's cylinder filling stations in Chennai and Hyderabad. Linde and Praxair, having failed to receive approval in their previous two notifications made before the CCI, due to non-conformity with the requirements under the Combination Regulations, accepted the divestiture proposed by the CCI while requesting for extension of time for completing the divestiture process. The CCI has provided detailed requirements for the purchasers of the businesses to be divested, along with providing directions to Linde and Praxair to provide transitional support as may be required by the purchaser. The CCI as part of the conditions for the divestiture has also required Linde and Praxair to not acquire any stake or influence (direct or indirect) over the whole or part of the divested businesses for a period of 10 years from the finalisation of divestiture.

The CCI had noted that the Linde and Praxair were both engaged in the production and supply of gases classified as (i) Industrial gases, (ii) Medical gases, and (iii) Speciality gases. It was also noted by CCI that Linde and Praxair both were engaged in provision of medical engineering services to hospitals and healthcare facilities. It was also noted that Linde was engaged in the business of constructing and supplying plants for production of industrial gases. The CCI concluded that the proposed merger is not likely to result in AAEC in the relevant markets of provision of medical engineering

services, market for speciality gases etc. The CCI however noted that the proposed merger is likely to result in AAEC in the relevant market of helium retail, cylinders for East and South Regions in India, 'regional bulk industrial and medical gases' etc. unless the divestiture as directed is undertaken.

The Order of the CCI can be accessed [here](#).

CCI HOLDS THAT SPECTRUM TRADING AMOUNTS TO ACQUISITION OF ASSETS AND IS THEREFORE NOTIFIABLE

Recently, the CCI had the chance to assess if spectrum trading between telecom service providers (TSP) in India, pursuant to guidelines for trading of access spectrum issued by the Department of Telecommunications, Government of India, would fall within the ambit of notifiable transaction under merger control regime. The CCI took *suo moto* cognisance of three separate transactions involving acquisition of right to use of spectrum by:

- a. Reliance Jio Infocomm Limited from Reliance Communications Limited;
- b. Bharti Airtel Limited from Aircel Limited; and
- c. Bharti Airtel Limited from Videocon Telecommunications Limited.

For the three aforementioned transactions, the CCI passed three separate orders under Section 43 A of the Act and imposed penalties of INR 0.5 million (~ USD 7,000) on each of the acquiring parties. The primary issue before the CCI was to determine whether acquisition of rights to use a spectrum (the ownership of which lies with the State) would amount to acquisition of assets under the Act. Some of the key findings are as follows

- a. A determination as to whether the spectrum transaction in question amounted to "acquisition of assets" would require assessment of following two factors:
 - **The asset must have economic significance:** In the instant case, the CCI noted that spectrum is a must have for a TSP as without it the TSP cannot provide wireless telecommunication services to its subscribers. This shows that it has a significant economic and competitive significance.
 - **The asset must constitute a business or market turnover can be attributed to the asset:** The phrase 'constituting business' or 'attribution of market turnover' must be seen in the context of 'potential' of generating turnover and constituting business. Here, by acquiring the spectrum, the TSP increases its ability to cater to a broader subscriber base and generate additional turnover.
- b. Although the ownership or control of the spectrum remains with the Government of India, in competition law, 'control' represents the right to economic benefits that would flow from the resource and not the perpetual ownership of the resource.
- c. There is a fundamental distinction between acquiring spectrum from other TSPs (*inorganic*) and acquiring spectrum by participating in auctions (*organic*). The merger review process focuses on examination of inorganic growth only and consequently the acquisition of spectrum by participating in auctions would not attract scrutiny under the merger review process.
- d. The CCI did not find these instances of spectrum trading to be in the ordinary course of business or solely as an investment as:

- Capital transactions are considered to be strategic (i.e., having economic or competitive significance) and the revenue transactions are considered to be routine and usual in nature. Based on the nature of business carried out by a party, capital transaction for one entity may be revenue transaction for the other.
- Here, the CCI held that the acquisition of right to use of spectrum by the acquiring parties cannot be seen as in the 'ordinary course of business' as the acquisition of spectrum is used to render the provision of services by TSPs and is therefore a strategic capital transaction.

The Orders of the CCI can be accessed [here](#), [here](#) and [here](#).



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

CCI ORDERS PROBE INTO PRACTICES OF STAR INDIA PVT. LTD. & SONY PICTURES NETWORK PVT. LTD. & POTENTIALLY OTHER BROADCASTERS

In an information filed by Noida Software Technology Park Ltd. (**NSTPL/Informant**), the CCI *vide* order dated July 27, 2018, directed investigation into the allegations of anti-competitive agreement and abuse of dominant position by Star India Pvt. Ltd. (**Star**), Sony Pictures Network India Pvt. Ltd. (**Sony**) and Indian Broadcasting Foundation (**IBF**) (collectively referred to as **OPs**).

The allegations stem from the terms of the interconnect agreements offered by Star and Sony to the NSTPL - a distributor engaged in the business of satellite communication viz., broadcasting and data services. NSTPL alleged a violation of Section 3(3) and Section 3(4) of the Act as well as abuse of dominant position by Star and Sony. NSTPL alleged that the terms of the Reference Interconnect Agreements (**RIO**) being offered by Star and Sony were onerous and unreasonable. It was also alleged that discriminatory treatment was meted to distributors whose agreements were based on the RIO compared to the non-RIO agreements, to the extent that it amounted to a constructive refusal to deal with distributors having RIO based distribution agreements. It was alleged that this also contravened the *non-discriminatory* and *must provide* obligations imposed by Telecom Regulatory Authority of India.

While finding no evidence to support the allegations of collusion, the CCI found that the discriminatory treatment meted out by Star and Sony with distributors, virtually amounting to refusal to deal with distributors having RIO based distribution agreements, was *prima facie* in contravention of Section 3(4) of the Act.

However, while the information pertained only to Star and Sony, the CCI clarified that if the DG comes across any anti-competitive conduct of any other broadcaster, it shall be at liberty to investigate into the same.

The order of the CCI can be accessed [here](#).

CCI ORDERS INVESTIGATION INTO DISCRIMINATORY PROCUREMENT OF COUNTRY LIQUOR BY BEVERAGE COMPANIES

Based on an information filed by Starlight Bruchem Ltd. (**Informant**), CCI *vide* order dated August 09, 2018, directed the Directorate General (**DG**) to investigate the allegations of abuse of dominance for alleged discriminatory procurement of country liquor by Flora and Fauna Housing & Land Developments (**OP – 1**), Patiala Kings Liquor Pvt. Ltd (**OP – 2**) Royal Beverages Pvt. Ltd. (**OP – 3**), Kiwi Wines and Beverages Pvt. Ltd. (**OP – 4**), Chadha Holdings Pvt Ltd (**OP – 5**), Government of Uttar Pradesh (**OP – 6**) (collectively referred to as **OPs**).

The Informant alleged that OP-1 to OP-4 have been following a non-transparent policy of procurement of country liquor, based on an arrangement and/or understanding to buy from favoured manufacturers which belonged to the same group. Specifically, the Informant alleged that OP-5, which owns or controls OP-1 to OP-4, has used its dominant position in the market of wholesale of liquor, to enhance its market share for manufacturing country liquor by setting up/ acquiring

Wave Distilleries and Breweries Ltd. (**WDBL**) and Lords Distilleries Ltd. (**LDL**). It has been alleged by the Informant, that OP-1 to OP-4 buy considerable quantities of their requirements from WDBL and LDL, which is unfair and discriminatory.

The CCI observed that the OPs have not been able to give a plausible justification for the preference shown to WDBL and LDL in procuring country liquor from and for not placing indents upon the Informant, thereby denying market access to the Informant. The CCI further observed that the reasons given by the OPs were only an attempt to subvert the fact that procurement from various manufacturers was being made in an arbitrary and discriminatory manner, leading to denial of market access to the Informant. In the light of these observations, the CCI found a *prima facie* case of contravention of sections 4(2)(a)(i) and 4 (2)(c) of the Act and directed the DG to investigate into the alleged conduct of the OPs.

The order of the CCI can be accessed [here](#).



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

CCI DISMISSES INFORMATION AGAINST TIMEX

The CCI *vide* its decision dated August 14, 2018, dismissed the information filed by M/s. Counfreedise (**Counfreedise**) against Timex Group India Limited (**Timex**) alleging contravention of Section 3 and Section 4 of the Act. Counfreedise had alleged that Timex was indulging in the practice of resale price maintenance, as Timex had instructed Counfreedise to not grant significant discounts to the customers of online retail platforms. It was also alleged that Timex had not imposed similar conditions on other sellers operating on online retail platforms. Counfreedise, had further submitted that the Timex had instructed its service centres across the country against providing after-sale services to the wrist watches sold by Counfreedise and that Timex had even filed a frivolous suit against Counfreedise alleging infringement of Timex's trademark.

The CCI took note of the fact that the website of Titan, another wrist-watch manufacturing company and a direct competitor of Timex, indicated that Titan had over 60% market share in the organised watch sector. In light of this fact, the CCI held that Timex could not be held to be dominant in the market as its competitor had a considerable market share. It was noted by the CCI that Timex had suspected that Counfreedise was selling counterfeit watches under the brand name of Timex and hence a suit for infringement of the trademark was filed against Counfreedise. The CCI held that the holder of an intellectual property has the right to protect it and therefore reasonable actions or restrictions imposed by the intellectual property holder, including filling a suit for infringement of trademark, does not attract liability under competition law. The CCI further noted that unless a manufacturer holds a significant market power, even if the manufacturer controls the price of its product, no AAEC would be caused.

The CCI also noted the fact that sale by Timex to the Informant is not significant and the sale of Timex products does not constitute a significant part of the revenue of the Informant. The CCI, applying the "Rule of Reason approach", held that the refusal to deal with Counfreedise was not in contravention of provisions of Section 3(4) of the Act as such denial was based on the apprehension of dilution of Timex's brand due to sale of counterfeit products in the market. The CCI further held that the alleged conduct of not taking coercive action against the other players in the e-commerce market was not a horizontal agreement and hence was not covered under the provisions of Section 3(3) of the Act.

The order of the CCI can be accessed [here](#).

NO COMPETITION CONCERN IN THE MARKET FOR CHOCOLATES IN INDIA

The CCI had received an information alleging anti-competitive conduct by Mondelez India Foods Private Ltd. (**Mondelez**) subsequent to the acquisition of Cadbury India Ltd by Kraft Foods Inc. The Informant, Khemsons Agencies, a stockist and distributor of Cadbury chocolates had alleged that the Mondelez had violated the provisions of Section 3 and Section 4 of the Act.

While defining the relevant market, CCI observed that due to their peculiar taste and craving induced demand, chocolates are not substitutable with any other confectionary items or eatables and defined the relevant market as the *market for chocolates in India*. On the issue of dominance, CCI found that Mondelez held a dominant position in the relevant market based on its market shares. However, CCI did not find Mondelez to be indulging in any anti-competitive conduct *inter alia* based on the following business justifications provided by Mondelez in response to the Informant's allegations:

S. No.	Allegation	Response
1.	The distribution agreement entered into between the Informant and Mondelez was one-sided.	Informant had been a distributor of Mondelez till late 2017 and had signed the one-sided agreement being fully aware of its terms and conditions.
2.	Mondelez terminated the distribution agreement based on frivolous and false grounds.	Informant's termination was due to unsatisfactory performance, insufficient storage space, unhygienic conditions etc. and hence was justified.
3.	The use of Mondelez's software for sale and purchase of products by the distributors is mandatory. It does not allow sale to a new retailer until it is registered with Mondelez.	The mandatory use of the software and the condition of registration is for the purposes of inventory management.
4.	To avail incentives schemes provided by Mondelez, retailers are required to purchase 'visi-cooler' from Mondelez and to display the products of Mondelez prominently.	Visi-cooler is not tied with the sale of chocolates. It is to store Mondelez's temperature sensitive perishable goods in a cool and safe place in order to retain the requisite quality of the products.
5.	Informant was required to issue post-dated cheques (PDC) in favour of Mondelez which were used by Mondelez for product orders delivered to the Informant at its own will (sometimes without the Informant's consent).	Informant was free to use other payment instruments e.g. Demand Draft and RTGS. The PDC arrangement was simply one of the payment mechanisms between Mondelez and the distributor.

Finding no case of contravention of the Act, CCI remarked that the dispute between the Informant and Mondelez appears to be a commercial and contractual in nature. Accordingly, the CCI closed the matter.

The CCI order can be accessed [here](#).

CCI RECOGNISES PROCURER'S RIGHT TO LAY DOWN CONDITIONS IN A BID DOCUMENT

Mr. G.P. Komar (**Informant**) had filed an information against the Department of Agriculture and Farmers Welfare, Government of Haryana (**Agriculture Department**), under Section 19 (1)(a) of the Act, alleging contravention of Section 4 of the Act. It was alleged, that the OP, has abused its dominant position by including unfair and discriminatory terms and conditions in its tender (dated April 13, 2018 (**Tender**) for outsourcing of soil testing, data entry on portal and printing of cards under the Soil Health Card scheme (**SHC scheme**) of the Government of India (**Goi**). It was alleged that clubbing the soil testing job with the two jobs of data entry and printing of SHC was unfair and discriminatory, as the product market for soil testing is different from the market for data entry and printing. It was further alleged that as per the Tender the bidder could not have any legal dispute with any government department, thereby denying access to a lot of players.

The CCI holding that the procurement of soil testing services is an economic activity, noted that the Agriculture Department would not fall within the exceptions of the definition of enterprise under the Act. The CCI also defined the relevant market as *market for provision of soil testing services in the territory of India*. The CCI while assessing the dominance of the Agriculture Department, observed that in addition to the agricultural sector, soil testing services were used for other sectors such as geological surveys, oil exploration and construction and infrastructure project, and hence the sellers could switch from one procurer as they are free to offer their services to any state. The CCI concluded that the Agriculture Department was not dominant in the relevant market. However, it reiterated the position that it is the prerogative of the procurer to decide the tender conditions and/or technical specifications in the tender document as per its own requirements.

The order of the CCI can be accessed [here](#).

CCI DISMISSES INFORMATION AGAINST THREE LEADING OIL COMPANIES

XYZ (**Informant**) filed an information against three leading public sector oil marketing companies, namely Indian Oil Corporation Limited, Bharat Petroleum Corporation Limited and Hindustan Petroleum Corporation Limited (collectively referred to as **OMCs**). The Informant alleged that the notice inviting tenders (**NIT/ Impugned Tenders**) floated by the OMCs in different States of India, for the transportation of Bulk LPG by road, contained anti – competitive terms. The Informant had alleged that - a) the identical price band in the tenders under which the bidders were forced to quote, were arbitrary and had no commercial basis; b) the OMCs had shared commercially sensitive information to come to an identical price band and floor rates; c) the payment terms mandating that 40% of the income earned by the bidder would be paid into a loyalty card usable only at the petrol pump of the concerned OMC; and d) the restriction that one tank truck could only bid in one tender and the preference given to the tank trucks registered in the state, was arbitrary and irrational. The Informant had alleged that the above conduct of the OMCs was in violation of Sections 3(3), 3(4), 4(2)(a) and 4(2)(d) of the Act.

The CCI while dismissing the Information held:

- i. That the existence of a sectoral regulator like Petroleum and Natural Gas Regulatory Board (**PNGRB**) does not exclude the jurisdiction of the CCI under the Act. The CCI held that the Act itself dictates that the mandate of the CCI is to eliminate practices which have an effect on competition. The CCI held that the role played by the CCI and the sectoral regulators are complementary and supplementary to each other as they share the common objective of obtaining maximum benefit for the consumers. The CCI held that the proceedings before it, are *in rem*, whereas the decisions of the PNGRB under the Petroleum and Natural Gas Regulatory Board Act, 2006 are in *personam*, therefore the role of the Board and the CCI are different in spirit.
- ii. That collective dominance as a concept has not been recognised by the Act and as such the CCI could not look into such allegations.
- iii. That cartels usually consist of sellers who fix prices and/or output since the agreement is to raise the price above the competitive levels or bring output below competitive levels. The CCI held that it needs to be shown that the 'buyer power' through joint purchasing agreements may lead to direct benefits for consumers in the form of lower prices bargained by the buyers. The CCI held that treating a buyers' cartel

at par with seller's cartel would not be valid and that in such cases, the theories of harm need to be considered, before the determination of competitive harm.

- iv. That with respect to the allegations concerning the floating of joint NITs or prescription of price brands or fleet cards, the CCI concurred with the justifications offered by the OMCs that the prices were not fixed but just offered to the bidders within which they could compete. The CCI also agreed with the OMCs commercial justification of their fleet/loyalty card since there were benefits to both the OMCs and the tank truck owners/drivers. As far as the preference given to tank trucks of a particular state, the conditions did not seem arbitrary as long as the registration in one state does not restrict from participation in the tender process in other states.

Thus, the CCI found no contravention of Section 3 or Section 4 of the Act and dismissed the allegations against the OMCs.

The order of the CCI can be accessed [here](#).



CASES CLOSED BY THE CCI UNDER SECTION 26(6) OF THE ACT

CCI AGREES WITH DG'S REPORT AND CLOSES CASE AGAINST HARYANA STATE PUBLIC WORKS UNIT

In its order dated July 09, 2018, the CCI agreed with the DG and closed an investigation against Haryana's Public Works Department (**HPWD**), holding that HPWD was not dominant in the market of procurement of construction services for construction/repair/maintenance of roads and bridges.

To determine whether the allegation that certain clauses within the bid document issued by HPDW for construction of railway crossing had merit, the DG delineated the relevant market by applying the concept of demand side substitutability inversely. Here, HPWD was a procurer of construction services and the Informant was a supplier of such services. To determine the relevant product, the DG eliminated the aspects of the market which were not relevant for the scope of investigation and therefore products like buildings, railway bridges etc., were not considered. The DG held that the fact that HPWD issues tenders both for construction and for maintenance/ repair of roads and bridges and as parties like the Informant participate in both such tenders, both types of work must be considered together for the relevant market. In terms of the geographic extent, the DG noted that as the suppliers of such service can supply their services in other parts of the country as well, the geographical market for assessment must be suitably expanded.

The DG assessed the dominant position of HPWD on factors provided in Section 19(4) of the Act and found HPWD not to be dominant in the relevant market as inter alia:

- a. there were no entry barriers as the informant participated in various tenders across various states; and
- b. suppliers like the informant were not dependent on only HPWD to provide their services to the market.

The CCI agreed with the DG's delineation of relevant market and held that as HPWD was not dominant in the relevant market, there can be no case of abuse of dominance under the Act.

The CCI's order can be accessed [here](#).

DLF IS DOMINANT NO MORE: DYNAMIC MARKET CALLS FOR ASSESSING RELEVANT TIME PERIOD FOR DOMINANCE

In 2014, an information was filed by one Shri Vijay Kapoor (**Informant**) against DLF Limited, DLF New Gurgaon Home Developers Ltd (collectively referred to as **DLF Group**) alleging violation of Section 4 of the Act by the DLF Group. According to the Informant, the cost of the allotment apartment of the residential project scheme launched by the DLF Group, and the conditions in the non - negotiable apartment buyers' agreement between the DLF Group and the Informant (**Agreement**) were unfair, one sided and discriminatory, which was in violation of Section 4(2)(a)(i) of the Act.

After considering the facts, the CCI had in 2014 found DLF to be dominant in the relevant market of provision of services for development and sale of residential units in Gurgaon and observed that *prima facie* the conduct of DLF was in

contravention of Section 4 of the Act, and thus directed the DG to investigate into the matter. The CCI, while considering the investigation reports of the DG, had found that the main issue of determination was whether the DLF Group was in contravention of Section 4 of the Act. The CCI concurred with the findings of the DG that the relevant market stands to be the *market of provision of services for development and sale of apartment/flats in Gurgaon*.

In assessing DLF's dominance for the period 2012-14, the CCI moving away from its previous decisions against DLF, observed that from the data collected by the DG, it can be inferred that several other developers had launched their projects when the Informant had bought the flat from the DLF Group and thus DLF Group did not hold a dominant position in Gurgaon anymore. Reflecting on the changed position in 2018, the CCI noted a fragmented nature of the market in Gurgaon, where 90% of the schemes were launched by other developers. The CCI concluded that DLF Group did not, any longer, have the ability to operate independently or influence the market. The CCI also noted that consumers were not dependent on DLF anymore.

The CCI reflected on its previous decision in *Belair Owners Association vs. M/s DLF* where a penalty of INR 6.3 billion (~ USD 87.6 million) had been imposed on DLF for abuse of dominant position and stated that given the dynamic nature of markets, it is necessary to consider the relevant time period while assessing dominance. In the instant case, the CCI noted that in a changed market scenario during the relevant period, no player inclusive of the DLF Group could influence the market. Thus, the CCI dismissed the case under Section 26(6).

The order of the CCI can be accessed [here](#).



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

CCI GRANTS 100% LENIENCY TO FIRST AND 30% TO SECOND LENIENCY APPLICANT

The CCI *vide* its decision dated August 11, 2018, in two of the initial applications under Section 46 of the Act read with provisions of the Lesser Penalty Regulations (collectively **Leniency Provisions**) filed with the CCI, awarded a reduction of penalty of 100% and 30% to the first and second leniency applicant, respectively. The CCI, had found actions of Globecast India Pvt. Ltd, Globecast Asia Pvt. Ltd. (collectively **Globecast**) and Essel Shyam Communications Limited (**Essel**), in contravention of Section 3(3)(d) read with Section 3(1) of the Act. It imposed a penalty of 1.5 times of the profits made during the years 2011-12 to 2012-13, on Globecast and Essel for the said period of contravention. The CCI had further imposed a penalty of 10% of average income of three years on certain employees of Globecast and Essel under Section 48 of the Act i.e., under the provisions relating to individual liability of persons in-charge. These penalties were proportionately reduced by 30% for Essel's employees and by 100% for employees of Globecast under the Leniency Provisions.

It was submitted by Globecast in their application under Leniency Provisions that two of its employees, under a tacit understanding with Essel, had exchanged commercially sensitive information relating to bidding for 12 sporting events, in contravention of the provisions of the Act. Globecast had accepted its vicarious liability for actions of its employee, and the fact that for one event Globecast had in fact colluded with Essel for bidding. The CCI held that, a violation of the contract by an employee, would not take away the fact that the employee at the relevant time was permitted to place bids on behalf of the company. The CCI further held that even a single instance of contravention of the provisions of the Act attracts penalty under the provisions of the Act and therefore Globecast is liable to be penalised for contravention of Section 3 of the Act. In respect of the penalty under Section 48 of the Act against the management of Globecast, the CCI also held that identification of person responsible under the provisions of Section 48 of the Act is incumbent upon the DG and does not require an express direction from the CCI.

It was argued by Essel that it had set up a compliance program and the same should be considered as a mitigating factor while determining the penalty under the Act. The CCI held that initiation of the compliance programme was subsequent in time to the acts of contravention and hence could not be considered as mitigating factors. The CCI, in response to submissions regarding consideration of the profits earned from the bids for imposition of penalty, held that relevant turnover does not mean restricted turnover, i.e., restricted only to the bids in question.

The order of the CCI can be accessed [here](#).

ONE STRAY INSTANCE OF VIOLATION, CCI GRANTS REMISSION OF PENALTY BY 40%

In its order dated July 12, 2018, the CCI penalised the Federation of Gujarat State Chemists and Druggists Association, its district associations and three pharmaceutical companies along with their office bearers under Section 27 of the Act

for indulging in the practice of requiring a no-objection certificate (**NOC**) for appointment of stockists in contravention of the provisions of Section 3 of the Act. Glenmark Pharmaceutical Limited was fined with the maximum penalty of INR 450 million (~ USD 6.26 million). While the associations were held liable for violating Section 3(3)(b) read with Section 3(1) of the Act by mandating NOC prior to appointment of stockists, resulting in limiting and controlling the supply of drugs in the market, certain pharmaceutical companies were held liable for violating Section 3(1) of the Act by entering into anti-competitive agreements/understanding/coordination with the associations.

- a. **Res judicata not applicable in the instant case** – The CCI noted that the doctrine of *res judicata* was not applicable in the instant case as the period of investigation in the previous case was different and the instant matter comprised of different transactions involving multiple associations, as well as pharmaceutical companies leading to different causes of actions.
- b. **Bona fide/ locus of informant is subservient to the Act's objective** – While the CCI noted that it does not encourage filing of multiple information, it emphasised that a person is not barred from approaching the CCI if the conduct which has been found to be in contravention previously, continues to exist despite the CCI's directions in earlier cases.
- c. **Prima facie finding against each party not needed for ordering investigation** – The CCI noted that proceedings before the CCI are inquisitorial and the scope of inquiry need not be confined to the facts stated in the information, as limiting the inquiry to facts stated in the information would render the inquiry incomplete.
- d. **Remission in penalty** – One of the pharmaceutical companies, Hetero Healthcare Limited (**Hetero**) admitted that the request for NOC by its official was a stray incident and assured the CCI that it would implement procedures to prevent the occurrence of such incident in the future. Hetero's admission was appreciated by the CCI and was considered to be a mitigating factor leading to remission of 40% on the total penalty attributed to Hetero. This is a rare instance of remission in penalty by the CCI.

In his investigation report, the DG had not returned any findings against certain pharmaceutical companies and even the informant could not establish any contravention against these companies during the course of the proceedings. Accordingly, on August 30, 2018, the CCI disposed of applications filed by such companies seeking deletion of their name and observed that these pharma companies will not be proceeded against any further, in relation to the instant case.

The penalty order of the CCI has been appealed by the associations and is currently being adjudicated at the NCLAT.

The Orders of the CCI can be accessed [here](#) and [here](#).

PANASONIC GETS 100% REDUCTION IN PENALTY FOR ANCILLIARY CARTEL

The CCI *vide* its order dated August 30, 2018, awarded a 100% reduction in the penalty to Panasonic Energy India Co. Ltd. (**Panasonic India**) and its employees, under the leniency provisions. The CCI had imposed a penalty of 1.5 times of profits for the period from October 2010 to April 2016 on Panasonic India and of 10% of the average income of the preceding three financial on two employees of Panasonic, for violation of Section 3(3) and Section 3(1) of the Act. The CCI on the other hand imposed a penalty of 4% of the total turnover of each year of continuance of the cartel on Geep Industries (India) Pvt. Ltd. (**Geep**) and of 10% of the average income of the preceding three financial years on three employees of Geep, for violation of Section 3(3) read with Section 3(1) of the Act and under Section 48 of the Act, respectively.

Panasonic Corporation, Japan, had filed an application under the Leniency Provisions on its own behalf and on behalf of Panasonic India, providing full disclosure of the bilateral anti-competitive practices indulged into by Panasonic India and Geep. The application had disclosed the fact that there existed a bilateral ancillary cartel between Panasonic India and Geep in the institutional sale of dry cell batteries. It was disclosed that Panasonic India had formed a cartel with Eveready Industries India Ltd. and Indo National Ltd., and the decision taken by these cartel participants used to influence the prices determined amongst Panasonic India and Geep. The application also disclosed that a Product Supply Agreement was entered into between Panasonic India and Geep, in which a clause clearly provided that the prices “*shall be reviewed and maintained at agreed levels from time to time*”. The CCI taking note of these vital disclosures, granted a 100% reduction in penalty imposed to Panasonic India, under the Leniency Provisions. Panasonic under a previous application under leniency provisions, was also granted a 100% reduction in penalty for complete disclosure of anti-competitive conduct entered into with Eveready Industries India Ltd. and Indo National Limited.

The CCI, while considering the fact that Geep was only receiving information as a part of a smaller cartel amongst a larger scheme, held that not only had Geep entered into the Product Supply Agreement with the abovesaid clause, Geep was also actively agreeing to set the prices in collusion with Panasonic India and hence could not escape the liability under the provisions of the Act.

The Order of the CCI can be accessed [here](#).

SUGAR MANUFACTURERS PENALISED FOR BID-RIGGING IN TENDERS FOR ETHANOL

The CCI *vide* its order dated September 18, 2018, imposed a penalty of 7% of the sugar manufacturers’ average turnover from the sale of Ethanol for financial years 2011-2014, on 18 of the sugar manufacturing companies who had participated in the bidding process for supplying Ethanol in the joint tender dated January 02, 2013 issued by Bharat Petroleum Corporation Ltd., Indian Oil Corporation Ltd. and Hindustan Petroleum Corporation Ltd. (**OMCs**). The tender was issued pursuant to the Government of India notification mandating 5% blending of Ethanol with petrol by the OMCs. It was alleged by India Glycols Limited (**India Glycols**) and Ester India Chemicals India (**Ester India**), that the OMCs had, in violation of provisions of Section 3 of the Act, issued joint tenders for procurement of Ethanol, for blending with petrol as mandated by the Government of India. It was also alleged by Ester India that the bidding sugar manufacturing companies had colluded through Indian Sugar Mills Association (**ISMA**), Ethanol Manufacturers Association of India (**EMAI**) and National Federation of Cooperative Sugar Factories Limited (**NFCF**) to indulge in bid-rigging for the joint tender dated January 02, 2013.

The CCI held that the joint tendering by the OMCs was caused in the interest of the public to reduce the cost on the Public Exchequer for issuing separate tenders for procurement of Ethanol for the OMCs. The CCI further held that the agreement between the OMCs was aimed at increasing efficiency and therefore was covered by the proviso to Section 3(3) of the Act. The CCI also did not find any evidence of anti-competitive practices against NFCF.

The CCI held that the 18 sugar manufacturing companies who participated in the tender, had colluded to determine the prices to be quoted, the quantities to be offered and the allocation of the depots for bidding. The CCI held that the 18 sugar manufacturing companies, were unable to justify the reason for the apparent similarity in the bidding pattern and

the prices quoted by them. It was observed by the CCI that the basic price of ethanol quoted by the bidders fell within a narrow range of Re. 1 per litre. The CCI further held that the executives of ISMA and the employees of the participating sugar companies were unable to justify their role and presence in certain meetings that were held and telephone calls that took amongst themselves close to the date of submission of the tender document. The CCI held that the standard of proof required to prove an understanding, or an agreement is one of 'preponderance of probabilities' and not of 'beyond reasonable doubt'. The CCI concluded that the 18 bidding companies had indulged in the practice of bid-rigging and hence had violated provisions of Section 3(3)(d) read with Section 3(1) of the Act. The CCI also found the conduct of EMAI and ISMA in violation of Section 3(3) read with Section 3(1) of the Act and imposed a penalty of 10% of the average receipts for the financial year 2011-2014.

The Order of the CCI can be accessed [here](#).

CONDUCT OF ALL INDIA CHESS FEDERATION VIOLATES SECTIONS 3 & 4

The CCI *vide* its order dated July 12, 2018, imposed a penalty of 2% of the average income from 'Tournament and Fees Receipts' for the preceding three financial years on All India Chess Federation (**AICF**) for violation of provisions of Section 3 and Section 4 of the Act. The information was filed by Mr. Hemant Sharma (**Mr. Sharma**) and others, pursuant to the directions passed by the Delhi High Court in Writ Petition No. 5770 of 2011. It was submitted by Mr. Sharma that AICF, being the National Sports Federation for the sport of chess, was indulging in practices which resulted in denial of opportunities for the players registered with AICF. Mr. Sharma submitted that the registration form, required to be filled by the player for membership of AICF, consisted of a clause restricting the player from participation in any tournament or championship which was not recognised by AICF. It was further submitted that if a player registered with the AICF attempted to participate in any tournament or championship not recognised by the AICF, such player would be banned from participation in the National Chess Championship and other events. It was also submitted that in addition to the ban, the player would be required to surrender 50% of the prize money received from such unauthorised event along with an unconditional apology. It was also alleged that the AICF could also remove the ELO rating points, given by Federation Internationale des Echecs (**ELO ratings**) of such player. It had been submitted by Mr. Sharma that the ELO ratings, which determine the playing strength of the individual player, are essential for the career of any professional chess player and the removal of such ratings by the AICF causes immense loss to the career of the player.

The CCI defined two relevant markets in the present case as the '*market for organisation of chess tournaments/events in India*' and '*the market for services of chess players in India*'. The CCI while determining the violations of the provisions of the Act, reiterated that a sports federation like AICF would be covered under the definition of enterprise as they engage in 'organising events/tournaments as well as in other revenue generating activities'. The CCI, while finding AICF to be dominant in both relevant markets as determined due to the regulatory power it enjoyed as a National Federation, held that the AICF had used its power to deny other organisers from accessing the relevant markets of organising tournaments and/or events. The CCI also noted that AICF exercised its power, obtained from clauses of the agreement entered into with the players, to restrict the players from participating in the events not recognised by it, by imposing sanctions and/or disciplinary actions. The CCI found the above conduct of AICF in violation of Sections 3(4)(c) and 3(4)(d) read with Section 3(1) of the Act and Sections 4(2)(b)(i) and 4(2)(c) of the Act. In addition to the penalty, the CCI also directed AICF to cease and desist from indulging in practices in contravention Section 4 of the Act and to lay down the

process and parameters for sanctioning of tournaments. The CCI further directed that while initiating disciplinary action against a chess player, the action taken by the AICF should be proportional, fair and transparent.

The Order of the CCI can be accessed [here](#).

DEFINITION OF RELEVANT MARKET WOULD NOT CHANGE THE COMPETITION ASSESSMENT WHERE THERE IS ONLY ONE PLAYER IN THE MARKET

In its recent order the CCI imposed a penalty of 10% (of the average annual turnover of the last three financial years) amounting to almost INR 200 million (~ USD 2.78 million) on South Asia LPG Company Pvt. Ltd. (**SALPG**). Based on information received from East India Petroleum Pvt. Ltd. (**EIPL**), the CCI found SALPG to be abusing its dominant position in contravention of Section 4 of the Act. EIPL is engaged in the business of providing terminalling services to oil marketing companies for import and export of fuels at the Vishakhapatnam port.

The CCI noted that access to infrastructure operated by SALPG is indispensable to offer terminalling services at the Vishakhapatnam port and therefore the relevant market was defined as the market for upstream terminalling services at Vishakhapatnam port where SALPG was the only operating entity. Pertinently the CCI noted that since SALPG is the only player in the market, competition assessment would not change by adopting any of the plausible market definitions. EIPL had alleged that SALPG was denying market access to EIPL by restricting access to SALPG's terminalling infrastructure at Vishakhapatnam port without any justification. The CCI held that the efficiency justifications advanced by SALPG ignore the inefficiencies and losses resulting from restriction on competition and market foreclosure. The CCI noted that protection of commercial interest by a dominant enterprise, at the cost of competition, is contrary to its responsibility cast under the Act. The CCI observed that effective competition does not necessarily mean prevalence of the most efficient to the exclusion of relatively less efficient choices to consumers.

The prolonged period of SALPG's conduct was considered to be an aggravating factor by the CCI. The CCI prescribed remedies by directing SALPG to provide potential and existing terminalling service providers meaningful and effective access to the terminalling infrastructure at the Vishakhapatnam port. CCI directed SALPG to:

- (a) immediately allow use of cavern on an optional basis and to allow bypassing of cavern for both pre-mixed and blended LPG without any restrictions;
- (b) extend full cooperation for the study or audit undertaken by Visakhapatnam Port Trust in relation to these remedies.

Granting of access to competitors was made conditional upon the competitor bearing additional cost towards necessary changes being made to the existing terminalling infrastructure and compliance with all safety, integrity and other legal requirements.

The Order of the CCI can be accessed [here](#).

KFCC & OTHERS PENALISED FOR ANTI-COMPETITIVE CONDUCT

Once again, the CCI found the Karnataka Film Chamber of Commerce (**KFCC**) to be indulging in anti-competitive conduct by acting in concert to impede entry and screening of dubbed movies and in particular, the film – “Sathyadev IPS” in Karnataka.

The CCI noted the evidence of a press meet indicating coordination amongst the Opposite Parties (**OPs**) which comprised of KFCC, its President, Mr. Sa. Ra. Govindu, Kannada Okkuta (an organization formed for the protection of Kannada language and culture), its President, Mr. Vatal Nagraj and Mr. Jaggesh, an influential actor/producer/politician in Karnataka. The CCI took note of the YouTube videos of the press meet placed on record showing the unity of cause amongst the OPs as could be observed in the backdrop of discussions taking place during the press meet. Based on these facts, CCI found that there was meeting of minds and the alleged acts were done in concert, in a well-planned manner to ensure that harm is caused to dubbed movies. Moreover, with respect to the individuals, the CCI noted that since it is an admitted position that the press meet was to oppose dubbed cinema at a grand scale, liability under Section 48 of the Act arose by virtue of mere participation in the press meet.

On the issue of recidivism, CCI found KFCC guilty of continuing anti-competitive conduct despite its strict, unambiguous order to cease and desist, thereby making KFCC liable for action under Section 42 of the Act. In view of this, CCI while imposing a 10% penalty, directed KFCC to put in place a Competition Compliance Manual and to file a compliance report with CCI within 90 days of the receipt of its order.

The Order of the CCI can be accessed [here](#).



OTHER ORDERS

SUPER SPECIALITY HOSPITALS IN DELHI UNDER INVESTIGATION FOR CHARGING EXPLOITATIVE PRICES FOR CONSUMABLES FROM IN-PATIENTS

In what is reminiscent of the sector-wise inquiry that the CCI undertook in the automobile sector, an inquiry has been initiated into the exploitative prices charged for provision of pharmaceutical products and other consumables by super speciality hospitals in Delhi to their in-patients.

The CCI *vide* its decision dated August 31, 2018, directed the DG to re-investigate the information filed against Max Super Speciality Hospital (**Max**). The CCI was of the view that while the DG made a reference to the alleged conduct as being akin to ‘aftermarket abuse’; however, he failed to investigate or analyse the same in greater detail. The DG has now been directed to investigate the issue of “aftermarket abuse”, where the patients are “locked in.”

Further, while the information was limited to the high prices being charged by Max for syringes sold to the in-house patients, the CCI considering “common knowledge” expanded the scope of the investigation to include:

- a. all super speciality hospitals in Delhi; and
- b. all pharmaceuticals and other consumables sold to the in-patients by the hospitals.

The Order of the CCI can be accessed [here](#).

PROOF OF NON-IMPLEMENTATION OF ABUSIVE DECISION SAVES THE ATHLETICS FEDERATION OF INDIA

The Department of Sports under the Government of India approached the CCI with information against Athletics Federation of India (**AFI**) aggrieved by AFI’s decision to take action against state units/officials/athletes which encouraged and participated in marathons not authorized by AFI, without AFI’s permission. In an interesting assessment of the relevant market in this case, the CCI considered two possible markets i.e., (i) the market for provision of services relating to organisation of athletics and athletic activities in India; and (ii) the market for services of athletes in India. The CCI defined both possible markets around athletics as it was observed that athletics is not substitutable with any other sport and the services of AFI were also not substitutable with that of any other sports governing body. However, CCI decided to not inquire into the market for services of athletes in India since there was no instance of coercive action taken by AFI against any athlete.

CCI found AFI to be dominant in the relevant market by virtue of being the apex body in the organization and administration of athletics and related activities in India. However, CCI held that AFI’s conduct is not abusive in terms of Section 4 of the Act for the following reasons:

- (i) The minutes of the meeting where AFI took the impugned decision making it mandatory for organisers to seek AFI’s permission before organising any marathon/road race at national and international level were draft minutes which were subsequently modified. The modified minutes were in the nature of an advisory issued by AFI to ensure the well-being of athletes.

- (ii) AFI did not disallow any organizer of a marathon or road race in furtherance of the impugned decision.
- (iii) There is no compulsion on any organizer of marathon/road race to take permission from AFI. Organizers are only required to pay a fee in lieu of services rendered by AFI.

The CCI observed that while AFI took the impugned decision, the same was neither adopted nor implemented. In fact, the minutes were significantly modified in a subsequent AGM. Therefore, there was no denial of market access to the organizers of athletic events or athletes in contravention of Section 4 of the Act.

The Order of the CCI can be accessed [here](#).

NO CASE OF CONTRAVENTION BY GOOGLE IN THE REMOTE TECHNOLOGY SUPPORT SERVICES SECTOR

In a case challenging the mechanism applied by Google on its online advertising platform called AdWords, the CCI was approached by remote technology support (RTS) service providers (**Informants**) whose AdWords accounts were terminated by Google owing to violations of its User Safety Policy. The CCI, in its majority decision, noted that Google's policies clearly defined minimum standards applicable to AdWords which cannot be left without a regulatory mechanism. The CCI held that a platform is within its rights to ensure that advertisements on it conform with its quality and safety standards. Therefore, termination of relationship between the platform and the user is a commonly used mechanism to legitimately enforce such standards.

The Informants *inter alia* had alleged that Google terminated the AdWords accounts of RTS service providers as RTS service was substitutable with the services being provided by Google on its own product viz., Google HelpOuts. The CCI, however noted that HelpOuts which was a platform to enable service providers and their potential customers to interact was not 'substitutable' with RTS sector.

With respect to the suspension and termination clauses in Google's Advertising Program Terms, the CCI observed that without having the ability to suspend or terminate dangerous advertisers, the platform owner would not be able to take immediate action to protect consumers and its platform. In view of this, the CCI found Google's conduct to be justified and accordingly closed the case.

The (then) Chairperson, CCI dissented from the majority's decision stating that the CCI should have sent the matter back to the DG for further investigation on the issue of substitutability between RTS and HelpOuts and the widescale termination of RTS accounts.

The Order of the CCI can be accessed [here](#).

INTERVENTIONS BY THE NCLAT

INTEREST CAN BE CHARGED FOR PENALTY NOT DEPOSITED DUE TO STAY ORDER

The NCLAT *vide* its order dated August 08, 2018, dismissed an interlocutory application for rectification and/or modification of interest payable by SCM Soilfert Ltd. (**SCM**) on the penalty imposed on it by the CCI under Section 43A.

The CCI had imposed a penalty of INR 20 million (~ USD 278 million) on SCM under Section 43A of the Act, for failing to notify a combination to the CCI. While CCI issued a demand notice for payment of penalty, SCM approached the COMPAT which granted an interim stay on payment of penalty subject to depositing 10% penalty.

After SCM's appeal at the COMPAT was dismissed, another demand notice was issued by the CCI for payment of penalty this time along with an interest of 1.5% every month. SCM however approached the Supreme Court, where the demand notice was stayed subject to payment of entire penalty with the Supreme Court Registry. After SCM's appeal at the Supreme Court was also dismissed, the CCI re-agitated its 2nd demand notice. While SCM deposited the entire amount of INR 20 million (~ USD 0.27 million), it refused to pay interest @ 1.5% per month, contending that since it made the payment within the period specified in the demand notice, in view of the conditional stay granted by first, the COMPAT and subsequently by the Supreme Court, the demand for payment of interest was illegal.

The NCLAT in a very brief order, dismissed the application by SCM, relying on the decision of the Supreme Court in *State of Rajasthan and Anr. vs. J.K. Synthetics Limited* which held that upon dismissal of the matter or vacation of stay, in the absence of any specific direction from the court, the party enjoying the benefit of the stay is liable to pay interest on the penalty, even for the period of continuance of the stay granted by a Court.

The Order of the NCLAT can be accessed [here](#).

NCLAT UPHOLDS CCI'S ORDER IMPOSING PENALTIES ON CEMENT COMPANIES AND TRADE ASSOCIATIONS FOR CARTELIZATION

The NCLAT *vide* its decision dated July 25, 2018, upheld the order of the CCI imposing penalties on 11 cement companies and their trade associations i.e., Cement Manufacturers Association (**CMA**) for violation of provisions of Section 3 of the Act.

After a chequered history of being remanded back by the COMPAT on the ground of violation of principles of natural justice, the 11 cement companies and CMA, found a significant penalty being re-imposed on them by the CCI *vide* an order dated August 31, 2016. In an appeal against the said order, the NCLAT, agreed with the CCI and found the cement companies and the CMA to be in contravention of the provisions of Section 3(3) of the Act, which *inter alia* prohibits cartels. The NCLAT held that the evident parallelism in pricing and supply decisions was captured under Section 3(3) of the Act. The NCLAT held that the cement companies had used the platform provided by CMA and shared details relating to prices, capacity utilisation, production and dispatch, thereby restricting production and supply of cement in the market in contravention of Section 3(3)(a) and Section 3(3)(b) of the Act. The NCLAT noted that information exchange can constitute a concerted practice if it reduces strategic uncertainty in the market thereby facilitating collusion. The

NCLAT decided to not interfere with the “*mere minimum*” quantum of penalty imposed by the CCI on the 11 cement manufacturers and the CMA.

The Order of the NCLAT can be accessed [here](#).

NCLAT SETS ASIDE PENALTY IMPOSED ON HYUNDAI FOR CCI’S FAILURE TO APPLY ITS MIND

In a significant ruling, the NCLAT *vide* a decision dated September 20, 2018, set aside the order passed the CCI imposing a penalty of INR 870 million (~ USD 12 million) on Hyundai Motor India Limited (**Hyundai**). The NCLAT noted that the CCI had failed to appreciate the evidence and had passed the order merely on the basis of the opinion set out by the DG in the investigation report.

The ruling of the CCI in the HMIL was significant as it was one of the first cases to have dealt with vertical restraints. The CCI in its order found HMIL to have contravened Section 3(4) of the Act by - (i) indulging in resale price maintenance - a practice of ensuring that the passenger cars are not sold below a minimum prescribed price, which HMIL implemented through a discount control mechanism; and (ii) by mandating its dealers to use recommended lubricants/ oils and penalising them for use of non-recommended lubricants and oils. The CCI’s order also dealt with exclusivity provisions in such contracts which prohibited acquiring dealerships of competing brands. However, based on available facts, HMIL was not found to have contravened the Act on the second issue.

Interestingly, the NCLAT found that the CCI “*of its own*” has not discussed any evidence but merely relied on the report of the DG, which is only an opinion to assist the CCI. Clarifying the responsibilities of the CCI, the NCLAT held that the CCI “*is expected to analyse the evidence and the report and required to read it in conjunction with the other evidence on record and then to form its final opinion on whether such report is worthy of reliance or not.*” The NCLAT also clarified that the CCI is required to inquire into the AAEC caused based on factors laid down in Section 19(3) of the Act. Further, the NCLAT held that the relevant geographic and relevant product market must be delineated based on the factors listed in Sections 19(6) and 19(7) of the Act, respectively.

In a significant departure from the approach that was followed by the erstwhile COMPAT, the NCLAT declined to go into the question of violation of principles of natural justice i.e., on the question of whether the CCI was required to give notice to HMIL while differing with the findings of the DG.

The Order of the NCLAT can be accessed [here](#).



INTERVENTIONS BY THE HIGH COURTS

CONTRADICTORY DECISIONS BY THE MADRAS AND DELHI HIGH COURT, COMMON RESULT – CCI CANNOT BE CRIPPLED ON TECHNICAL GROUNDS

In two recent and contradictory decisions, the Division Bench of the Madras High Court and the Delhi High Court have conferred wider powers on the CCI and the DG, respectively in conducting investigations.

In an appeal preferred by Hyundai Motors India Limited (**Hyundai**), challenging CCI's decision to expand the scope of investigation in its inquiry into the practices adopted by car manufacturers in the aftermarket of repair services, Hyundai had approached the Madras High Court in 2012. Hyundai contended that the information before the CCI was only limited to three car manufacturers and the CCI's decision to expand the scope pursuant to a request by the DG was legally untenable.

The Division Bench of the Madras High Court has now clarified that the DG was covered under the definition of 'person' under Section 2 of the Act and hence could have informed the CCI of conduct of parties, other than those mentioned in the information. The Court further held that the CCI was empowered under the proviso to Section 26. to combine the substantially similar information received from the informant and thereafter, the DG. The Court also noted that the CCI was not required to once again record a subjective satisfaction over an existing material while clubbing information. *Notably, the decision does state that the DG cannot suo moto expand the scope of the investigation.*

The Division Bench of the Delhi High Court, in an appeal preferred by Cadila Healthcare Limited (**Cadila**), went a step further in expanding the scope of inquiry by the CCI and the DG. The Division Bench of the Delhi High Court held that, the investigation conducted by DG is not restricted to the information received by the CCI or to the order of investigation issued by the CCI. The Division Bench of the Delhi High Court, considering the decision of the Supreme Court in *Excel Crop Care vs. Competition Commission of India*, further held that *no specific order would be required for the DG to expand the scope of the investigation*, even to the extent of adding parties not named in the information or the order directing investigation.

While there is uncertainty on the limited procedural point of whether the DG is required to take permission from the CCI to expand the scope of the investigation, both the High Courts have recognised that the CCI has wide powers while conducting investigations and mere technical errors would not vitiate an investigation.

The Decision of the Madras High Court can be accessed [here](#). The Decision of the Delhi High Court can be accessed [here](#).



INTERVENTIONS BY THE SUPREME COURT

SUPREME COURT ISSUES CLARIFICATIONS ON DETERMINATION OF RELEVANT MARKET FOR ANTI-COMPETITIVE AGREEMENTS

In March 2017 the Supreme Court, while assessing the anti-competitive activities of the members of a committee of film and TV artists and technicians, observed that the for assessing any probable anti-competitive agreement under Section 3 of the Act, including cartels, it is imperative that a relevant market be defined to assess the effect on competition.

However recently, on an application filed by CCI, the Supreme Court has clarified that determination of a relevant market is not a mandatory requirement for all cases being assessed under Section 3 of the Act, especially for certain coordinated activities which are *pre se* treated as having an appreciable adverse effect on competition. The Supreme Court further clarified that where the party rebuts the presumption of AAEC, a relevant market may have to be delineated.

The main of the Supreme Court can be accessed [here](#) and the clarificatory order can be accessed [here](#).





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