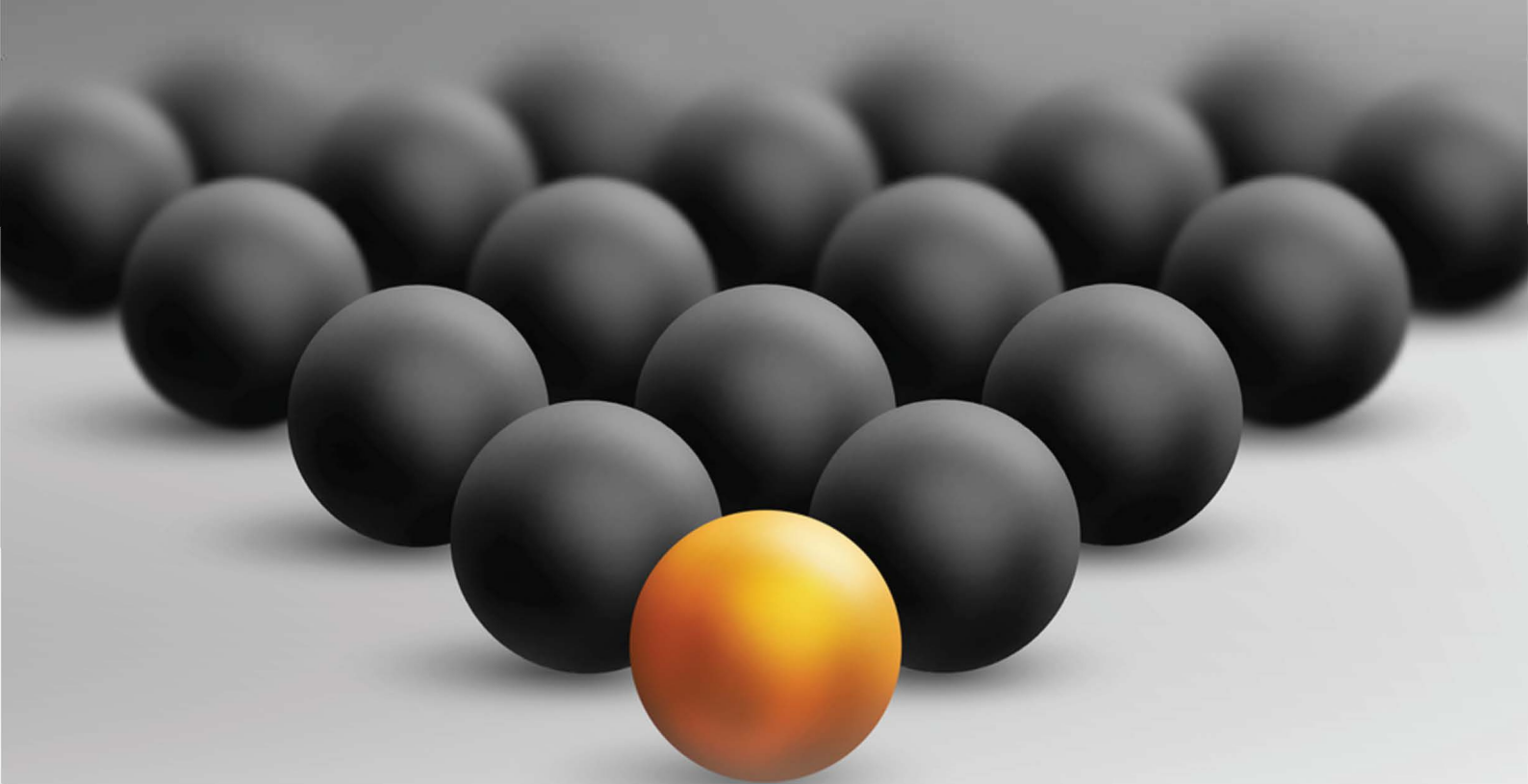




ECONOMIC
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COMPETITION LAW & POLICY UPDATE

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SNAPSHOT

NCLAT and CCI increase the burden on informants

In two recent orders, the CCI and the NCLAT have held that informant has no vested right to seek investigation

02

Evidence should be provided to support allegations of RPM

The CCI reiterates the necessity to prove RPM based on facts and the requirement to establish effects

04

CCI approves Jio's acquisition of Den and Hathway

A deal expected to change the landscape of broadcasting industry was approved by CCI

06

CCI to conduct a study on big data and AI

In a welcome move the CCI has stated that it will study big data to see how it will impact competition

07

Supreme Court cautions against staying DG investigation

A word of caution to the High Courts on granting a blanket stay on investigation

07

The scope of DG's powers: A tale of two cities

ELP Insights explores the contradictory judicial decisions on the scope of DG's powers during an investigation

08

SECTORS COVERED IN THIS ISSUE



Broadcasting



Media and Technology



Automotive



Consumer Goods

Cartels and horizontal agreements

No vested right to seek investigation into allegations, says NCLAT

On February 26, 2019, the NCLAT upheld the order of the CCI refusing to initiate an investigation into allegations of collusive bidding against Hitachi Systems Micro Clinic Private Limited (**Hitachi**) and IL&FS Technologies Ltd. (**IL&FS**), in a tender floated by Bharat Heavy Electricals Limited (**BHEL**) in 2017 for supply, installation and maintenance of PCs and other computer peripherals.

Dismissing the appeal filed by the informant viz., Reprographic Limited, the NCLAT held that an informant does not have a “vested right to seek investigation.” Laying down the obligation of an informant, the NCLAT held that an informant has “to make out a *prima facie* case warranting investigation by DG (sic)” and “has to demonstrate that there is substance in the allegations levelled in the information and that he will fairly succeed in establishing that the Respondents are engaged in anticompetitive agreements.”

While agreeing with the CCI on the plus factors, that need to be taken into consideration, the NCLAT also held that business linkages between bidders, cannot by itself be seen as an indication of collusion. Similarly, only because certain employees of one organization have worked with the other in the past, that cannot, by itself, lead to a finding of collusion.

The NCLAT’s order acquires significance as it lays out the burden, which an informant needs to discharge in order to make a *prima facie* case before the CCI for initiating an investigation under Section 26(1) of the Act.

The NCLAT’s order can be accessed on the link:

<https://nclat.nic.in/Useradmin/upload/19669390495c7518dea2c8a.pdf>

Presumptive inferences will not be sufficient to initiate investigation

On March 22, 2019, the CCI dismissed allegations of cartelisation levelled against the All India Sugar Traders Association (**Association**) comprising of sugar traders, couple of millers, refiners and bulk consumers. The Informant alleged that the Chairperson of the Association, who was also arraigned as an opposite party, had formed a WhatsApp group which was used to circulate price sensitive information like the lowest price

of sugar, on a daily basis. It was alleged that the information shared on this WhatsApp group was used to quote lower prices in the tenders floated by the sugar millers for sale of sugar, in the state of Maharashtra.

Dismissing the allegations, the CCI found that the Informant had not been able to show how the information shared was “price sensitive” and how, the sharing of such information had an effect on prices of sugar. Reiterating a view taken earlier by the CCI, the order states that, a mere allegation that exchange of information “affected the market price, in the absence of any evidence is without merit and does not warrant any investigation.”

Laying down the standards for initiating an investigation, the CCI noted that “presumptive inference and analysis provided by the Informant cannot be the basis for forming a *prima facie* opinion as to order investigation.” The CCI clarified that in cases of collusion, an Informant would have to provide some evidence to prove collusion and meeting of minds. The order of the CCI echoes the judgement of the NCLAT in the Reprographics case (above) and expressly casts an obligation on an informant to provide some evidence in support of its allegations.

The order can be accessed on the link:

<https://www.cci.gov.in/sites/default/files/25-of-2018.pdf>

CCI holds absence of profits does not indicate absence of cartelization

On January 15, 2018, the CCI decided the fourth application under the CCI (**Lesser Penalty**) Regulations, 2009 (**Lesser Penalty Regulations**) that was filed by Panasonic Corporation, Japan (**Panasonic**). The CCI granted it 100% reduction in penalty, making this the third case in which leniency was granted to Panasonic.

The order pertains to an alleged bilateral ancillary cartel between Panasonic Energy India Co. Limited (**Panasonic India**), a subsidiary of Panasonic and, Godrej and Boyce Manufacturing Co. Ltd. (**Godrej**). Panasonic India was contract manufacturing batteries to be sold by, and under, the trade name of Godrej. Panasonic in the lesser penalty application, stated that the prices decided in a primary cartel between Panasonic India, Eveready Industries India Limited and Indo National Limited, were also intimated to Godrej and accordingly, the said prices were maintained in batteries sold by Godrej.

The CCI found that, in the Product Supply Agreement between Panasonic India and Godrej, the parties undertook “not [to] take any steps which are detrimental to the other party’s market interests.” This provision along with email communications revealed the existence of a price monitoring system and maintenance of price parity in the market. Some other interesting observations in the order are:

- Vertical agreements in some situations may have effects on the market and possible competition problems similar to those seen in horizontal agreements and should therefore be assessed accordingly. While recognizing that Godrej and Panasonic India were in a vertical relationship for supply of dry cell batteries, they also competed in the downstream market. In such situations, the vertical relationship in the upstream market may have impact on the downstream market.
- Mere absence of profits does not negate findings of a cartel: While usually the motive behind cartelization is earning of supra normal or high profits, the mere absence of profits of one entity can be of no consequence; given the availability of strong evidence of cartelization on record.

The CCI found Panasonic India and Godrej to have colluded and went on to impose a penalty of 4% of its turnover for each year of continuation of the cartel on Godrej. Panasonic India received a 100% reduction in penalty.

The CCI’s order can be accessed on the link:

https://www.cci.gov.in/sites/default/files/Suo-Moto-03-of-2017_0.pdf

Panasonic’s tryst with leniency: Panasonic has filed 4 applications under the Lesser Penalty Regulations, and successfully received reduction of penalty in 3 out of these 4 applications.

- **Primary Cartel:** The main application was with respect to a cartel between the three largest players in the market of dry cell battery in India viz., Panasonic India, Eveready Industries India Limited (**Eveready**) and Indo National Limited (**Nippo**). Following a dawn raid, both Eveready and Nippo also filed lesser penalty applications before the CCI. The CCI in its order dated April 19, 2018 found the three parties to have colluded to raise and maintain high market prices for their batteries. While Panasonic India received 100% reduction in penalty, Eveready was granted a 30% reduction and Nippo a 20% reduction in penalty.
- **Ancillary Cartel with Geep:** Similar to the Godrej matter, Panasonic also filed a lesser penalty application regarding a bilateral ancillary cartel with Geep Industries India Pvt. Ltd. (**Geep**). Like Godrej, Panasonic India was contract manufacturing batteries sold by Geep. As per the lesser penalty application, this bilateral ancillary cartel, was informed and sustained on the basis of the Primary Cartel and high prices for dry-cell batteries were maintained in the market. The CCI, in similar circumstances as in the case above, found Panasonic India and Geep to have cartelized. A similar clause in the Product Supply Agreement and email communication were relied upon by the CCI to arrive at the finding. An identical penalty of 4% on the turnover of for the period of continuation of the cartel was imposed on Geep. Panasonic India was granted a 100% reduction in penalty.
- **The Flashlights cartel:** Panasonic India and Eveready also filed an application for lesser penalty claiming that a cartel existed between Panasonic India, Geep, Nippo, and Eveready in the market of sale of flashlights. Interestingly, despite the lesser penalty applications by Eveready and Panasonic, contravention of provisions of Section 3 could not be established. The CCI held that sharing of information alone, without evidence of price fixation, cannot indicate a violation of provisions of Section 3 of the Act.

Vertical agreements

Resale Price Maintenance against one retailer can be justified if the conduct has no adverse impact on its sales

On January 15, 2019, the CCI found that Snapdeal's allegations of Resale Price Maintenance (**RPM**) against Kaff Appliances (**Kaff**) were not supported by evidence on record. Jasper Infotech Private Limited, which owns and operates the popular online marketplace website (www.snapdeal.com), had filed an information against Kaff - a manufacturer/seller of kitchen appliances sold under its brand name 'Kaff'.

Snapdeal had alleged that since Kaff products were available at a discounted price on its platform, Kaff had displayed a caution notice on its website stating Snapdeal is not an authorized retailer and products sold on the platform may be counterfeit. These actions were directed to discourage a buyer from purchasing Kaff products on Snapdeal. Kaff also stated that they will not honour warranties on its products sold through Snapdeal. An employee of Kaff Appliances also wrote an email to Snapdeal stating that if Minimum Operating Price is not maintained on the platform, Kaff will not allow Snapdeal to sell its products.

The CCI found that (a) the evidence on record did not reveal that RPM was enforced on the dealers; (b) there was a fair degree of intra-brand competition; and (c) the actual impact of Kaff Appliances' conduct did not demonstrate appreciable adverse effect on competition (**AAEC**) in the market. The CCI also accepted Kaff's justifications for issuing the caution notice as a sincere attempt to safeguard the reputation and goodwill of its products, to protect its dealership network from the adverse discounting strategy of the online portal, and to discourage sale of spurious products. The CCI also found that the email sent by a Kaff employee to Snapdeal was not on directions of the company but in his personal capacity. The CCI's order can be accessed on the link:

<https://www.cci.gov.in/sites/default/files/61-of-2014.pdf>

The differing treatment of minimum RPM

Agreements which enforce minimum RPM i.e., the direct or indirect fixation of the minimum price at which goods can be sold, reveal an unlikely distinction between European Union (**EU**) and India. In EU, RPM is considered to be a hard-core restriction i.e., a restriction which by its very nature has the potential to restrict competition. The European Commission presumes the presence of adverse effect on competition in case of hard-core restrictions and, in fact has in the recent past, found four manufacturers of electronic products viz., Phillips, Asus, Denon & Martanz and Pioneer to have indulged in RPM without requiring any proof of effect on competition.

The CCI, however, consistent with the provisions of the Act, has always held that RPM will be prohibited, subject to a proof of AAEC in the market. However, the CCI's approach towards the evidentiary burden to prove RPM and the determination of AAEC, has not been so consistent. In *Timex*, the CCI noted that for RPM to be effective in the form of discount control, it has to be imposed on all the online retailers. The CCI also stated that even if a manufacturer controls the prices of its products in the market, such conduct would not result into an AAEC unless, such a manufacturer holds significant market power. In *Hyundai*, (which was later set aside by the NCLAT) the CCI found a scheme of discount control implemented by Hyundai to be sufficient to prove existence of RPM despite arguments of it not having been implemented strictly. The CCI also found AAEC to exist in the market, even though it was only a single manufacturer of cars (Hyundai) which had imposed minimum RPM. This order was set aside by the NCLAT for, inter alia, the CCI's failure to prove existence of an AAEC.

Vertical agreements and abuse of dominant position

CCI finds no *prima facie* competition concern in retail sale of beverages at higher prices inside multiplexes

On February 28, 2019, the CCI held that the exclusive sale of beverages inside multiplexes at prices higher than those in the retail market was not in contravention of the Act.

The Informant – a social activist filed an information against Inox Leisure Limited (**Inox**) and Hindustan Coca Cola (**Coke**), alleging that multiplexes like Inox were entering into agreements with beverage companies like Coke to sell water and beverages inside multiplexes at significantly higher prices compared to the prices that prevailed in the retail market. It was also alleged that Inox had an exclusive supply agreement with Coke as a result of which, competitors' products were not available in the multiplexes.

The CCI found that the facts and allegations in the case were similar to the findings in two previous cases decided under the erstwhile Monopolies and Restrictive Trade Practices Act (*In Re M/s Cine Prekshakula Viniyoga Darula Sangh v. Hindustan Coca Cola Beverages Private Limited* and *In Re: Consumers Guidance Society v. Hindustan Coca Cola Beverages Private Limited* and *Inox Leisure Private Limited*).

Broadly relying on its findings in the previous cases, the CCI found that the exclusive agreement did not cause an AAEC. The CCI noted that if a supplier has significant market power and enters into an exclusive supply agreement with a purchaser to create entry barriers for other suppliers, the contract can be seen as exclusionary. However, in the present case, the agreements were for a shorter duration, and neither party had significant market power. The CCI observed that the market was highly contestable with the presence of other brands inside other multiplexes. The CCI also found no illegality in forcing moviegoers to purchase beverages from the multiplex. With regard to this allegation of a tie-in arrangement, the CCI concluded that there is no market foreclosure since beverages are incidental to visiting multiplexes and water is available without cost inside multiplexes.

The CCI also found that higher MRP charged inside the multiplexes is not likely to have any AAEC. The CCI's order can be accessed on link:

<https://www.cci.gov.in/sites/default/files/29-of-2018.pdf>

CCI decides not to initiate investigation into allegations pending investigation by the securities market regulator, SEBI

On January 7, 2019, the CCI closed a case alleging abuse of dominant position by the National Stock Exchange (**NSE**). The basic allegation against NSE was that it was discriminating between its trading members while providing its co-location services. According to the information filed with the CCI, certain trading members were getting price feeds and other data before other members to whom such preferential access was not provided by NSE. Therefore, it was alleged that NSE had limited and restricted the provision of services to certain trading members availing the co-location service which resulted in 'denial of market access' to others to whom such unfair access was not given.

The CCI noted that the NSE, by virtue of its own circular, was required to provide equal benefits of the co-location services to the said trading members. The CCI observed that similar allegations of discriminatory conduct, were pending investigation before the market regulator viz., the Securities and Exchange Board of India (**SEBI**). While holding that it would have jurisdiction to examine discriminatory conduct, the CCI however, decided against initiating an investigation on the ground that the allegations against NSE are yet to be established in an appropriate proceeding before the SEBI and sufficient information and data was not provided to the CCI.

The CCI's order in this case acquires significance in view of the decision of the Supreme Court in *CCI v. Bharti Airtel*, where the Supreme Court found that the CCI could not have initiated investigation pending determination of factual aspects by the sectoral regulator.

The CCI's order can be accessed on the link :

<https://www.cci.gov.in/sites/default/files/47-of-2018.pdf>

Merger update

Reliance consolidates its presence in cable TV industry through acquisition of Den and Hathway

On January 21, 2019, the CCI approved Reliance Industries Limited's (**Reliance**) acquisition of sole control in two competing entities viz., Den Networks Limited (**Den**) and Hathway Cable and Datacom Limited (**Hathway**) by various subsidiaries of Reliance Industries Group (**Reliance**). Both Den and Hathway are multi system operators (**MSOs**) and are involved in distribution of cable TV services, retail supply of local cable TV channels and sale of advertising airtime on such local Cable TV channels across various states in India. While Reliance was found to be directly or indirectly, providing some related services, the CCI also examined horizontal and vertical overlaps, arising from acquisition of two competing entities. The broad segments where the CCI examined the overlaps were:

- **Distribution of TV Channels:** Deviating from its opinion in the prior order of merger between two direct to home platforms (Videocon D2h Ltd and Dish TV India Limited), the CCI has now opined that D2h and MSOs form a part of the same market. Noting the presence of pan India DTH service providers as well as cable TV providers, the CCI found that a negligible increase in market share post combination would not result in an AAEC. Interestingly, since the CCI did not find IPTV to be a part of the same market, it did not consider Reliance Jio DTH which was, interestingly, considered as an upcoming competitor while approving the merger of Videocon and Dish.
- **Retail Supply of Audio-Visual content:** Noting that the retail supply of local cable TV (where both Den and Hathway are present) is complementary to the distribution of TV channels, the CCI limited the assessment in this segment to Over the Top (**OTT**), recognizing OTT as a distinct market. While both Den and Reliance were found to be present in the OTT segment, acknowledging the presence of competitors like Netflix, Amazon Prime Video, ZEE5 etc., the CCI did not find any concerns to be raised by the combination.
- **Vertical linkages:** Since Reliance was also found to be present in the market for licensing of content, the vertical overlaps were also assessed. However, given the position of the parties in the market for

distribution of TV channels and OTTs, as well as the competition in the market for creation of content, the CCI found no concern.

- **Wired broadband internet services (BIS):** The CCI found that wired BIS and wireless BIS, constitute distinct markets. While both Den and Hathway hold a pan-India Internet Service Providers license granted by the Department of Telecommunications, their combined market share was not found to be significant in view of presence of other major players in the market. The CCI also found a negligible incremental addition to Reliance's existing optical fiber network.
- **Advertising Airtime:** In this segment, both horizontal and vertical overlaps were found to exist. The CCI noted that although the TV channels broadcast by Reliance, carry advertisements that are pan-India in nature, both Den and Hathway carry advertisements catering to local agencies. In addition to this distinction, the market share of Den and Hathway (in terms of value of advertising) was found to be insignificant, implying an insignificant increase in market share. The CCI also found an insignificant vertical overlap as even though Reliance advertises on Den's server based local cable TV channels, the revenue generated from this was found to be insignificant.

The combination also saw the parties utilizing the newly included provision in the extant regulations permitting them to offer voluntary modifications to a combination. The parties here voluntarily committed that:

- a. They will not undertake any technical realignment due to the instant transaction which will result in change in customer premises equipment of existing subscribers of Den and Hathway
- b. In case a technical re-alignment does take place, the parties will bear the costs of such technical realignment and/ or the change in customer premises equipment and the same would not be borne by their customers
- c. Ensure that the parties would be free to choose any type of services or their bundle, i.e., between broad band, cable TV and telephone, offered by the respective companies
- d. Provide an annual compliance report for a period of 5 years, in relation to the above

Enforcement and policy updates

CCI to conduct a study on big data and its impact on competition

The Chairperson of the CCI, Mr. Ashok Kumar Gupta, has stated that CCI will conduct a study to understand the role of artificial intelligence (AI) and algorithms in collusion. Press reports suggest that the study would cover various industries which can use AI or algorithms to achieve collusive ends. Given the increasing interest over the impact of AI and concerns of algorithmic collusion, the efforts by the CCI to undertake such a study is laudable. While AI does have some unique characteristics, its impact on competition cannot be conducted in a void. To adequately assess the impact, it is necessary to conduct a study which is thoroughly informed by the legal and economic considerations relevant to the sector. This study would help the CCI develop an appropriate and adequate enforcement strategy. An inclusive study which gives an opportunity to all stakeholders to present their comments can go a long way in creating and developing regulatory clarity. Notably, the CCI has earlier dismissed allegations¹ against cab aggregation services – Ola and Uber or their drivers - of collusion by use of algorithms.

CCI to develop code of conduct for automotive sector

The Chairperson of the CCI announced that the CCI would be developing a code of conduct for the automotive sector. His comments came during a workshop organized by industry groups Society of Indian Automobile Manufacturers, Automotive Component Manufacturers Association of India. The CCI had earlier imposed huge penalties on various car manufacturers for adopting restrictive practices in the aftermarket for spare parts. In addition to imposing penalties, the CCI had also issued detailed directions for conduct of business practices, which were upheld and modified by the erstwhile Competition Appellate Tribunal. However, since the matter is pending before the Supreme Court, these directions are yet to be implemented. A code of conduct for the sector will not only help address concerns already identified by the CCI but will potentially reduce the necessity for further enforcement.

Supreme Court cautions against blanket restraint on DG's investigation by High Court

On January 15, 2019, in a significant win for the CCI, the Supreme Court of India set aside the Delhi High Court's interim direction which had restrained the CCI from utilizing material seized during a dawn raid till further orders.

In 2014, the CCI had directed investigation against JCB India Limited (JCB) on allegations of denial of market access on account of dominant position. The initiation was challenged by JCB in a writ petition filed before the Delhi High Court. During the course of its investigation, the DG conducted a search operation of JCB's premises and seized certain documents, laptops and hard drives. JCB approached the Delhi High Court, challenging this seizure of materials and prayed for setting aside of the entire search operation. The single judge of the Delhi High Court restrained the use of the seized data observing that the search warrant only permitted search of the premises and not the seizure of the material searched (Impugned Order). The CCI appealed against this order to the Supreme Court and the jurisdictional challenge was also transferred to the Supreme Court. In setting aside the Impugned Order, the Supreme Court held that:

- **Power to search includes the power to seize:** The power of the DG which is derived from Section 240A of the Companies Act, 1956, not only relates to an authorization for a search but extends to seizure as well. Unless the seizure were also to be authorized, a mere search by itself would not be sufficient for the purposes of investigation
- **High Court to be circumspect before restraining investigation:** The High Court has blocked the investigation on an erroneous construction of the powers of the Director General and that the High Court should be more circumspect before restraining the DG's investigation

While vacating the Impugned Order and remitting the writ petitions back to the Delhi High Court, the Supreme Court left it open for the Delhi High Court to determine the extent of reliance on the seized material that may be necessary to test the issue of jurisdiction as raised in the writ petitions.

¹<https://www.cci.gov.in/sites/default/files/37of2018.pdf>

ELP insights

The Scope of the DG's Power: A Tale of Two Cities

Background

The Act created a distinction between the adjudicatory and investigative powers, vesting the former in the CCI and creating a separate authority i.e., the Office of the DG for the latter. The DG is obligated to “assist” the Commission “when so directed” in “investigating into any contravention” under the Act.²

While the DG's role under the Act is clear, the scope of his assistance has become a cause of debate with contradictory opinions emerging from different High Courts.

What does the Act say?

The responsibility of the DG under the Act is specified under Section 41 of the Act. As stated above, the section specifies that the DG is required to assist the CCI, “when so directed”. Such directions are given, inter alia, in the forms of orders passed under Section 26(1) of the Act. Under Section 26(1) of the Act, if the CCI finds a *prima facie* case, it directs the DG to investigate into the “matter” and accordingly submit a report on the basis of the investigation. After submission of the report by the DG, if the CCI is of the opinion that further investigation is called for, it can direct the DG to cause such further investigation.

The direction to investigate which is in the form of an order under Section 26(1) records the existence of a *prima facie* case against an investigated party (i.e., the party alleged to have contravened the Act). To that end, the order can be understood as identifying:

- The enterprises/persons to be investigated or, opposite parties as referred to in proceedings before the CCI/DG
- The basis of *prima facie* case or in other words, the broad facts on the basis of which the CCI arrives at a *prima facie* determination regarding existence of a contravention. The orders generally, identify the provisions whose contravention is *prima facie* established.

As such, a reading of the Act would suggest that the DG can exercise its powers only when directed to do so by the CCI and has no suo moto powers to conduct an investigation. However, the scope of such DG investigations³, has been a cause of much debate since as far back as 2011.

The main question that arises is whether the DG can, during an investigation directed by the CCI, expand the scope of investigation to include:

- additional opposite parties not originally included in the CCI's direction
- additional issues or provisions not originally included in the CCI's direction or
- facts and evidence beyond the period of contravention identified by the CCI.

Since 2011, the broad issue of whether the DG has power to expand the scope of investigation has come up before various High Courts and even the Supreme Court. However, as our ensuing section will show, there is little clarity on what the DG can do.

The meandering journey of the DG's powers

In 2011, the first case dealing with the DG suo moto enhancing the scope of investigation came up and the investigated party – Grasim Industries Limited (**Grasim**), challenged the same before the Delhi High Court. Briefly, the DG was directed to investigate into allegations of collusion (i.e., contravention of Section 3 of the Act) against Grasim. During investigation, curiously enough, the informant before the CCI, brought to the notice of the DG that Grasim was also dominant in the concerned relevant market and had allegedly abused its dominance. The DG after investigation found no case of violation of Section 3 of the Act, however, found that Grasim had contravened Section 4 of the Act. Grasim's application before the CCI for quashing the DG's report as being beyond the scope of his powers was set aside by the CCI. Aggrieved, Grasim approached the Delhi High Court by way of a writ petition.

² Section 41 of the Act.

³ Even the Statement of Objects and Reasons for enacting the Competition Act clarify that the DG, “would be able to act only if so directed by the Commission but will not have any suo motu power for initiating investigation.”

In its 2013 judgment, the Delhi High Court reasoned that the, “investigation by the Director General depends upon the nature of the opinion formed by the Commission, on consideration of reference or information received by it.”⁴ Discussing the scheme of Section 26 and Section 41 of the Act and Regulation 42 of the CCI (General) Regulations, 2009 (**General Regulations**), the Court concluded that the DG investigation should be “confined to the allegations made in the information...and he is not competent to travel outside the scope of the same.” The Court noted that a contrary view would erode a respondent’s right to defence before the DG which is the first authority before whom an opposite party may defend itself. It was clarified that so long as the DG investigation was limited to the information considered by the CCI while directing investigation, the DG could arrive at finding of contravention of any provision of the Act. However, since, in the case of *Grasim*, the DG had not restricted itself to the “information considered by the Commission”, the DG’s report was set aside.

After a bit of a setback in *Grasim*, the CCI’s power to expand the scope of investigation to include enterprises not included in the *prima facie* order, was unsuccessfully challenged before the Madras High Court in 2012 by Hyundai Motor India Limited (**Hyundai**) and BMW India Private Limited (**BMW**).⁵ This was challenged before the Division Bench of the Madras High Court and before it could decide on the issue, the Supreme Court of India in *Excel Crop Care Limited*⁶, weighed in with a pragmatic interpretation of the scope of the DG’s powers.

The issue before the Supreme Court was whether an alleged contravention committed beyond the period of contravention covered in the information, can be included within the scope of investigation by the DG. The informant complained about big rigging in tenders issued by Food Corporation of India (**FCI**) between 2007-2009, on the basis of which investigation was directed. During investigation, the DG found evidence supporting a finding of contravention in the 2011 tender floated by FCI as well. The CCI agreed with the recommendation of the DG and imposed a penalty. The issue as to whether the DG could have looked into conduct not covered in the information was raised before the Supreme Court which held that while the DG does not have suo motu powers, the information and the *prima facie* order are only the starting point of inquiry. The DG is duty bound to conduct a

comprehensive investigation and, “while carrying out this investigation if other facts are also revealed and are brought to light, revealing that the ‘persons’ or ‘enterprises’ had entered into an agreement that is prohibited by Section 3 which had appreciable adverse effect on competition, the DG would be well within his powers to include those (within the investigation) (sic) as well.” Given the facts, the decision by the Supreme Court seems obvious, as the alternate, would restrict the investigative process and defeat the purpose of the Act. The Supreme Court reasoned that at the *prima facie* stage the CCI cannot foresee whether any violation of the Act would be found during investigation and “what would be the nature of the violation” and hence, found no illegality in the DG finding a contravention in a 2011 tender issued by FCI itself.

In *Excel Crop*, it would arguably be unreasonable to restrict the scope of investigation to the tenders identified in the information, when investigation revealed that bid-rigging continued. However, the reasoning of the Supreme Court and the language of the decision, raises a very pertinent question: Does the Supreme Court permit the CCI/DG to expand the investigation to include continuing acts of contravention that are identified in the *prima facie* order, or, can allegations unrelated to the complaint and *prima facie* order also be raised and parties not mentioned in the complaint and *prima facie* order also be investigated?

This question was addressed by the Delhi High Court (Division Bench) in its September 2018 decision in *Cadila Healthcare Limited & Anr. v. CCI & Anr.*⁷ Relying on *Excel Crop*, the Delhi High Court found that in investigations directed by Section 26(1) of the Act, “the subject matter included not only the one alleged, but other allied and unenumerated ones, involving other (i.e., third parties)” and Section 26(1) of the Act “talks of action by CCI directing the DG to inquire into “the matter”. At this stage, the scope of inquiry is the tendency of market behaviour, of the kind frowned upon in Section 3 and 4.” In this decision, the Delhi High Court reasoned that every party will have a right to present its case before the CCI, before any adverse order is passed, rejecting to that end, the opinion in *Grasim* of the DG being the first authority to defend. Accordingly, relying on *Excel Crop*, it held that the DG could expand the scope of investigation to investigate into the conduct/enterprises not included in the *prima facie* order.

⁴ *Grasim Industries Limited v. CCI, W.P. (C) No. 4159 of 2013, judgement dated December 17, 2013.*

⁵ *Hyundai Motor India Limited v. CCI & Ors, W.P.(C) Nos. 31808 and 31809 of 2012, judgement dated February 04, 2015.*

⁶ *Excel Corp Care v CCI and Anr Civil Appeal No. 2480 of 2014, judgment dated May 08, 2017.*

⁷ *L.P.A. No. 160/2018, judgement dated September 12, 2018.*

However, while this broad interpretation presents in own challenges, including, rendering an order passed under Section 26(1) directing investigation limitless, it is another aspect of the decision in *Cadila*, which is completely contrary to the provisions intent of the Act, as well as the decision in *Excel Crop*. An issue that *Excel Crop* appeared to have settled was that the DG has no suo motu powers of investigation. This would imply that the DG would need the CCI's permission to expand the scope of investigation, and it suo motu cannot expand the scope of investigation. However, eroding this well accepted principle, the Delhi High Court in *Cadila* also held that no permission from the CCI was required for the DG to expand the scope of investigation.

This finding runs absolutely contrary to the observations of a Division Bench of the Madras High Court. The Court was hearing the appeal preferred by Hyundai against the order of the Single Judge which held that, in so far as the DG obtained a specific direction from the CCI to expand the investigation to include car makers other than those originally mentioned in the information, her actions were justified. Upholding the same, the Madras High Court held that there was no illegality in the present case as the DG had approached the CCI before the scope of the investigation was expanded and this was in accordance with the decision in *Excel Crop*. Arriving at this conclusion, the Court also held that if the direction had not been passed, the DG could not have proceeded against Hyundai.⁸

The *Cadila* order is not just completely contradictory to

the decision in *Hyundai*, it is perhaps per incuriam in light of the provisions of the Act as well as *Excel Crop*. Interestingly, almost a year before *Cadila*, the Delhi High Court stayed investigations on allegations of fishing and roving inquiry by the DG in a matter where the jurisdiction of the CCI was under challenge⁹.

So what can the DG do and what should a party being investigated do?

As evident, the judicial journey of the scope of the DG's power to investigate is one characterised by lack of clarity. The differing interpretations of the Supreme Court's decision in *Excel Crop* case as adopted by the two High Courts has created ambiguities with respect to the scope of the DG's power.

The appeal against the *Cadila* decision is pending before the Supreme Court and may resolve the inconsistencies created by *Cadila* and *Hyundai*. However, at present an investigated party has limited clarity on powers of the DG with respect to the scope of any investigation. An investigated party, therefore, may consider seeking appropriate legal advice while responding to the DG's probe notices during the course of an investigation.

⁸ W.A. No. 340 of 2015, judgment dated 23 July 2018.

⁹ In *Roche Products India Pvt Limited and Ors v. Competition Commission of India and Ors*, W.P.(C) 4529/2017, Roche approached the Delhi High Court challenging the jurisdiction of the CCI to initiate investigation. While the writ was pending, Roche received a notice for information from the DG. Roche challenged the same claiming that the queries in the notice were unrelated to the prima facie allegation of contravention. The High Court noted that DG was conducting a roving and fishing inquiry unrelated to the allegations made before the CCI and stayed the investigation.



ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS

Mumbai

109 A, 1st Floor, Dalamal Towers
Free Press Journal Road, Nariman Point
Mumbai 400 021
T: +91 22 6636 7000

New Delhi

801 A, 8th Floor, Konnectus Tower, Bhavbhuti Marg
Opp. Ajmeri Gate Railway Station, Nr. Minto Bridge
New Delhi 110 001
T: +91 11 4152 8400

Ahmedabad

801, 8th Floor, Abhijeet III
Mithakali Six Road, Ellisbridge
Ahmedabad 380 006
T: +91 79 6605 4480/8

Pune

202, 2nd Floor, Vascon Eco Tower
Baner Pashan Road
Pune 411 045
T: +91 20 4912 7400

Bengaluru

6th Floor, Rockline Centre
54, Richmond Road
Bengaluru 560 025
T: +91 80 4168 5530/1

Chennai

No 18, BBC Homes, Flat-7 Block A
South Boag Road
Chennai 600 017
T: +91 44 4210 4863

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elplaw@elp-in.com



elplaw.in



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