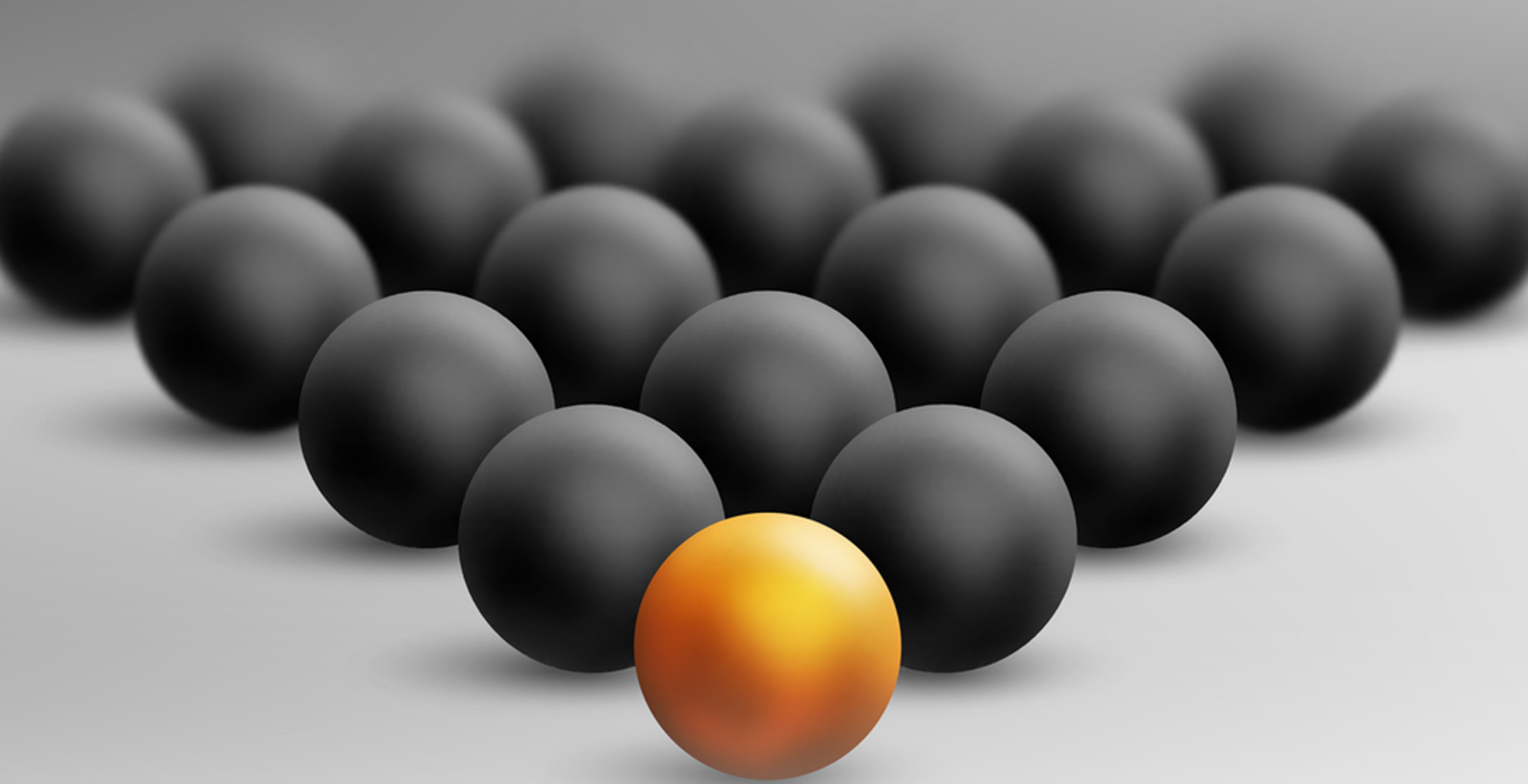




ECONOMIC  
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# COMPETITION LAW & POLICY UPDATE

QUARTER 3 OF 2019



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Automobile



Sports



## Cartels and Horizontal Agreements

### CCI grants leniency to NSK and JTEKT for global cartel in electric power steering system market

On August 09, 2019, the Competition Commission of India (“**CCI**”) granted a 100% reduction in penalty to NSK Limited (“**NSK**”), Japan for disclosing a cartel amongst NSK, JTEKT Corporation, Japan (“**JTEKT**”) along with their Indian subsidiaries viz., Rane NSK Steering Systems Ltd. (“**RNSK**”) and JTEKT Sona Automotive India Limited (“**JSAI**”) in electric power steering system market.

Subsequently, JTEKT also approached the CCI under Section 46 of the Competition Act, 2002 (“**Act**”) read with provisions under the Competition Commission of India (Lesser Penalty) Regulations, 2009 (“**Leniency Provisions**”), disclosing additional information about the cartel.

The evidence collected by the Director General (“**DG**”) revealed that representatives of NSK and JTEKT had met and held telephonic discussions to exchange pricing information and discuss market allocation in India (and other countries) from 2005 to July 25, 2011. The CCI notes that the cartel ceased to exist from July 25, 2011, when the Japanese Fair Trade Commission had conducted an onsite inspection of four Japanese companies including NSK and JTEKT, in connection with alleged cartelization for various products including, electronic power steering system.

As all evidences collected by the DG remained uncontested, the CCI held that NSK, JTEKT, RNSK and JSAI had contravened the provisions of Section 3(3) of the Act and imposed a penalty accordingly. Pursuant to the applications filed under the Leniency Provisions by NSK and JTEKT, the penalty imposed on them was reduced by 100% and 50% respectively.

The order of the CCI also stands out for the extent to which confidentiality has been granted over the details of the evidence provided by the parties as well as the individual officers for both companies. The CCI has not provided any specific reasoning for the grant of confidentiality on these points. As such, it remains uncertain whether similar treatment will be available for other leniency applicants as well.

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

## The CCI imposes penalty on LPG Cylinder Manufacturers for cartelizing in HPCL tenders

On August 09, 2019, the CCI imposed penalties on 51 LPG cylinder manufacturers (“**Manufacturers**”) and 58 individuals, for bid rigging in violation of Section 3(3)(d) of the Act. An anonymous letter dated April 25, 2013 addressed to the CCI contained allegations regarding cartelization in two tenders floated by Hindustan Petroleum Corporation Ltd. (“**HPCL**”) on the basis of which the CCI initiated a *suo moto* investigation.

The DG’s investigation report concluded that 48 manufacturers which had participated in the first tender dated October 28, 2011 (“**Tender 1**”), and 53 manufacturers which had participated in the second tender dated January 24, 2013 (“**Tender 2**”), had engaged in bid rigging or collusive bidding. The CCI examined the allegations and evidence in both the tenders separately. Some interesting points that emerge from the observation of the CCI are:

- **No ‘price’ cartel where market is an oligopsony:** Following the decision of the Supreme Court in [Rajasthan Cylinders case](#), the CCI noted that the market was an oligopsony and concluded that no violation of Section 3(3)(d) of the Act had been established even though the price bids of 48 manufacturers in Tender 1 and 2 manufacturers in Tender 2 were found to have been identical. The CCI findings come despite evidence of identical prices, exchange of information, an active trade association and presence of common or related management for various manufacturers. All these have been regarded as plus factors by the CCI in the past. However, as the market was found to be an oligopsony and further since HPCL was not dependent on the rates quoted by the bidders and negotiated to finalize the L-1 rates, the CCI concluded that there was no violation of Section 3(3)(d) of the Act.
- **Only exchange of strategic information is in contravention of the Act:** Dealing with evidence of information exchange in Tender 1, the CCI found that such exchange of information could constitute a concerted practice only if it involved sharing of strategic data such as details about price, demand, capacity utilization etc.
- **Collective boycott is a problem even in an oligopsony:** Not all forms of collusive actions can benefit from the argument of the market being an oligopsony. The CCI in its order found that the [collective withdrawal](#) by 51 manufacturers in Tender 2, was a contravention of the Act. The plus factors that CCI took into consideration include:
  - [similar reasons](#) given for withdrawal
  - [common format](#) of the withdrawal letter, shared through mail between the manufacturers
  - [Identical IP addresses](#) through which the bids for several related as well as unrelated manufacturers were sent in Tender 2
  - [Six common](#) agents worked for all the manufacturers with their main job being submission of documents and [conveying important information](#) to the manufacturers
  - [Emails](#) showing exchange of [strategic information](#) between some manufacturers
  - [Active association](#) of manufacturers namely, Indian LPG Cylinders Manufacturers Association and regional associations, showing the presence of a common platform for exchange of information

While holding that there was no evidence of fixation of price, the CCI held that 51 manufacturers who withdrew from Tender 2 had engaged in collusive bidding in contravention of Section 3(3)(d) of the Act and levied penalty on all 51 manufacturers as well as 58 employees/officers from these manufacturing companies. Interestingly, this was the first decision by the CCI applying the Supreme Court’s reasoning in the *Rajasthan Cylinders* case. It remains to be seen whether and to what extent the CCI will extend the logic of *Rajasthan Cylinders* to other sectors and markets.

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

# Abuse of Dominant Position

## The CCI holds that 'Termination for Convenience' clauses are not abusive

On August 02, 2019, the CCI dismissed allegations that a unilateral termination clause in Oil and Natural Gas Corporation Limited's ("ONGC") Charter Hire Agreement ("CHA") was abusive. The Indian National Shipowners' Association ("INSA"), a representative body of various ship owners, had alleged that ONGC by including one-sided clauses, such as the unilateral termination clause in the CHA with offshore support vessel ("OSV") providers, had abused its dominance. Some interesting points that emerge from the CCI's order are:

- **Issues rejected in *prima facie* order are not required to be investigated:** The CCI after examining the information had taken a *prima facie* view that out of the three clauses complained against only one clause i.e., the unilateral termination clause (also known as Termination for Convenience clause) was abusive. Since the other two clauses were not found to be *prima facie* abusive, the CCI dismissed INSA's contention that the DG erred in not investigating them.
- **The CCI's jurisdiction extends to competition issues arising from contractual terms:** The CCI reiterated that an agreement between/amongst parties will not insulate them from the applicability of the Act and the CCI will have power to investigate into any anti-competitive conduct arising out an agreement.
- **The test for determining unfair conduct in B2B Transactions:** Examining the exploitative conduct, the CCI noted that in a case involving a consumer and business ("B2C") situation, the mere existence of exploitative conduct 'may' amount to abuse under Section 4(2)(a)(i) of the Act. However, in a case where exploitative conduct was in a business to business ("B2B") situation, the determination of unfairness under Section 4(2)(a)(i) of the Act would require the application of a "*fairness or reasonability test*". This test, according to the CCI, requires an examination of : (i) how the condition affects the trading partners of the dominant enterprise; and (ii) whether there is any legitimate and objective necessity for the enterprise to impose such conditions. Applying this test, the CCI found that the unilateral 'Termination for convenience' clause was a legally accepted way for termination of a contract, when used in good faith. It

was also noted that even though the clause seemed *prima facie* abusive, it was necessary in view of the conditions in the oil exploration and production activities and was therefore not abusive.

- **Examination of good faith in implementation of the clause:** The CCI also held that assessment of the manner of implementation of the clause was necessary to determine if the conduct of ONGC was abusive. Having assessed the manner of implementation of the clause by ONGC in 2016 on the basis of the tests of '*good faith*' and '*change in circumstances*', the CCI held that ONGC had objective justifications for termination i.e., an increase in crude oil prices which made the continuation of the CHA economically unviable. While the CCI found ONGC to be dominant, the allegations of abuse of dominance were not established and accordingly the CCI dismissed the case.
- **Outreach to other regulators:** The order reveals that the DG reached out competition authorities from Europe, USA and UK to understand the position adopted by the regulators regarding Termination of Convenience clauses.

The CCI's order creates an uncertainty about applicability of the '*effect test*' in a B2C situation. The use of '*may*' by the CCI (while dealing with applicability of '*effects test*' in B2C situation) suggests that it would be dependent on the facts of each case. However, this position would need a confirmation by the CCI in an appropriate case.

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



## The CCI refuses to initiate investigation into allegations against the Delhi Excise Department

On August 02, 2019, the CCI dismissed allegations of abuse of dominant position against the Department of Excise, Entertainment and Luxury Tax, Government of National Capital Territory of Delhi (“**Excise Department**”). The informant, United Breweries Limited (“**UBL**”) alleged that by imposing unfair and discriminatory conditions in the terms of the L-1 License for the supply of alcoholic beverages to retailers, the Excise Department was abusing its dominance. UBL also complained of *resale price maintenance* through a clause in the public notice of 2018 issued by the Excise Department, which mandated restrictions on any discount/ commission/ rebate beyond the permitted criteria.

The CCI held that because the allegation pertains to the conduct of the Excise Department in discharge of its statutory functions i.e., granting a L1 License, its actions fell in the realm of public policy and it was therefore, excluded from the definition of ‘enterprise’. The CCI further noted that, the Excise Department was not involved in production, storage, distribution or sale of beer and there was no vertical agreement between UBL and the Excise Department. As such, the allegation of resale price maintenance could not be analyzed under the framework of Section 3 of the Act.

This decision of the CCI seems to raise certain concerns. In an [earlier matter](#), it had initiated investigation upon similar allegations of *abuse of dominance* by the state agricultural marketing board which was the exclusive wholesale licensee of foreign liquor/beer/wine. While a distinction may be sought to be established between a licensee and an *Excise Department*, such a distinction may be superfluous and result in providing an artificial protection to state departments from the scrutiny under the Act.

The order of the CCI is accessible [here](#).

On similar lines, the CCI also dismissed allegations of abuse of dominance against the Directorate General of Foreign Trade (“**DGFT**”) and India Rare Earth Limited (“**IREL**”). Similar to the Excise Department case discussed above, the CCI held that the activities of the DGFT and its implementations through IREL, were in pursuance of its statutory duties and therefore belonged to the domain of policy formulation which could not be scrutinized under the Act.

The order of the CCI is accessible [here](#).

## COMPAT decisions on Enterprise

The COMPAT in some previous judgements has rendered observations on the definition of ‘enterprise’ under the Act

In **The Malwa Industrial & Marketing Ferti-Chem Cooperative Society Ltd. v. Competition Commission of India and Others, Appeal No. 25 of 2015**, the COMPAT observed that even though the Registrar, Cooperative Societies, Punjab had issued circulars under statutory powers, the circulars created a monopoly for The Punjab State Co-operative Supply & Marketing Federation Ltd. and therefore the Registrar fell within the definition of ‘enterprise.’

In **Wing Cdr. (Retd.) Dr. Biswanath Prasad Singh v. Director General of Health Services and Ors., Appeal No. 63 of 2014**, the COMPAT had held that government departments which are engaged in activities under the definition are covered under the term enterprise. The COMPAT noted that only two exceptions to the definition of ‘enterprise’ exists as per the Act - (i) the activities of the Government relating to sovereign functions of the Government; and (ii) activities covered by the departments of Central Government dealing with atomic energy, currency, defence and space.

## Supreme Court upholds COMPAT’s ruling directing DG to investigate UBER

On September 03, 2019, the Supreme Court upheld the order of the erstwhile Competition Appellate Tribunal (“**COMPAT**”) in *Meru Travels Solutions Private Limited v. Competition Commission of India and Ors.* ( *Appeal No. 31 of 2016*), directing the DG to investigate the allegations of abuse of dominance by Uber. The decision of the COMPAT came in an appeal against the [CCI’s dismissal](#) of the information filed by Meru Travels Solution Private Limited (“**Meru**”) against Uber in 2015, under Section 26(2) of the Act.

The Supreme Court noted that the information revealed that Uber’s incentive system caused a loss of INR 204 per trip to Uber. Such a loss, according to the Supreme Court, favoured Uber and adversely affected its competitors. This, according to the Supreme Court, was a *prima facie* contravention of Section 4(2)(a)(ii) of the Act requiring an investigation. Accordingly, the Supreme

Court directed the DG to undertake an investigation within a period of 6 months. Notably, one of the grounds on which COMPAT had directed investigation was the presence of contradictory evidence on market share before the CCI.

The decision of the Supreme Court is laudable but raises some concerns about the time taken in appeal processes and grounds on which wide ranging interim stays are granted pending an appeal. In this case for instance, despite the COMPAT's order in 2016, a stay from the Supreme Court prevented any investigation by the DG during pendency of the appeal before the Supreme Court. The original information was filed by Meru in 2015 and in the duration of these 4 years, the alleged damage to the competition in the market may well have already happened, making any intervention by the CCI delayed and less effective. In matters of exclusionary conduct such as predatory pricing, swift action is needed. Permitting the investigation to continue pending disposal of an appeal i.e., granting a limited *ad-interim* stay may have helped balance the interests of both the appellant (Uber) and the market.

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

### Intel's India Specific Warranty Policy Invites CCI Scrutiny

On August 09, 2019, the CCI, on a complaint received from an importer, found that Intel Corporation's ("Intel") India specific warranty policy pertaining to its boxed micro-processors (which required purchases to be made through an authorized distributor in India), was *prima facie* an abuse of dominant position and accordingly directed an investigation by the DG.

The CCI, by relying on its [earlier decision](#) involving Intel as well as information available in the public domain, found Intel to be dominant in the market of boxed micro-processors for desktop and laptop PCs in India.

Intel argued that its warranty policy was a commercially justified practice which was required to overcome dishonest *modus operandi* of importers. The CCI however disagreed and opined that the India specific warranty policy *prima facie* amounts to imposition of unfair and discriminatory conditions on the following grounds:

- Intel's policy would be advantageous to Intel's authorized distributors and had the potential to deny market access to parallel importers and resellers of Intel's boxed microprocessors;
- Consumer choice may be limited as Intel's policy only provides the benefit of seller's warranty and not manufacturer's warranty; and
- This warranty policy was not enforced in other jurisdictions and that high prices were being charged by Intel's authorized distributors.

This order is the second probe ordered by the CCI against Intel in past two years. In 2018, the CCI found Intel to be *prima facie* abusing its dominant position in the market of processors for servers in India by denying access to reference design files essential for designing server boards in a non-discriminatory manner, without justification. The matter is currently pending adjudication.

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

### The CCI orders investigation against Volleyball Federation of India for imposing restriction on players

On August 07, 2019, the CCI issued an order under Section 26(1) of the Act directing the DG to investigate the conduct of the Volleyball Federation of India ("VFI"). The allegations dealt with - (i) VFI's agreement appointing Baseline Ventures (India) Pvt. Ltd. ("Baseline"), as the exclusive organizer of Volleyball League in India for 10 years; (ii) complete bar on organization of any volleyball event at international, national, district or local level, by anyone other than Baseline; and (iii) restrictions imposed on players participating in Baseline's Volleyball League.

Following its previous decisions in sports federation cases, the CCI noted that VFI has the mandate to undertake an economic activity of organizing tournaments and was hence an 'enterprise' under the Act. Being the sole national level sports federation for volleyball, VFI was also found to enjoy dominance in the relevant markets of (i) *organization of professional volleyball tournaments/ events in India*; and (ii) *the market for services of volleyball players in India*.

The CCI observed that the bar on organization of any volleyball event at any level potentially foreclosed the *relevant market for organization of professional volleyball tournaments/events in India* from the competitors of Baseline. The CCI also noted that the

restrictions on players participating in Baseline's Volleyball League from participating in other sports tournaments had resulted in denial of market access to other competitors and amounted to abuse of dominance. VFI had argued that the agreement in question had been amended and that it was no longer abusive. The CCI observed that prior to the amendment, the agreement had restricted the players from international events like Olympics, Asian Games etc. and that such restrictions appeared to limit the provision of services of participating players in the *relevant market for services of volleyball players in India*.

On this basis, the CCI ruled that the issue merits an investigation despite the amendment.

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

## Sports and Competition law in India

The investigation into VFI represents continuing efforts to reduce anti-competitive conduct in sports

- **Cricket:** In 2017, the CCI imposed a penalty of INR 52.24 crore on Board for Control of Cricket India ("BCCI") noting that the restrictions placed on players and personnel and terms in the IPL Media Rights Agreement amounted to denial of market access for organization of leagues competing with IPL. Another investigation against the BCCI on similar allegations pertaining to foreclose of the market for organization of competing cricket leagues is currently pending before the CCI.
- **Chess:** In 2018, the CCI imposed a penalty of INR 6,92,350 on the All India Chess Federation for abuse of dominance by imposing restrictions on chess players from participating in unapproved tournaments.
- **Athletics:** In 2019, the CCI found that the Athletics Federation of India's decision to take action against athletes/state units/officials who encourage or participate in unapproved marathons was not in contravention of the Act as it was in a draft form which was subsequently amended and never effectuated.
- **Hockey:** In 2013, the CCI in a majority order, found that the conditions imposed by Hockey India, on players restricting their participation in unsanctioned prospective private professional leagues were inherent and proportionate to the objectives of Hockey India and not anti-competitive.

## Significant market share does not indicate dominance - CCI closes matter against OYO

On July 31, 2019, the CCI dismissed allegations of unfair business practices against hotel rooms aggregator OYO under Section 4 of the Act in a complaint filed by RKG Hospitality's ("RKG"). RKG contended that certain clauses in their agreement with OYO were one-sided, unfair and discriminatory, which OYO was able to impose solely due to its dominant position.

Delineating the relevant market as the "*market for franchising services for budget hotels in India*", the CCI found that OYO was a "*leading player*" in the relevant market and had a "*significant market share*" (in terms of number of rooms and number of hotels). However, the CCI found that OYO was not a dominant player, since franchising is only one of the many business models under which a hotel can be operated under and that the competition *dynamics* in the franchising model - an emerging model in the hotel industry - "*are still unfolding*." This, per the CCI, "*hinders a deterministic assessment of the relevant market and OYO's position in it*."

Despite holding OYO not to be a dominant player, the CCI went on to assess allegations of abuse of dominance with respect to OYO's conduct stating that in the franchise model, the commercial arrangement requires certain reciprocal obligations between franchisor and franchisee, which may have "*valid business justifications*." The CCI examined clauses of the agreement such as those which granted a revenue share to OYO, barring RKG from engaging with online aggregators and exclusively entitling OYO to modify the structure of the hotel and put its signage.

This decision is intriguing, since the relevant market and the factors used to assess dominance in that market do not seem to fall in line. The CCI's order in fact suggests that no player in an emerging sector can be found to be in abuse of dominance. This may pose a concern for the CCI in other cases making the decision a problematic precedent. Since the CCI rightly found that clauses in the agreement do not *prima facie* showcase any abuse of dominance, its self-contradictory assessment of relevant market and dominance only makes the decision vulnerable.

The order of the CCI is accessible [here](#).



## Vertical Agreements



### The CCI to investigate allegations of Resale Price Maintenance against Maruti Suzuki India Limited

On 04 July 2019, the CCI directed an investigation against Maruti Suzuki India Limited ("MSIL"). The case was initiated after CCI received an e-mail from a dealer of MSIL alleging that MSIL was controlling the discounts offered by its dealers to the customers.

While MSIL argued that there is no agreement with its dealers amounting to imposition of discount control policy, the CCI was of the view that "agreement" under Section 2(b) has a wide import and includes within its purview any tacit understanding. Though MSIL argued that the Dealership Agreement contained a clause allowing dealers to sell the products at a price lower than the Maximum Recommended Retail Price, the CCI nevertheless thought it fit to order an investigation to ascertain whether such a clause is *"actually followed without any restraint"* and whether MSIL by controlling discounts was indulging in resale price maintenance ("RPM"). The CCI also noted that MSIL has a market share of over 50% in the domestic passenger car market.

The present investigation against MSIL may have following implications for the automotive sector:

- The CCI / Director General may expand the scope of investigation to include investigation into the conduct of other car manufacturers, as has been done [previously](#) in the investigation pertaining to supply of spare parts.
- Given the wide media coverage of the investigation against MSIL and in light of the significant downturn in the Indian automobile industry, the CCI's order against MSIL may prompt disgruntled distributors of any other automobile manufacturers to approach the CCI / DG with a similar complaint against other automobile companies.

The order of the CCI is accessible [here](#).

# Merger Update



## The CCI's Green Channel may give limited benefits

On August 13, 2019, the CCI, in a welcome change, amended the Combination Regulations and introduced an automatic channel for approval ("**Green Channel**") which is based on self-assessment by the parties. The recommendation for introducing an automatic route has been made by the Competition Law Review Committee ("**Committee**") as well, but was implemented by the CCI, a day before the submission of Committee's report.

The amended Combination Regulations, which came into effect from August 15, 2019, provide that a transaction where *under all plausible alternative market definitions, the parties, their respective group entities and/or any entity in which they, directly or indirectly, hold shares and/or control, are:*

- not engaged in similar or identical products or services i.e., have no horizontal overlaps;
- not in different stages or levels of production chain; or
- not engaged in products or services complementary to each other,

would, upon filling a notice to the CCI under revised Form-I, be deemed to be approved.

The parties to the proposed transaction would be required to submit a declaration (stating that the combination fulfills the criterion for automatic approval under the Green Channel), along with Form-I, specified in the amended Combination Regulations. The CCI may, however at any time after filing of the Form – I, and after providing the parties an opportunity of being heard, hold that the combination does not fall under Green Channel or is likely to cause AAEC. The deemed approval in such an event would be considered to have not been granted at all.

While the move is laudatory, it may be applicable for a very limited set of transactions, and mostly for green field investment. In the absence of the definition of 'complementary' in the Act or the Regulations and also any guidance from the CCI, the parties are likely to be cautious in applying under the Green Channel.

The CCI also revised the earlier Form-I to include necessary details regarding Green Channel. The revised Form I requires parties to provide market share information and data for three years as opposed to one year as required earlier.

The gazette notification can be accessed [here](#).

## Enforcement And Policy Update

### The Delhi High Court holds that the scope of DG's investigation is not limited to the *prima facie* order of the CCI

The first ever case dealing with the DGs power to *suo-moto* enhance the scope of investigation came up in 2011 in the matter of Grasim Industries Ltd. ("**Grasim**"). Grasim had challenged the investigation report submitted by the DG before the Delhi High Court ("**DHC**") where the Single Judge had held that inasmuch as the direction issued by the CCI was to investigate the violations pertaining to anti-competitive agreements, the DG could not have investigated into any violation by Grasim which pertained to abuse of dominant position.

On September 12, 2019, a Division Bench of the DHC, on appeal reversed the judgment of the Single Judge, upholding the DG's power to submit a report regarding the violation of Section 4 irrespective of whether the direction issued by the CCI in its *prima facie* order was with reference to violation of Section 3(3) (a), (b) and (c) of the Act, *alone*.

The Court while placing reliance on the Supreme Court's order in [Excel Corp](#) and its September 2018 decision in [Cadilla Healthcare](#) held that both Regulations 18 (1) and 20 (4) of the CCI Regulations, require the DG's investigation to be "*a comprehensive one*". While upholding the wide ambit of the powers of the DG, the Court noted that directions of the CCI merely "*trigger*" investigation and the CCI may not be able to anticipate what information may emerge during the course of investigation. Simply because the information that emerges does not pertain to the specific subject matter which the DG had been asked to investigate, would not constrain the DG from examining it as well.

The Division Bench interestingly pointed out that the Single Judge did not have the benefit of the Excel Corp and Cadilla judgements at the time of hearing Grasim's petition, otherwise the impugned judgment would not have stood as is. Notably, the appeal from the Cadilla judgment is pending before the Supreme Court.

The decision of the DHC is available [here](#).

### Stay on penalty does not excuse payment of interest, rules the Delhi High Court

On September 11, 2019, the DHC held that enterprises would be liable to pay interest on penalty for the period during which a stay granted by an appellate court was operational.

A penalty was imposed by the CCI on United India Insurance Company Limited ("**UIICL**") in July 2015, the payment of which was stayed by the Competition Law Appellate Tribunal (*subject to UIICL depositing 10% of the penalty*). In December 2016, the COMPAT upheld the CCI's findings but reduced the penalty amount from 2% of the average turnover to 1% of the relevant turnover. Although UIICL deposited the reduced penalty with the CCI, the CCI issued a demand notice seeking payment of interest on the reduced penalty for delay in payment of penalty.

UIICL contended before the High Court that as the COMPAT had conditionally stayed the payment of penalty and had thereafter reduced the penalty, the CCI's recovery notice was unsustainable as there was no delay in payment of penalty. Relying on the decision of the Supreme Court in [State of Rajasthan and Anr. v. J.K. Synthetics Limited](#), the High Court disagreed with UIICL's submissions and noted that as the COMPAT had reaffirmed the CCI's decision to levy penalty, the CCI's decision could not be seen to be inoperative for the period during which it was suspended on account of the stay order. Therefore, the interest on the delayed payment of penalty was required to be paid and was a statutory levy. Last year, the [NCLAT](#) relying on the same decision of the Supreme Court, refused to interfere in the demand notice issued by the CCI for payment of interest on penalty upheld by appellate court *qua* which a conditional stay had initially been granted.

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



## Absence of judicial member not to prevent the CCI from hearing final orders

On July 17, 2019, the DHC, held that the decision of a division bench of the DHC in the matter [Mahindra & Mahindra Ltd. & Ors v. Competition Commission of India & Anr.](#) (“**Mahindra Case**”), could not have the effect of preventing the functioning of the CCI.

The petition was filed challenging the orders passed by the CCI directing final hearing in the matter of [Nagrik Chetna Manch v. SAAR IT Resources Private Limited and Ors.](#), in the absence of a judicial member in the CCI. The petitioner, CAAD Systems and Services Private Limited (“**CADD Systems**”) had contended that the fixing of the final hearing by the CCI in the absence of the judicial member was in contravention of the law laid down in the *Mahindra Case*.

The High Court after analyzing the contentions of CADD Systems and those raised by the CCI, observed that High Court in the *Mahindra* decision did not interdict the functioning of the CCI pending the appointment of the judicial member.

The High Court also based its decision on Section 15 of the Act which specifically clarifies that the proceedings of the CCI would not become invalid because of any vacancy or any defect in its constitution. The High Court also referred to a decision of the Supreme Court in *B.K. Srinivasan and Ors. v. State of Karnataka and Ors.* [(1987) 1 SCC 658] where the court had considered a similar provision in the Mysore Town and Country Planning Act, 1961 and found that so long as no substantial prejudice was caused such clause would protect any decision on account of defect in composition. In the absence of any proof of substantial prejudice, the High Court rejected CADD’s petition.

The High Court’s order can be accessed [here](#).

## The CCI conducts workshop on E-commerce and Competition

On August 30, 2019, the CCI conducted a workshop on competition issues in the e-commerce sector. The workshop is a part of the CCI’s ongoing market study in the e-commerce sector. The workshop and the study largely concentrate on competition issues in three segments of e-commerce viz., online food delivery, hotel booking and retail space. During the workshop the CCI also released the [interim findings of the market study](#). The interim findings do not point towards any specific position being taken by the CCI and merely highlight the potential issues in the online sectors.

The workshop witnessed four panel discussions and brought together industry representatives from the online food delivery, hotel booking and retail space. Both the interim findings and the panel discussions revolved around contentious issues, such as the need for stronger regulation of e-commerce to prevent deep discounting, data masking and ensure platform neutrality. It is interesting to note that some concerns in the online retail sector such as the sale of counterfeit products and unauthorized dealers were also addressed by the [Draft guidelines on e-commerce for Consumer Protection](#) published on August 02, 2019, by the Department of Consumer Affairs.

During the last session, on the scope and extent of regulatory interference in e-commerce, the panelist, agreed that the sector was poised for remarkable growth and had led to undeniable consumer welfare. However, it was recognized that cautious regulatory interference may be necessary to address issues arising due to increasing market power, including deep discounting, access to data and data protection.

Recently, the CCI has been reported to be “closely watching” the practice of deep discounting by the e-commerce players. With the festive season approaching, it will be interesting to see if the CCI would take any action on this front.

The press release by the Ministry of Corporate Affairs on the CCI workshop can be accessed [here](#).

## ELP Insights

### The Competition Law Review Committee recommends amendments to the Act

On August 14, 2019, the Competition Law Review Committee ("**Committee**"), submitted its report ("**Report**") to the Ministry of Corporate Affairs ("**MCA**"). The Report makes various recommendations for amendments to both substantive and procedural aspects of the Competition Act, 2002 ("**Act**") and the Rules and Regulations framed under the Act.

The Committee was constituted on October 18, 2018, to review the existing competition law regime. With the benefit of experience of ten years of enforcement of the Act and in view of the dynamic business environment, the Committee was tasked with re-calibrating the existing competition law regime and suggesting changes to create a more robust competition enforcement regime.

The Committee was composed of ten members including the Secretary and the Joint Secretary of MCA, Chairpersons of the Competition Commission of India ("**CCI**") and Insolvency and Bankruptcy Board of India, prominent lawyers and academicians. The Report has been made after consultation with various stakeholders, including industry chambers, professional institutes, Government Departments/ Ministries, and experts.

A few key recommendations and suggestions have been highlighted below:

#### General recommendations

- **Settlements and commitments** – In line with the practices in foreign jurisdictions, the Committee recommended that the CCI should be empowered to accept settlements and commitments for contraventions under Section 3(4) (anti-competitive vertical agreements) and Section 4 (abuse of dominant position) of the Act. As per the Committee's recommendation, while, the applications for settlements should only be permitted after receipt of the report of the Director General ("**DG**"), commitments should be offered prior to the submission of the report of the DG. In case of settlements, the CCI's decision should be final and should not be appealable to the Appellate Authority viz., the National Company Law Appellate Tribunal ("**NCLAT**").



- **Dedicated competition bench at NCLAT** – The Committee recognized that with the Finance Act 2017, the NCLAT has been given an extensive mandate to deal with cases under Insolvency and Bankruptcy Code, the Companies Act and the Competition Act. This, according to the Committee, has reduced the overall efficiency of the appellate forum and increased the time lag in the appeal process. The Committee accordingly recommended that a separate bench dedicated to hearing appeals under the Act should be constituted.
- **Issuance of show cause notice with statement of charge** – The Committee recommended that the CCI, after receiving comments and objections to the DG Report from the parties, should issue a show cause notice to the parties containing a "statement of charges" to the concerned parties.
- **Penalty guidance** – The Committee supported the need for clear guidance on the imposition and computation of penalty. The Committee recommended that the Act be suitably amended to require the CCI to provide reasonable grounds for derogation from the penalty guidance. The Committee however did not think that a separate penalty hearing was required.
- **Changes to the Regulatory Architecture:** The Committee recommended setting up a governing board for the CCI consisting of four 'eminent persons' and two ex-officio members, for overseeing CCI's advocacy and quasi-legislative functions, including those pertaining to human resources. The Committee also recommended a merger of the office of the DG with the CCI, while maintaining the functional autonomy of the DG's office. In addition, the Committee recommended setting-up offices of the CCI at multiple locations across India in order to boost its advocacy functions and accessibility.
- **Inclusion of "buyer's cartel" and "hub and scope cartel":** The Committee recommended that the definition of cartel in Section 2(c) of the Act be clarified to include 'buyers' cartel. Further, it also recommended that an explanation should be included in Section 3(3) of the Act for expressly imputing liability on 'hubs' in 'hub-and-spoke' style cartel. However, imposition of liability on 'hubs' in 'hub-and-spoke' type cartels would not require establishing knowledge or intention
- **Withdrawal of leniency application and leniency plus:** The Committee recommended the introduction of a 'leniency plus' regime where a party investigated for a cartel will be incentivized to come forward with disclosure regarding other cartels which the regulator is not aware of. Enabling applicants to withdraw their leniency applications has also been suggested by the Committee.

### Recommendations regarding Abuse of Dominant Position

- **No 'Collective Dominance' in India:** The Committee noted that conduct covered by collective dominance may already be covered by Section 3 of the Act. Further, there has been limited enforcement actions for collective dominance in jurisdictions where collective dominance has been recognized. Noting this, the Committee recommended against introducing the concept of collective dominance in India.
- **Requirement of "effects" for "abuse of dominant position"?:** The Committee noted that the CCI has "wherever appropriate" analysed the effects of an alleged abuse and language of Section 4(2) of the Act has not proven to be a hindrance to the CCI to assess effects. The Committee found no significant issues with the decisional practice of the CCI in this regard.
- **IPR defence in cases of abuse of dominant position:** The Committee has recommended that a defence allowing reasonable conditions and restrictions for protecting IPR should be provided by way of specific provision in Section 4 of the Act.

### Recommendations regarding Anti-competitive Agreements

- **CCI can look into agreements other than horizontal and vertical agreements:** The Committee recommended that Section 3(4) of the Act be amended to expressly include "other agreements", over and above the vertical and horizontal agreements currently covered by Section 3 of the Act. These would be subject to the same rule of reason analysis as vertical agreements.

## Recommendations on mergers and acquisitions under the Act

- **Introduction of Green Channel for approval of combinations:** The Committee suggested that combinations which are unlikely to result in an AAEC should be given implied approval i.e., approved through a Green Channel. The Committee has suggested that the CCI should come up with guidelines for determination of eligibility for this Green Channel. This recommendation has already been implemented and the CCI on August 13, 2019 amended the Combination Guidelines to allow for approval under a Green Channel (i.e., automatic route) for certain combinations.
- **Derogation of standstill obligations:** The Committee also recommended that the CCI should have power to permit derogation of standstill obligations (i.e., obligations not to implement combination or any part thereof, prior to approval by the CCI) and provide modifications and conditions along with such derogation. It advised that this power should be used in exceptional circumstances only. The Committee recognized public bids and hostile takeovers as instances where such obligations may be diluted.
- **Door open for deal value threshold:** With its focus on new age digital markets, the Committee has recommended that an enabling provision should be introduced to allow the Government to introduce necessary deal value threshold. These thresholds should be based on clear and objectively quantifiable standards for computing the values and a local nexus criteria to enable reviewing mergers and acquisitions that may have an AAEC in the market but due to small or insignificant asset/turnover size of the target were not notifiable under the existing thresholds.
- **Equal opportunity of negotiating remedies during the review process:** The Committee has recommended that the CCI should, at various stages of the merger assessment process, allow an equal opportunity to the parties to propose remedies, though the final decision may remain with the CCI.

The Report of the Committee makes some very laudable suggestions, such as empowering the CCI to accept settlements and commitments, introduction of a Green Channel, laying down guidance for imposition of penalties, creation of a separate bench for dealing with competition matters at the NCLAT, removing the asymmetrical appeal rights under the Act. Certain clarificatory amendments, such as, amendments to the explanations to Section 3(4) of the Act which describe various vertical agreements, empowering the CCI to pass orders on confidentiality requests, integrating the target-based exemption into the Act, are also welcome and would bring much needed certainty.

However, the rationale behind certain other recommendations made in the Report is unclear and would have benefited from greater analysis along with detailed reasonings. The suggestions on reforming the regulatory architecture, specifically the composition of the Governing Board and merger of the DG with the CCI; the requirement to issue a show cause notice after objections to the DG's report have been received; provision for withdrawal of leniency application; allowing for compensation claims to be filed only after determination of appeal by Supreme Court; not mandating CCI to look into effects in cases of abuse of dominant position could have benefited from a deeper analysis and discussion.

The Report is not open for further public comments at this stage, but the MCA may decide to invite further comments. It is also possible that the MCA may suggest amendments based on the Report without any further public consultation.

A copy of the report is available [here](#).



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