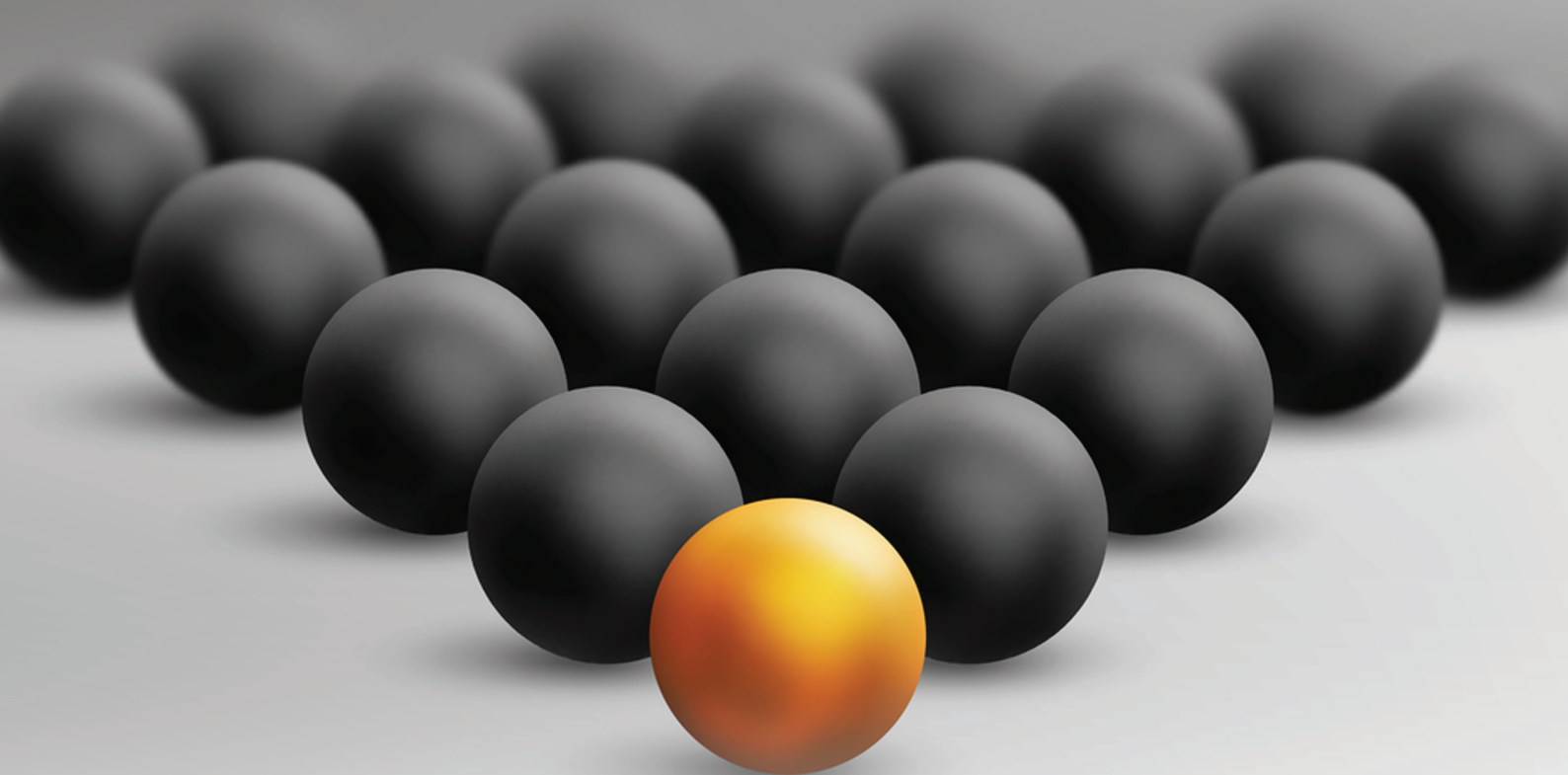




ECONOMIC  
LAWS  
PRACTICE  
ADVOCATES & SOLICITORS

# COMPETITION LAW & POLICY UPDATE

QUARTER 1 OF 2020



## SNAPSHOT

### CCI directs investigation against e-commerce giants

*Amazon and Flipkart accused of indulging in preferential treatment, deep discounting and exclusive agreements*

02

### CCI continues scrutiny into online hotel aggregator sector

*MMT and OYO being investigated for imposing unfair and exclusionary conditions on certain hotels listed on its platform and potentially denying market access to competitors*

04

### Grasim's unilateral conduct invites INR 300 crores penalty

*In the market of VSF, CCI finds Grasim's pricing and discount policy to be discriminatory to downstream spinners*

06

### CCI amends General Regulations

*DG can investigate any other contravention(s) that stand revealed during the investigation process, no longer curtailed by scope of the prima facie order*

08

### ELP Insights

*CCI mulls over introducing the settlements and commitments mechanism in the Act - implications and way forward*

09

## SECTORS COVERED IN THIS ISSUE



E-commerce



Hotels



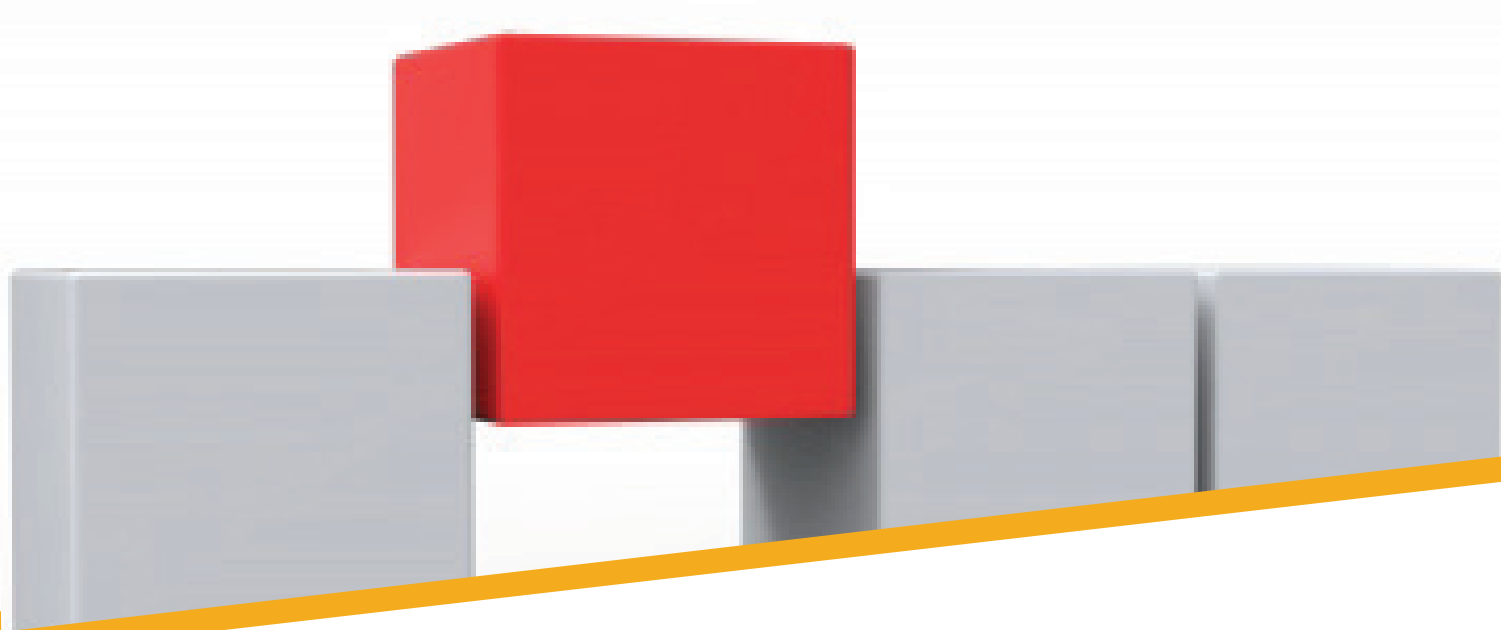
Textiles



Railways

Decorative  
Paints

Finance



## Anti-Competitive Agreements

### CCI orders investigation against Amazon and Flipkart for their exclusive and preferential vertical agreements

On January 13, 2020, the Competition Commission of India (CCI) ordered an investigation into the alleged contravention of the provisions of the Act by Amazon Seller Services Pvt. Ltd. (**Amazon**) and Flipkart Internet Services Pvt. Ltd. (**Flipkart**), upon an information filed by Delhi Vyapar Mahasangh, a traders' association (**Association**), backed by the Confederation of All India Traders (**CAIT**).

The Association alleged contravention of Section 3(4) read with Section 3(1) of the Act by Amazon and Flipkart (collectively, referred to as **platforms**) on account of: (a) exclusive vertical anti-competitive agreements with certain preferred sellers; (b) exclusive launch of mobile phones on their platforms, and (c) foreclosure of competition by providing deep discounts and preferential listing to only preferred sellers. The Association also alleged contravention of Section 4(2) read with Section 4(1) of the Act on account of collective abuse of dominant position by the two companies.

On the allegation of joint abuse of dominant position by Amazon and Flipkart under Section 4, the CCI did not carry out an assessment since collective dominance is not recognized within the legal framework of the Act.

With regard to the other allegations relating to vertical agreements under Section 3, the CCI noted that the allegations are interconnected and warrant a holistic investigation to examine the key provisions, operation and the effect such agreements have on competition.

The CCI directed the Director General (**DG**) to investigate into the following aspects relying on evidence available on record such as email communication with the sellers, media reports and advertisements by the platforms about their respective exclusive launches:

- Preference given to certain sellers by the platforms and linkages between the platforms and such sellers;
- Exclusive arrangements between smartphone/mobile phone brands and platforms/preferred sellers for launch of mobile phones;
- Significant discounts provided by preferred sellers and the funding for such discounts;
- Foreclosure of competition by virtue of such preference, exclusive agreements and deep discounting.

The CCI's order came immediately following the issuance of its [market study](#) on e-commerce in India (summarized below), wherein interestingly, it had recommended *self-regulation* by e-commerce platforms in India.

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

## Karnataka High Court grants stay on investigation against Amazon and Flipkart

Amazon followed by Flipkart approached the Karnataka High Court by way of a writ petition challenging the order of the CCI directing an investigation into the alleged contravention of Section 3 of the Act (**Investigation Order**). Amazon *inter alia* challenged the Investigation Order on the ground of lack of jurisdiction since there was a pending inquiry against Amazon before a specialized regulator for allegedly violating the FDI norms by providing deep discounts. Placing reliance on the Bombay High Court's judgment in *Star India Private Limited v. CCI*, wherein it was held that the CCI needs to clearly identify the "agreement" in question before directing an investigation against an anti-competitive agreement, Amazon argued that CCI failed to identify the agreement between Amazon and the sellers on its platform in the Investigation Order.

Amazon and thereafter Flipkart successfully obtained a stay on the investigation ordered by CCI. The Association challenged the stay order before a larger bench, but the same is yet to be listed and heard.

## CCI continues its scrutiny of the online hotel aggregator sector, initiates incremental investigation into MakemyTrip and OYO

Late last year, on receiving a complaint from a trade association (**2019 Case**), brought against MakemyTrip Private Limited (**MMT**) and Oravel Stays Private Limited (**OYO**) for engaging in predatory pricing and entering into exclusionary agreements (horizontally), the CCI directed investigation into the conduct of MMT and OYO holding MMT to be *prima facie* dominant in the market of online intermediation services for booking of hotels in India. In February this year, the CCI received a complaint from Rubtub Solutions Pvt. Ltd. (**Treebo**), which provides budget hotels, alleging,

- **exclusion from listing** of Treebo and its partner hotels from MMT on account of the commercial arrangement between MMT and OYO;
- **imposition of price parity restrictions** on Treebo partner hotels through the Chain Agreement; and
- **imposition of exclusivity conditions** on Treebo through the Exclusive Agreement.

After reviewing the information provided, the CCI found *prima facie* abuse of dominant position by MMT (*under Sections 4(2)(a)(i) and 4(2)(c) of the Act*) and a vertical agreement having appreciable adverse effect on competition (**AAEC**) between MMT and OYO (*under Section 3(4) of the Act*) and clubbed the investigation in the present case with ongoing investigation in the 2019 Case, due to similarity in facts and allegations. In directing the DG to investigate the practices of MMT and OYO, the CCI observed that,

- Both MMT and OYO have considerable presence in their respective market segments and restrictive agreement between them may lead to refusal to deal which may have an AAEC;
- The Chain Agreement imposed *price parity* and *room parity* restrictions which may result in removal of the incentive for platforms to compete on the commission they charge to hoteliers, may inflate the commissions and the final prices paid by consumers and may also prevent entry of new low cost platforms. Therefore, these were *prima facie* held to be anti-competitive and were directed to be investigated under Section 3(4) and Section 4 of the Act;
- Per the *exclusive* clause Treebo was not permitted to list its hotels situated in cities classified under category A and B on MMT's two competitors – Bookings.com and Paytm for a period of 72 hours and 30 days respectively, prior to the check-in day. These restrictions *prima facie* appear unfair, and hence exploitative, under Section 4(2)(a)(i) of the Act and could potentially also lead to denial of market access for Bookings.com and Paytm regarding the hotels branded by Treebo under Section 4(2)(c) of the Act.

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



# Abuse of Dominant Position

## CCI dismisses abuse allegations against Ministry of Railways and its ticketing unit

After conducting a detailed investigation, the CCI dismissed a complaint alleging that the ticketing practices of Ministry of Railways (**MoR**) and Indian Railway Catering and Tourism Corporation (**IRCTC**) (collectively, **OPs**) were abusive, by holding that its practices were efficiency enhancing and the policy in question was *inter alia* implemented uniformly without any discrimination.

When directing a detailed investigation into the matter in November 2018, the CCI had noted that the rounding off actual fares for online bookings without any plausible justification *prima facie* amounted to imposition of unfair condition in the market for sale of rail tickets in India.

The DG investigation concluded that rounding off the base fares by the OPs was not violative of section 4 of the Act and found that -

- The OPs though government entities were 'enterprises' under the Act as the High Court had already identified Indian Railways to be an enterprise in an earlier ruling;
- That the OPs being the sole entity which undertakes transportation of passengers and goods as well as being its only agency selling online tickets, is dominant in the identified relevant market;
- That the pricing of passenger fares manifests the principle of rate action and is therefore, non-discriminatory and that the income generated from rounding off the actual base fare was a miniscule portion of the receipt of total passenger fare.

The CCI agreed with the DG's findings and affirmed its recommendation, noting that the policy had efficiency parameters and helped the MoR to service their passengers better, especially as the uniformity is maintained irrespective of different modes of booking viz. online or offline. It was also observed that the policy of the MoR was stated to be duly backed by commensurate social and commercial justification and thus such conduct cannot be classified as exploitative abuse by a dominant enterprise.

Interestingly, the CCI also noted that generally the plea of recouping of losses cannot be an objective justification, in allegations of abuse of dominant position, and that anti-competitive conduct cannot be justified by requirement of performance of every social obligation by the enterprise under investigation. However, in the present case, the CCI recognized efficiency parameters associated with the rounding off practice, as it helps in saving the time for both the end consumer as well as the OPs and there is no adverse effect to the interest of the consumers as there is no evidence of discrimination.

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

## CCI orders investigation against Asian Paints for vertical restraint and abuse of dominant position

On 14 January 2020, the CCI ordered an investigation into the alleged contravention of Section 4(1) and Section 3(4) read with Section 3(1) of the Act by Asian Paints Ltd. (**Asian Paints**). The complainant, JSW Paints Private Ltd. (**JSW Paints**), a part of the JSW group of companies levelled accusations against Asian Paints for preventing dealers/distributors/retailers from dealing with JSW Paints by taking coercive actions.

JSW Paints approached the CCI aggrieved by the conduct of Asian Paints particularly in the States of Karnataka, Tamil Nadu and Telangana *inter alia* on the following grounds:

- Immediately upon the launch of decorative paints by JSW Paints, Asian Paints began pressurizing dealers to cease dealing with JSW Paints;
- Dealers were coerced to remove display of JSW Paints products from retail shelves and signboards;
- Dealers were threatened by disallowing discretionary discounts, loyalty schemes, etc. for engaging with JSW Paints.

The CCI observed that in the market for manufacture and sale of decorative paints by the organized sector in India, Asian Paints *prima facie* enjoyed a dominant position with a market share of 55.92% in the FY 2017-18 and 56.3% in the FY 2018-19. Further, Asian Paints was stated to have 60,000 dealers and 135 depots across the

country while the next big competitor had 25,000 dealers and 129 depots.

As per the CCI, Asian Paints *prima facie* abused its dominant position under Section 4 by denying market access to JSW Paints, by threatening and pressurizing dealers from indulging in business with JSW Paints. Further, Asian Paints was also *prima facie* found to have denied access to distribution channels in the relevant market to JSW Paints by threatening and coercing such dealers through various means, including taking punitive action against dealers dealing with other paint manufacturers.

With respect to contravention of Section 3 of the Act, the CCI noted that the conduct of Asian Paints *prima facie* appeared to be directly aimed at foreclosing the entry of a new entrant like JSW Paints from competing in the relevant market while also driving existing competitors like Nippon Paints out of the market. In light of this, the CCI directed an investigation against Asian Paints under Sections 3 and 4 of the Act.

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

### CCI penalizes Grasim for abuse of dominant position

On March 16, 2020 the CCI imposed a penalty on Grasim Industries Limited (**Grasim**) for abusing its dominant position in the 'market for supply of Viscose Staple Fibre (VSF) to spinners in India'. Grasim was alleged to be charging discriminatory prices from its customers i.e. the spinners and was also alleged to be imposing supplementary obligations upon them in contravention of Section 4 of the Act.

Before dealing with the allegations, the CCI delineated the relevant market on the basis that for spinners different fibres viz. VSF, other manmade fibres and cotton are different products and VSF is not substitutable with other fibres. The relevant geographic market was defined as India.

On dominance, the CCI found Grasim to enjoy a dominant position in the relevant market defined on the basis of factors such as market share, Grasim's size and

resources, lack of competitors, vertical integration, sale and service network and entry barriers including regulatory barriers.

With respect to the allegations, the CCI noted that the data provided by Grasim confirms that it was charging discriminatory prices from downstream spinners. Such data, according to the CCI, negated the justifications provided by Grasim for charging differential pricing. CCI also noted that since Grasim communicates prices confidentially to each spinner, there is information asymmetry which adversely affects the spinners' ability to supply yarn at a competitive price. With respect to Grasim's pricing and discount policy, CCI noted that the plethora of discount parameters, frequent changes effected to the pricing and discount policy coupled with non-transparency of the same to its buyers also indicate Grasim's unilateral and abusive behavior in contravention of Section 4(2)(a)(ii) of the Act.

Separately, the DG found Grasim to have sought details of production and exports from the spinners for sale of VSF. Such requisitions imposed upon the spinners were found to be in the nature of supplementary obligations having no connection with the primary sale. By seeking the details of production and sale from its customers/spinners, CCI found Grasim to be controlling the entire market in its favor in contravention of Section 4(2)(d) of the Act.

Accordingly, the CCI directed Grasim to refrain from adopting unfair/discriminatory pricing practices and seeking the consumption details of VSF from the spinners. Further, the CCI directed Grasim to put in place a discount policy which is transparent and non-discriminatory to all the market participants and make it easily and publicly available. Grasim was also directed to not place any end-use restriction on the spinners. The Commission imposed a penalty of INR 301.61 crore on Grasim calculated @ 5% of the average revenue from sale of VSF by Grasim in the relevant market.

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

# Appellate Enforcement

## NCLAT upholds CCI's approval of Walmart/ Flipkart

On March 12, 2020 the National Company Law Appellate Tribunal (**NCLAT**) dismissed the appeal filed by the Confederation of All India Traders (**CAIT**), a trader's body, against the order of the CCI approving the combination between Wal-mart International Holdings, Inc. (**Walmart**) and Flipkart Private Ltd. (**Flipkart**).

CAIT had alleged that the Walmart/ Flipkart combination would allow the ecommerce giants to engage in predatory pricing, preferential and exclusive treatment to certain preferential sellers. The NCLAT did not find any merit in CAIT's allegations and held that the CCI, while approving the combination, had considered:

- The business activities of Flipkart and Walmart including the horizontal overlaps in the B2B segment and had assessed in detail that no vertical overlaps could be found between the parties;
- That both parties are entities with foreign investments and are thus governed by the government's Foreign Direct Investment Policy which lays the boundaries of B2B sales within which the parties had to operate,

and had therefore passed a reasoned and detailed order approving the transaction after considering the issues raised by CAIT after finding that the combination was not resulting in elimination of any major player in the relevant market.

Relying on its decision in the matter of [Piyush Joshi v. CCI](#), the NCLAT noted that in absence of any *prima facie* opinion that the combination is likely to cause or has caused any AAEC, the CCI was not required to follow any procedure under Section 29 and Section 30 of the Act and that it was only required to pass approval order under Section 31 of the Act. The NCLAT further noted that in the present matter no *prima facie* case was made out on the facts and that the decision of the CCI was correct.

Notably, in January 2020 this year, the CCI directed investigation against Flipkart and Amazon into allegations of exclusive arrangements, deep discounting and preferential listing to see if such practices are being used as an

exclusionary tactic to foreclose competition under Section 3(1) and read with Section 3(4) of the Act.

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

## Penalty being higher than the earnings not a ground for interference, holds NCLAT

The NCLAT *vide* its order dated February 17, 2020 while considering the evidence on record, dismissed the appeal preferred by two suppliers of fans to the Indian Railways and BEML Limited. It held that the plea that an enterprise is a family run small scale industry and its net profit for a year is less than the penalty imposed on it by the CCI, is not a ground for interference with the CCI's decision.

The two appellants Western Electric & Trading Company and R. Kanwar Electricals had challenged the CCI's order imposing a penalty on them along with a penalty on Pyramid Electronics for bid rigging in tenders issued by the Indian Railways and BEML Limited. The CCI however granted a reduction of 75% in the penalty imposed on Pyramid Electronics for its application under Competition Commission (Lesser Penalty) Regulations 2009 and its cooperation during the investigation.

The appellants had challenged decision of the CCI for placing reliance on allegedly unreliable statements of the representative of Pyramid Electronics and the fact that the enterprises were forced to follow the directions of the representative of Pyramid Electronics. The NCLAT noted that the CCI had relied upon an email communication, the call data records, the statements of the representatives, the conduct of the enterprises and the prices quoted by them which clearly reflected that the three enterprises had an understanding/arrangement. It further noted that the three enterprises had engaged in bid-rigging for at least two tenders issued by the Indian Railways and BEML Limited during February-March 2013 and that the appellants had failed to substantiate the grounds raised in the appeals. The NCLAT in light of the above concluded that the order of the CCI did not require any interference.

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





## Imposition of penalty only in one case is a lenient view, holds NCLAT

The NCLAT *vide* its common order dated March 13, 2020 dismissed two appeals preferred by Verifone India Sales Pvt. Ltd. (**Verifone**) against two separate orders passed by the CCI. The CCI in its orders dated April 10, 2015 had found Verifone to have abused its dominant position in the relevant market of supply of hardware of point of sale (**POS**) terminals in India. The NCLAT, while dismissing the appeals preferred by Verifone, held that based on the facts and evidence on record the CCI had adopted a lenient view by imposing a penalty in only one of the two cases.

Atos Worldline India Pvt. Ltd. and Three D Integrated Solutions Ltd. in their separate information filed before the CCI had alleged that Verifone had abused its dominant position, amongst others, by imposing unfair and restrictive conditions in access to the software development kits (**SDK**) for its POS terminals. It was further alleged that Verifone was entering into the market for providing software services for its POS terminals and in

the garb of protecting its intellectual property rights was seeking access to confidential information of other software developers through its SDK agreements. The CCI based on the facts and findings in the investigation report of the DG observed that the above conduct of Verifone were an abuse of its dominant position.

The NCLAT while dismissing the appeals made the following key observations:

- A dominant player mandating a party to sign an agreement, consisting of restrictive and arbitrary clauses/terms, within the dotted line of the agreement without negotiations will also amount to abuse of dominant position;
- For assessment of dominant position of an enterprise, only the products or technology, which were in use during the period under investigation, can be considered;
- For assessment of dominance the relevant factor is the product and not its intended use.

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



## Policy Update

### CCI revises guidelines notes to reflect Green Channel filing system

In August 2019, as part of its ongoing efforts to streamline the merger filing process, the CCI had amended the Combination Regulations, introducing among other things, an automatic route for approving certain combinations under Green Channel and had also revised the Form I (*one of the formats for giving notice of a combination to the CCI*).

Now the CCI has revised the guidance notes to Form I with a view to incorporate and explain the changes made last year. The guidance notes provide the scope of information and documents to be submitted along with Form I and also provide clarity on the eligibility criteria for seeking Green Channel clearances. For instance, the parties to the combination are now required to provide details of the sector to which the combination belongs, including, details of supply chain, intermediate customers, role of imports and emerging technologies in the sector.

The revised guidelines can be accessed [here](#).

### CCI codifies judicial directions on DG's investigative powers, amends General Regulations

With a view to ascribe the judicial treatment of the scope of the investigation carried out by the DG, the CCI on February 6, 2020 (effective from same date), made a small yet significant change to the Competition Commission of India (General) Regulations, 2009 (**General Regulations**).

The CCI amended Regulation 20(4) of the General Regulations to tweak the operative part of the regulation and eliminate the part which stated that the investigation report(s) of the DG *must contain the findings on each of the allegations made in the information or reference*. The amended Regulation 20(4) now reads as –

*“20(4) –The report of the Director General shall contain his findings together with all the evidences or documents or statements or analyses collected during the investigation.”*

In its recent judgements, the Delhi High Court had settled the judicial position regarding the wide scope of DG's investigation<sup>1</sup> placing reliance on the decision of the Supreme Court of India decision in *Excel Crop Care Limited v. CCI*. Here the court had categorically stated that *“if other facts also get 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 the competition, the DG would be well within his powers to include those as well in his report”*. The Supreme Court in the matter had upheld the validity of the DG's report that also contained findings on the existence of a cartel in relation to a tender which was not mentioned in the information to the CCI.

With this amendment, the CCI has done away with the erstwhile procedural uncertainty by explicitly empowering the DG to conduct investigation process beyond the issues set out in the *prima facie* findings of the CCI to cover any other contravention(s) that stand revealed during the investigation process.

The notification as published in the national gazette can be accessed [here](#).

### CCI recommends online platforms to adopt certain self-regulatory measures based on its market study on e-commerce in India

On January 8, 2020 the CCI published a report based on a market study on e-commerce in India (**Report**) covering three broad categories of e-commerce i.e. consumer goods, accommodation services and food services. The CCI identified “bargaining power imbalance” and “information asymmetry” between e-commerce platforms and their business users as the core issues and suggested certain self-regulatory measures for platforms with a view to increase transparency.

In its Report, the CCI identified five issues in the e-commerce sector which are likely to pose concerns under the Act. It was however, clarified that an assessment of these issues (identified below) would be subject to a case – by – case determination.

- Platform neutrality;
- Platform to business contract terms;
- Platform price parity clauses;
- Exclusive agreements; and
- Deep discounting.

The CCI also identified ensuring competition, promoting transparency and fostering sustainable business relationships between all stakeholders as its advocacy priorities. Report, as published by the CCI, can be accessed [here](#).

A more detailed update published by our team in January 2020, assessing the key takeaways from the report, can be accessed [here](#).

<sup>1</sup> See orders of Delhi High Court in *CCI v. M/s. Grasim Industries Ltd. and Cadila Healthcare Limited and Anr. v. CCI*.

## ELP Insights

### Introduction of settlements and commitments mechanisms under the ACT: Implications and way forward

In February this year, the Ministry of Corporate Affairs made the Draft Competition (Amendment) Bill, 2020 (**Draft Bill**) available in the public domain and invited comments to the same. The Draft Bill proposes, amongst others, the introduction of a settlements and commitments regime under the Act. This proposal is based on the recommendations of the Competition Law Review Committee (**CLRC**) which was constituted to review the existing competition law framework in India.

#### The Need for Settlements and Commitments

In the interest of speedier resolution of cases, the CLRC recommended settlements and commitments as an additional enforcement mechanism. Settlements and commitments are nothing but “negotiated remedies” which exist in different forms in other jurisdictions. CLRC noted that jurisdictions like the EU, UK and Singapore allow for settlements<sup>2</sup> and commitments. For India, CLRC deliberated on the advantages of introducing such mechanisms and agreed that procedural and enforcement efficiencies are the driving factors behind them. This would mean that businesses can avoid long investigations/uncertainty and the CCI can free up its scarce resources.

The issues of efficiency are particularly relevant for the CCI. As of January 2020, the CCI had 165 matters pending.<sup>3</sup> In its 2016-17 Annual Report, the CCI noted that, “... the investigations are taking increasingly more time for completion. This partly reflects inadequate staff strength in the office of the DG and partly reflects increasing complexity of cases being referred to the DG by the Commission.” Unlike combination matters under Sections 5 and 6 of the Act that are subject to statutory timelines, the CCI expends a significant amount of resources on long drawn investigations which are followed by an adjudication process. Therefore, the CLRC’s recommendation of introducing a mechanism for settlements and commitments under the Act for faster resolution of cases is welcome.

<sup>2</sup> The settlement mechanism in these jurisdictions (expressly or otherwise) applies to cartel cases as well. However, the settlement mechanism as contemplated under Section 48A of the Draft Bill does not cover cartel cases.

<sup>3</sup> Ministry of Corporate Affairs, Monthly Newsletter, Volume 28 (February 2020) available [here](#)

### The Proposed Provisions under the Draft Bill

The provisions under new Sections 48A, 48B and 48C have been proposed by the Draft Bill to introduce settlements and commitments under the Act. Under the proposed Section 48A of the Draft Bill, parties against whom an inquiry has been initiated for anti-competitive vertical agreements and/or abuse of dominant position (i.e., Sections 3(4) and 4 of the Act), can offer “settlements” to the CCI. The Draft Bill states that:

- Settlements can be offered only after receipt of the DG’s report and before the CCI issues its final order.
- The CCI may accept or reject the settlement at its discretion having regard to the nature, gravity and impact of the contraventions and/or on payment of a monetary sum or any other terms set by the CCI.
- If CCI accepts the settlement proposal, it would specify the manner in which the settlement terms will be implemented and monitored.
- If the CCI were to find the settlement proposal inappropriate in the circumstances or if the parties and the CCI do not arrive at a consensus within a prescribed time, the CCI would pass an order rejecting it and proceed with inquiry.
- Most importantly, an appeal cannot be filed against any order passed by the CCI accepting or rejecting the settlement with NCLAT.

In addition to settlements, Section 48B of the Draft Bill has introduced a commitments mechanism where the CCI can accept commitments offered by the parties against whom an inquiry has been initiated for anti-competitive vertical agreements and abuse of dominant (i.e., Sections 3(4) and 4 of the Act). The Draft Bill states that:

- Commitments may be submitted any time after the issue of the *prima facie* order of the CCI but before receipt of the investigation report of the DG. The CCI may accept or reject the commitments offered at its discretion.
- The CCI can accept the commitments after taking into consideration the nature, gravity, and impact of the contraventions and effectiveness of the proposed commitments.

- If CCI accepts the commitments, it would also specify the manner in which the commitments will be implemented and monitored along with any other terms as may be determined by the CCI.
- If the CCI were to find the commitments proposal inappropriate in the circumstances or if the parties and the CCI do not arrive at a consensus within a prescribed time, the CCI would pass an order rejecting it and proceed with its inquiry.
- An appeal cannot be filed against any order passed by the CCI accepting or rejecting the commitment with the NCLAT.

Further, Section 48C of the Draft Bill states that the CCI would have the power to revoke its settlement or commitments order and impose costs on the parties if the applicant (i) fails to comply with the order at any time after it is passed; or (ii) it comes to the notice of the CCI that the applicant has not made full and true disclosure; or (iii) there has been a material change in the facts. The applicant may be liable to pay appropriate legal costs incurred by the CCI which may extend to INR 1 crore and the CCI may restore or initiate the inquiry.

### Implications and the Way Forward

In view of the language of Section 48A as drafted under the Draft Bill, offering a settlement may not be an attractive option for potential applicants for the following reasons:

- Section 48A in its current form suggests that an applicant may need to admit to contravening the Act while making an application for settlement.<sup>4</sup>
- The proposed provision does not allow an applicant to withdraw its settlement offer.
- Section 48A also bars an applicant from filing an appeal against the CCI’s settlement order.
  - However, compensation claims under Section 53N may still lie against such an applicant based on the order of the CCI under Section 48A of the Draft Bill.
  - Therefore, the proposed settlement mechanism leaves the applicant susceptible to compensation claims without a right to appeal.

<sup>4</sup> Sub-section (3) of Section 48A reads as follows - “The Commission may, after taking into consideration the nature, gravity and impact of the contraventions, agree to the proposal for settlement.”

- In cases where the CCI rejects the settlement proposal, it will continue with its inquiry under Section 26 of the Act.

- However, the proposed Section 48A does not contemplate a situation where information shared by the applicant with the CCI including any admission of contravention may be held against such applicant as the CCI continues its inquiry.
- Such potential prejudice against the applicant in a continuing inquiry under Section 26 of the Act may deter a potential applicant from opting for the settlement mechanism as currently contemplated under the Draft Bill.

While the settlement mechanism is available after the receipt of the DG report and before the CCI issues its final order, a party can offer commitments only before the receipt of the DG's report. In view of the language of Section 48B as drafted under the Draft Bill, offering commitments may not be an attractive option for potential applicants for the following reasons:

- At the investigation stage, parties are unclear of the case against them.
- Neither the Act nor the Draft Bill in its current form contemplate any communication with the party under investigation on the evidence on record or the potential outcome of the investigation.

- In such a situation, proposing commitments when a favorable report remains in prospect may not be an attractive option for a party under investigation.

- Moreover, like Section 48A, Section 48B which provides for the commitments mechanism does not allow the party offering commitments to appeal or withdraw its offer.
- Similarly, the proposed provision does not protect an applicant against prejudice if the CCI decides to reject the offer.
- For reasons explained in the context of settlements above, such potential prejudice against the applicant in a continuing inquiry under Section 26 of the Act may deter a potential applicant from opting for the commitments mechanism as currently contemplated under the Draft Bill.

The idea of incorporating settlements and commitments under the Act is ambitious and admirable. It will add to the ease of doing business in India and enable CCI to focus on its enforcement priorities. However, to incentivize and develop an effective mechanism for settlements and commitments under the Act, the Draft Bill needs to account for the aspects discussed. These aspects must be addressed appropriately before the Draft Bill is tabled before the Parliament.





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



[elplaw.in](http://elplaw.in)



[insights@elp-in.com](mailto:insights@elp-in.com)



[/elplaw.in](https://www.facebook.com/elplaw.in)



[/ELPIndia](https://twitter.com/ELPIndia)



[/company/economic-law-practice](https://www.linkedin.com/company/economic-law-practice)

## DISCLAIMER:

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