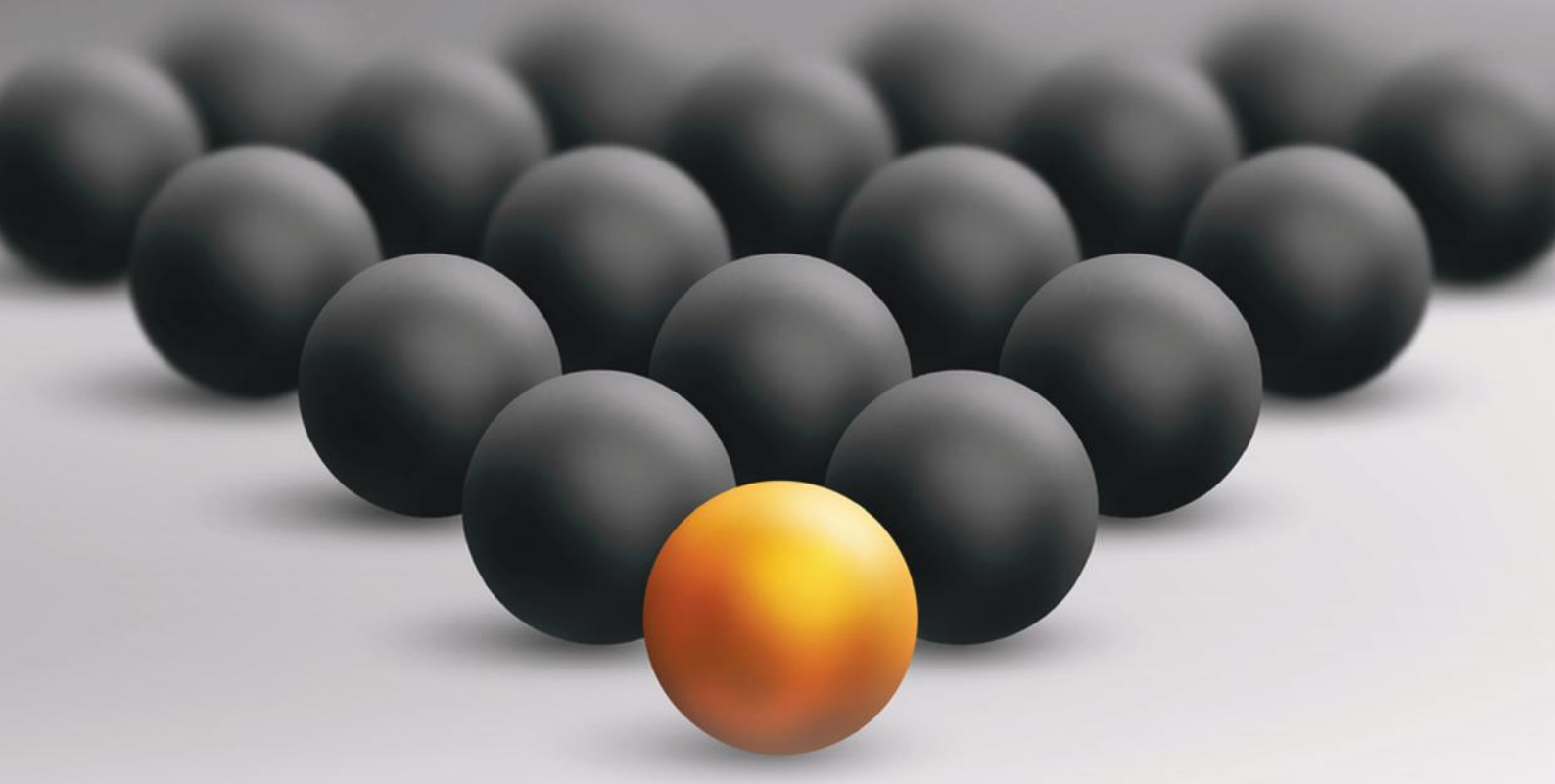
ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS

COMPETITION LAW & POLICY UPDATE

QUARTER 2 OF 2020



SNAPSHOT

SECTORS COVERED IN THIS ISSUE

E-commerce | Finance | Automotive Components | Digital Market

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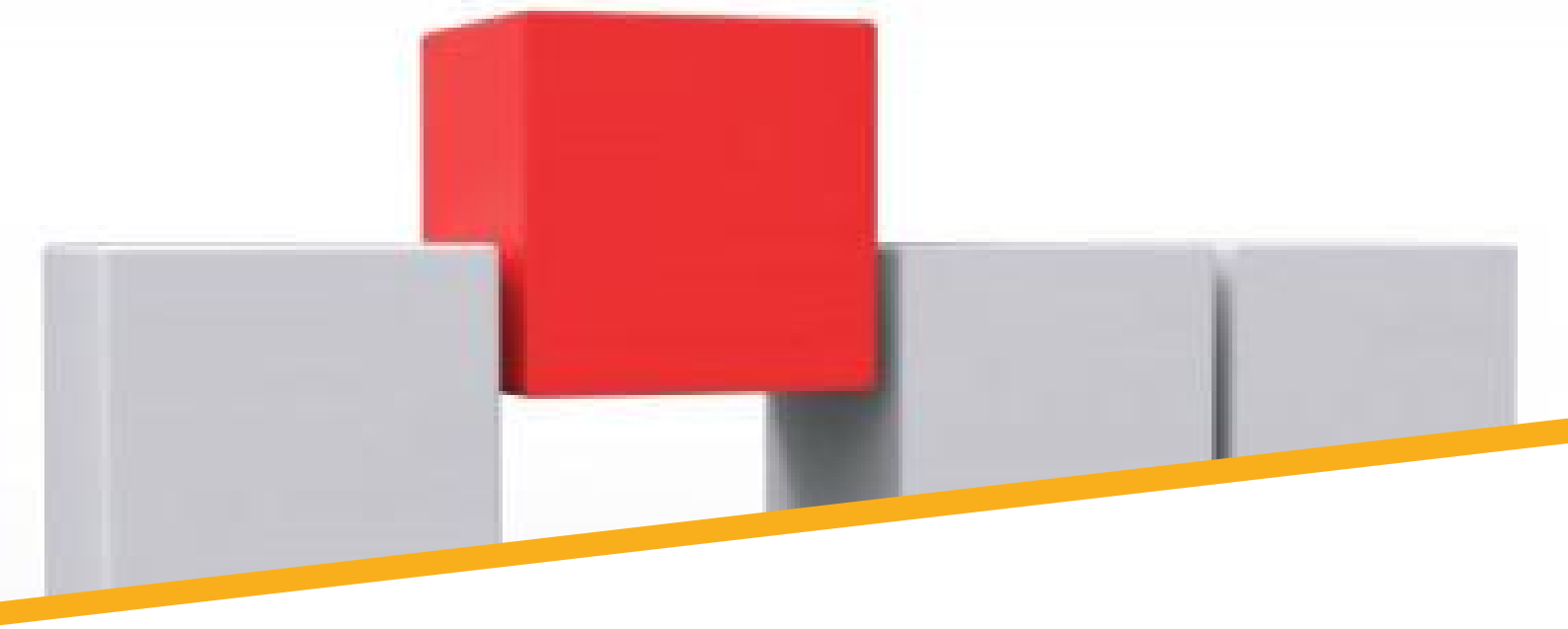

Anti-competitive agreements

CCI finds cartelization amongst bearing manufacturers, but stops short of imposing a penalty

The Competition Commission of India (**CCI**) in its order dated June 5, 2020 has found four bearing manufacturers along with their identified employees to have contravened the provisions of the Competition Act, 2002 (**Act**). The CCI however, refrained from imposing any monetary penalty on the ground of **peculiar circumstances** in the matter. The investigation in the matter was initiated upon an application filed by Schaeffler India Limited (**Schaeffler**), under the leniency provisions of the Act. It was alleged that Schaeffler along with SKF India Ltd (**SKF**), National Engineering Industries Ltd (**NEI**), Tata Steel Limited, Bearings Division (**Tata**) and ABC Bearings (**ABC**) had cartelized in seeking price increases from original equipment manufacturers (**OEM**) in the automotive and industrial markets in addition to distribution market.

The CCI in its analysis has agreed with the findings of the DG that there was inadequate evidence to establish cartelization amongst the bearing manufacturers with respect to the distribution market segment. The CCI also agreed with the DG on there being inadequate evidence against ABC bearings having cartelized with the other bearing manufacturers. The CCI in its decision has further confirmed the findings of the DG with respect to the contravention of the provisions of the Act by Schaeffler, SKF, NEI and Tata (**OPs**) in the sales to the automotive and industrial OEMs during November 2009 to January 2011 (**Relevant Period**). The CCI observed that the circumstantial evidence, statements and call data records of the identified employees of the OPs, indicate that the identified employees of the OPs had attended two of the three alleged meetings during the Relevant Period to discuss the prices to be quoted to the OEMs. The CCI in light thereof concluded that the OPs had cartelized in the market for sale of bearings to OEM customers during the Relevant Period in violation of Section 3(3) of the Act.

The CCI while making the above observations dismissed the submission of the OPs that, as per the OEMs statements to the DG, OEMs did not perceive any cartelization by the OPs. It held that Section 3 of the Act not only covers the instances of the conducts which cause an appreciable adverse effect on competition (**AAEC**) rather also covers conduct which are likely to cause an AAEC. Without carrying out an AAEC analysis in sufficient detail, the CCI simply concluded that the parties were unable to effectively rebut the presumption of AAEC and thereby have violated the provisions of section 3 (3) of the Act.

Interestingly, this is the first such case of leniency, where the CCI has found a contravention of the provisions of the Act but has held back from imposing a penalty on the contravening parties.

The order of the CCI can be accessed *here.*

CCI holds that recovery as per the SARFAESI Act may not amount to a violation of the Competition Act

On May 14 and 22, 2020, in two consecutive orders, the CCI found no competition concern where recovery of debts was being done by banks as per the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (**SARFAESI Act**). The CCI held that any bank under the provisions of SARFAESI Act has a right of enforcement of its security interest under the provisions of Section 13 of the said Act and if a borrower defaults in repayment of a loan or any instalment thereof then his account is classifiable as a Non-Performing Asset (**NPA**) by the secured creditor. The CCI further noted that the main purpose behind provisions of the SARFAESI Act is to empower banks and other financial institutions to auction residential or commercial properties (of the defaulter) and to recover outstanding loan in the event of defaults by the borrower/guarantor.

Therefore, the CCI held that a bank acting as per the remedies available to it under the SARFAESI Act for recovery cannot be termed as a dominant entity when it acts in accordance of such provisions as it is acting in recovery of its funds/money in order to mitigate losses in such transactions (i.e. where account has been declared as an NPA).

The State Bank of India which was an opposite party in one of the cases challenged the CCI's jurisdiction to deal with issues which fall under a special law i.e. the SARFAESI Act. The CCI observed that such an objection raised by SBI is not tenable in view of Section 62 of the Act. The CCI concluded that in respect of matters falling within the provisions of the Act, the CCI's jurisdiction is never ousted.

The CCI's orders are available *here* and *here.*

Abuse of Dominant Position

CCI closes case against Swiggy

On June 19, 2020, the CCI closed a case against Swiggy which alleged that Swiggy is charging prices higher than what was being charged by the respective restaurants for walk-in customers, without the knowledge of the customers. The case was filed under Section 4 of the Act alleging abuse of dominant position by Swiggy through charging unfair prices to its customers in the market of app-based food delivery with a restaurant search platform.

While defining the market, the CCI recognized that given the dynamic and contestable nature of the market, relevant market assessment cannot have a static approach. The market was, thus, defined as the market for food delivery. However, upon a perusal of the material available on record, the CCI found that the allegations against Swiggy are unsubstantiated and therefore observed that it may not be germane to define a precise relevant market and conduct further analysis.

Interestingly, Swiggy argued that it only acts as an 'intermediary' as defined under Section 79 of the Information Technology Act, 2000, and thus, any discrepancy in the rates, is solely attributable to partner restaurants and not to it. The CCI, in line with approach of encouraging self-regulation by e-commerce platforms, advised Swiggy to give sufficient disclosures on its platform to clarify that it is not involved in fixation of price of the products/menus of the restaurants on its platform.

CCI's order is available *here.*

Mergers and Acquisitions

Warburg Pincus increases stake in Apollo Tyres

The CCI through its order dated April 13, 2020 approved the *acquisition* of 9.93% stake in *Apollo Tyres* by *Emerald Sage Investment* Limited (**Emerald**). As per the combination notice, Emerald will acquire 10,80,00,000 compulsorily convertible preference shares from Apollo *Tyres*, in addition to the rights to,

- appoint a non-executive director on the board of directors of Apollo Tyres (**Investor Director**) and two of its subsidiaries based outside India; and
- nominate the Investor Director on various board committees of Apollo Tyres.

Emerald is stated to be wholly owned by certain private equity funds managed by Warburg Pincus LLC (**Warburg Group**), which already holds 8.92% of the shareholding in Apollo Tyres through one of its affiliates. As a result of the acquisition, the shareholding of Warburg Group in Apollo Tyres would increase to around 17.97%.

Considering the fact that neither Emerald nor the portfolio companies of Warburg Group is engaged in any business relating to automotive tyres in India (which is the primary business of Apollo Tyres), the CCI noted that the proposed acquisition is not likely to have an AAEC and approved the same.

The order of the CCI can be accessed *here.*

CCI approves ZF Friedrichshafen's acquisition of WABCO Holdings, with structural modifications

On 14 February 2020, the CCI approved 100% acquisition by ZF Friedrichshafen AG (**ZF/Acquirer**) from WABCO Holdings Inc. (**WABCO**) after holding that the voluntary modifications offered by ZF sufficiently addressed the competition concerns arising from the proposed acquisition in the limited overlapping product areas.

Both parties develop, manufacture or supply different systems and products in segments ancillary to the automotive sector. These include manufacturing automotive components such as axles, gearboxes, passive and active safety technologies (by ZF) and supplying pneumatic braking control systems, technologies and services that improve safety (by WABCO). The CCI's order notes that both parties are present in India through their subsidiaries and joint ventures and are engaged in manufacturing and sale of automotive components in India and that ZF was carrying out this business through its joint venture with TVS Group viz., Brakes India (**Brakes India**). The global transaction triggered a filing requirement in India as it led to an indirect acquisition by ZF of WABCO Asia Private Limited which in turn holds 75% of the voting share in WABCO India Limited.

Having found overlaps in the businesses carried out by the parties, the CCI undertook a competition assessment of the following overlaps between ZF/Brakes India and WABCO,

- components/systems relating to brake, clutch, steering and certain embedded software products used in commercial vehicles (**CV**) and off highway vehicles (**OHV**);
- manufacture and sale of components forming part of steering, brakes and clutches system used in light commercial vehicle (**LCV**) and heavy commercial vehicle (**HCVs**); and
- OHV components and steering systems.

After assessing the various overlapping segments highlighted above and other industry dynamics, the CCI *prima facie* noted that the proposed acquisition is likely to result in AAEC as it appears to, *inter alia*,

- reduce/eliminate the incentives of WABCO and Brakes India to compete in terms of price, products, innovation, areas of operation etc., in the market of foundation brakes for HCVs in India;
- result in the exit of Brakes India, a major market player from slip control systems/components;
- perpetuate the substantial market position of the parties in the market for clutch master cylinder and clutch booster/servo for HCVs and reduce/eliminate the competitive pressure that would prevail in the absence of the proposed acquisition;
- reduce the intensity of innovation in brake and clutch systems/components for LCVs ad HCVs in India; and
- reduce the extent of countervailing bargaining power that the OEMs enjoy on account of competition exerted by the independent presence of WABCO and Brakes India.

Given the circumstances, the CCI found it appropriate to conduct further inquiry to address the data inconsistencies, estimate actual market position of the parties and verify potential harm to competition and consumers. The CCI thus directed ZF to show cause (*under Section 29(1) of the Act*) as to why a detailed investigation into the instant transaction should not be conducted.

Before issuance of the show cause notice, ZF had offered certain behavioral remedies mainly pertaining to firewalling, in order to avoid coordination between WABCO and Brakes India. The CCI did not agree that these remedies would be sufficient to drop the present inquiry. ZF then submitted another set of voluntary modifications under Regulation 25 (1A) of the Combination Regulations as offered to the Department of Justice in US, including the divestment of WABCO's steering business in India. To address the remaining concerns, ZF proposed the divestment of its 49% shareholding interest and rights in Brakes India and committed to not re-acquire shares or exercise influence or control over Brakes India for a certain number of years. As these overlaps were to be divested to third parties, the CCI noted that competition between the overlapping products would be preserved.

The order of the CCI can be accessed *here.*

CCI approves Facebook's acquisition of ~10% stake in Jio Platforms

On June 24, 2020, CCI approved the acquisition of a minority non-controlling shareholding of 9.99% by Facebook in Jio Platforms (**Jio**), a unit of Reliance Industries. The acquisition has been in the limelight since April 2020 when Reliance Industries *announced* that Facebook was set to invest INR 43,574 crore in Jio.

Though the order of the CCI is not yet available on its website, as per the filing details available in the public domain, the proposed acquisition has been effected by Jaadhu Holdings (**Jaadhu**), an indirect wholly owned subsidiary of Facebook, acquiring minority non-controlling shareholding of the fully diluted equity share capital in Jio. Simultaneously, Jio, WhatsApp (a wholly owned subsidiary of Facebook) and Reliance Retail Limited are also proposing to enter into a separate commercial arrangement. JioMart (a Reliance e-commerce product) plans to integrate certain WhatsApp services with JioMart.

The parties to the transaction offered that no relevant market needs be defined in this case as this proposed acquisition will not alter the competitive landscape in any potential relevant market and that Facebook and Jio Platforms will continue to operate independently. However, in order to aid CCI's assessment, the parties identified two common segments - *Consumer Communication Applications, and Advertising Services*, but stated that the parties do not have a significant horizontal overlap in either of these.

The proposed acquisition garnered much attention in the media, particularly because of the size of investment - one of the *largest FDI deals* in the technology sector. In an email *interview*, the CCI Chairperson Mr. A K Gupta when asked about the present acquisition generally commented that CCI was considering whether to include new parameters in its review criteria in order to catch certain potentially 'harmful' mergers and acquisitions that were escaping regulatory scrutiny as they did not meet the current thresholds. As the order of CCI is still awaited in this matter, it will be interesting to see how the CCI identified the relevant market for the proposed transaction especially since market studies by the CCI of both the *telecom sector and mergers and acquisitions in the digital market*, to which the acquisition broadly relates, are still underway.

Policy Update

CCI issues advisory and CII issues a compliance manual for businesses amid Covid-19

On April 19, 2020, the CCI, in view of the prevailing circumstances in the country due to the Covid-19 pandemic, issued an advisory for the businesses operating in India. Through this advisory the CCI has recognized and highlighted that the Act provides for certain built-in safeguards to protect businesses from sanctions for certain coordinated conduct, provided such arrangements lead to increase in efficiencies. By way of the advisory, the CCI clarified that coordinated conduct which results in increasing efficiencies are protected from retribution within the Act. But the CCI cautioned that only conduct which is necessary and proportionate to address the concerns arising out of Covid-19 would be granted favorable consideration and that businesses must not take advantage of the current situation to contravene the provisions of the Act.

Subsequently, on May 23, 2020, the Confederation of Indian Industries (**CII**) published a compliance manual containing guidelines to ensure continued compliance with competition law in India during the Covid crisis. These guidelines discuss the following:

- **Competitor collaboration:** For collaborative efforts, CII has advised that:
  - The scope of the collaboration must be limited to products/services directly affected by the pandemic or the exigency measures;
  - Detailed documentation must be maintained on the purpose, necessity and intended benefits of the collaboration;
  - Exchange of commercially sensitive information must be prevented through clean teams and firewalls;
  - All such arrangements must be reviewed by external legal counsel before implementation; and
  - Even if the cooperation is suggested or directed by the Government, companies must ensure that their actions are restricted to the Government's objective and do not go beyond what is necessary to deal with the pandemic.
- **Exploitation of market power:** For companies that enjoy market power, the CII has advised that:
  - Dominant enterprises must refrain from abusing their position by e.g. bundling non-essential products/services with essential ones;
  - Dominant enterprises must record minutes of meetings setting out detailed reasons that prompted a price increase, specifically of essential products and services; and
  - Dominant enterprises engaged in the manufacture and sale of essential commodities must avoid entering into any exclusive distribution agreements.

The CCI's advisory note is available *here.* The CII's compliance manual is available *here.*

The team has also prepared detailed analysis of this business advisory, which is available *here.*

CCI Proposes to Reduce scrutiny of Non-Competes during Merger Assessment

In May this year, the CCI invited public comments on a suggested amendment to the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (**Combination Regulations**). With this amendment, the CCI proposes to omit paragraph 5.7 of Form 1 (the shorter notification form) that seeks information regarding non-compete restrictions agreed between the parties to the combination and justification for the same. According to the notice, the CCI seeks to amend the Combination Regulations on the grounds that

- prescribing a general set of standards for assessment of non-compete restrictions may not be appropriate in modern business environments;
- while it may be possible to conduct a detailed examination on a case by case basis, the same may not be feasible considering the timelines followed in combination cases; and
- the proposed omission would allow the parties flexibility in determining non-compete restrictions, while also reducing the information burden on them.

The proposed omission effectively obligates the transacting parties to self-assess their non-compete arrangements in light of the *guidance note* as well as other provisions of the Act[1]. The CCI also clarified that competition concerns, if any, that may arise from the non-compete restrictions can be reviewed under the enforcement provisions of the Act, i.e. Sections 3 and 4.

In practice, since it published the guidance note, the CCI has only been identifying non-compete clauses that are not ancillary to the transaction, thus indicating that such clauses are no longer being assessed by it for the purpose of approving the transaction.

The CCI's notice inviting public comments is available *here.*

[1] The guidance note explains the circumstances under which a non-compete restriction would be regarded as 'ancillary' or 'not ancillary' and identifies acceptable duration and scope of such non-compete clauses.

Enforcement

Delhi High Court upholds its earlier decision and re-iterates that the Patents Act by virtue of being a special law does not exclude the applicability of the Competition Act

On May 20, 2020, the Delhi High Court dismissed the petitions filed by Monsanto Holdings Pvt. Ltd. and Maharashtra Hybrid Seeds Company (**Petitioners**) challenging an initiation order of the CCI directing the DG to conduct an investigation against the Petitioners under Section 26(1) of the Act.

The Petitioners argued that the CCI has no jurisdiction to entertain any complaint against an enterprise in respect of matters which relate to exercise of its patent rights. The Court, relying upon its decision in the *Telefonaktiebolaget L.M. Ericsson v. Competition Commission of India & Another* (**Ericsson Case**), held that there was no irreconcilable repugnancy or conflict between the Competition Act and the Patents Act and, therefore, the jurisdiction of the CCI to entertain complaints regarding abuse of dominance with respect to patent rights could not be excluded.

The Petitioners argued that a patentee could include any condition/obligation in an agreement for restraining infringement of a patent and examination of such clause including the question whether such clause is reasonable or not, is expressly excluded by virtue of sub-section (5) of Section 3 of the Act. The Court found no merit in this contention and observed that sub-section (5) of Section 3 of the Act does not mean that a patentee would be free to include onerous conditions under the guise of protecting its rights. Plainly, the Court explained that the exclusionary provision to restrain infringement cannot be read to mean a right to include unreasonable conditions that far exceed those that are necessary, for the aforesaid purpose.

Finally, the Petitioners contended that the decision of the Supreme Court in *Competition Commission of India v. Bharti Airtel Ltd. And Ors.* (**Bharti Airtel**) effectively overrules the decision of this Court in the Ericsson case. The Court disagreed and recalled that in Bharti Airtel one of the principal questions to be addressed on interconnection was clearly required to be technically evaluated. In that context, the Supreme Court held that since TRAI had domain expertise this would be best done by them and CCI's assessment ought to be deferred till the technical aspects (which formed the factual basis of the complaints before the CCI) were determined. Distinguishing the decision in Bharti Airtel, the Court observed that in Bharti Airtel the Supreme Court upheld the decision of the Bombay High Court which found that the role of TRAI was different than the role of a Controller of Patents and, therefore, the decision in Ericsson was not applicable.

The decision of the Delhi High Court can be accessed *here.*

NCLAT refuses to condone a delay of 730 days

The National Company Law Appellate Tribunal (**NCLAT**) through its decision dated May 29, 2020, dismissed an application for condonation of delay of 730 days in preferring an appeal against the decision of the CCI and consequently the appeal itself. In its decision under Section 26(2) of the Act, the CCI closed the dismissed the complaint against NIIT Limited, New Delhi (**NIIT**) finding no evidence of a violation of Section 3 of the Act. It further observed that NIIT was not in a dominant position in the relevant market of Hyderabad as it had similarly placed competitors from whom it faced vigorous competition.

The Appellant, Maj. Pankaj Rai, who was also the informant before the CCI, preferred a writ petition before the Telangana High Court challenging the decision of the CCI alleging that the decision had been obtained by fraud. Subsequent to the dismissal of his writ petition and the appeals therefrom, the Appellant preferred the present appeal before the NCLAT after 768 days of the decision of the CCI.

The NCLAT while dismissing the application on the ground that no cogent reason had been given by the Appellant for the delay in preferring an appeal, observed that under the Act the NCLAT had ample powers to determine all issues arising out of the appealable orders under the provisions of the Act. It further held that while a statutory remedy in form of an appeal was available, an aggrieved person could not be allowed to bypass the same and invoke writ jurisdiction of the High Court. The NCLAT also observed that Section 5 of the Limitation Act, 1963 (**Limitation Act**) would not apply to the appeal under the Act. It explained that though Section 53B(2) of the Act and Section 5 of the Limitation Act have been

worded similarly, the purpose of defining a separate period of limitation under the Act will be frustrated if judgements interpreting 'sufficient cause' under Section 5 of the Limitation Act were used to interpret the words under Section 53B(2) of the Act.

The NCLAT with the above observations dismissed the appeal as barred by limitation.

The Order of the NCLAT can be accessed *here.*

Period of three years reasonable for seeking compensation

The NCLAT in its interim order dated June 3, 2020, upheld the maintainability of the compensation application preferred by Food Corporation of India seeking compensation from Excel Crop Care Limited, UPL Limited and Sandhya Organic Chemicals (P) Limited (collectively **Respondents**) amounting to Rs. 26.12 crores. The compensation application has been filed by Food Corporation of India within two years and two months from the date of the decision of the Supreme Court upholding the decision of the erstwhile NCLAT.

It was alleged on behalf of the Respondent that the application under Section 53N of the Act, seeking compensation was barred by limitation as it was preferred after more than five years from the decision of the erstwhile COMPAT. The Respondents challenged the maintainability of the application on the ground that as Section 53N of the Act only prescribes for seeking compensation from the decision of either CCI or the erstwhile COMPAT (now NCLAT), the aforementioned delay was beyond the period of three years as prescribed under the Limitation Act, 1963 for money claims.

The NCLAT while partially agreeing with the submission of the Respondents that an application for compensation should be preferred within a reasonable period of three years as prescribed in the Limitation Act, 1963, dismissed the submission of the Respondents that the period of limitation would commence from the date of the decision of the erstwhile COMPAT. NCLAT held that as the decision of the erstwhile COMPAT had been appealed before the Supreme Court, it was imperative to await the final determination by the Supreme Court and hence the period of limitation would commence from the date of such decision.

The NCLAT with the above observations upheld the maintainability of the compensation application preferred by Food Corporation of India.

The Order of the NCLAT can be accessed *here.*

NCLAT rules that Informant should be a person who has suffered legal injury

On May 29, 2020, the NCLAT dismissed an appeal filed by an advocate Mr. Samir Agrawal (**Appellant**) against a closure order of the CCI. The appellant approached the CCI primarily alleging that ANI Technologies Pvt. Ltd. (**OLA**) and Uber India Systems Pvt. Ltd. (**Uber**) use their respective algorithms to fix prices and facilitate collusion between drivers. The CCI *primafacie* found no case of price fixing or collusion. The Appellant while challenging the CCI's order argued that it is erroneous because (a) it implied that price fixing done through an app is immune from scrutiny; and (b) it ignored the fact that Uber's business model was challenged in the United States with identical allegations which were considered fit for investigation.

Ola and Uber argued that the Appellant's allegations are unsubstantiated. Ola challenged the Appellant's legal standing arguing that he is not an aggrieved person and that no prejudice has been caused to him. The NCLAT held that the term '*any person*' under Section 19(1)(a) of the Act refers *"to a person who has suffered invasion of his legal rights as a consumer or beneficiary of healthy competitive practices*". Therefore, the NCLAT concluded that the Appellant (a lawyer) had no standing/locus to approach the CCI since there was nothing on record to show that he had suffered a legal injury as a consumer or as a member of any consumer or trade association.

On the merits of the case (assuming the Appellant had locus to approach the CCI), the NCLAT observed that there is no allegation of collusion between the Uber and Ola through their algorithms which necessarily implies an admission on part of the Appellant that the two taxi service providers are operating independent of each other. The NCLAT further observed that the concept of hub and spoke cartel stated to be applicable to the business model of Ola and Uber with their platforms acting as a hub for collusion *interse* the spokes i.e., drivers based on the American class action suit of *SpencerMeyerv.TravisKalanick* has no application as the Indian operation of Ola and Uber does not manifest in restricting price competition among drivers to the detriment of its riders.

In sum, the NCLAT dismissed the Appellant's appeal on In sum, the NCLAT dismissed the Appellant's appeal on the basis of a lack of legal standing to approach the CCI.

The decision of the NCLAT can be accessed *here.*

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