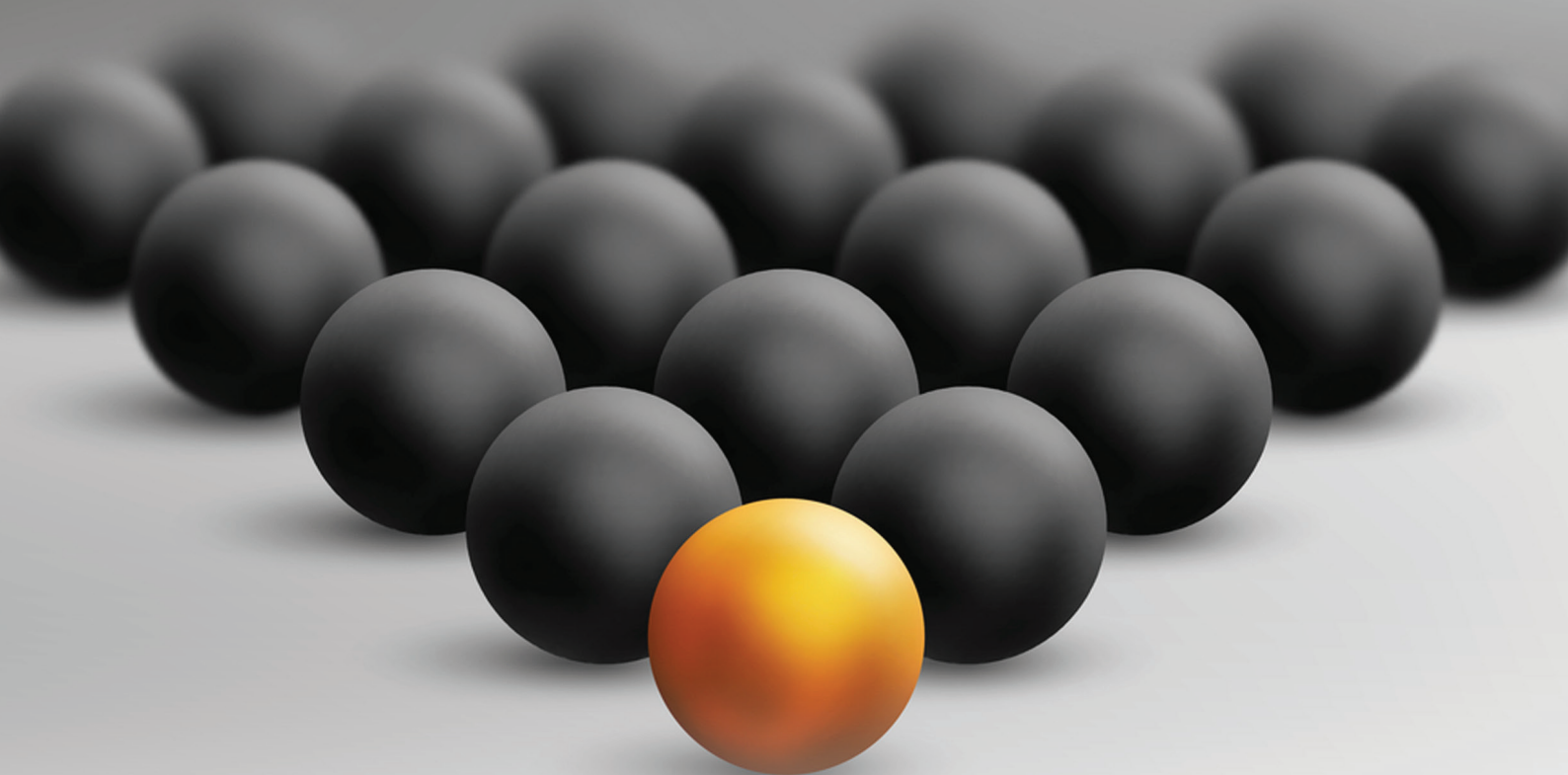




ECONOMIC  
LAWS  
PRACTICE  
ADVOCATES & SOLICITORS

# COMPETITION LAW & POLICY UPDATE

QUARTER 1 OF 2021





## SNAPSHOT

### Gmail users not coerced to use Gmeet, CCI closes case against Google

*The CCI notes that adding functionality to a product, or app, does not constitute leveraging. Dismisses complaint filed against Google*

04

### CCI to investigate WhatsApp's privacy policy

*CCI ordered investigation into WhatsApp's updated privacy policy, noting that its investigative powers allow it to intervene even in respect of acts about to be committed in contravention of Sections 3, 4 and 6 of the Act.*

04

### Interim relief granted against MMT and OYO

*CCI uses powers under Section 33 of the Act, orders MMT and OYO to re-list delisted companies, Fab Hotels and Treebo, on their sites.*

06

### Uttarakhand Agricultural Produce Marketing Board guilty of abuse of dominance, fined INR 1 crore

*The CCI finds UAPMB to have limited / restricted the wholesale procurement and distribution of IMFL in the State of Uttarakhand leading to denial of market access to producers of certain brands of IMFL.*

07

### CCI goes regional

*For the first time since inception, the CCI has opened a regional office, in Chennai, for greater reach and flexibility.*

09

## SECTORS COVERED IN THIS ISSUE



Information  
Technology



Logistics



Retail



Insurance



Aviation

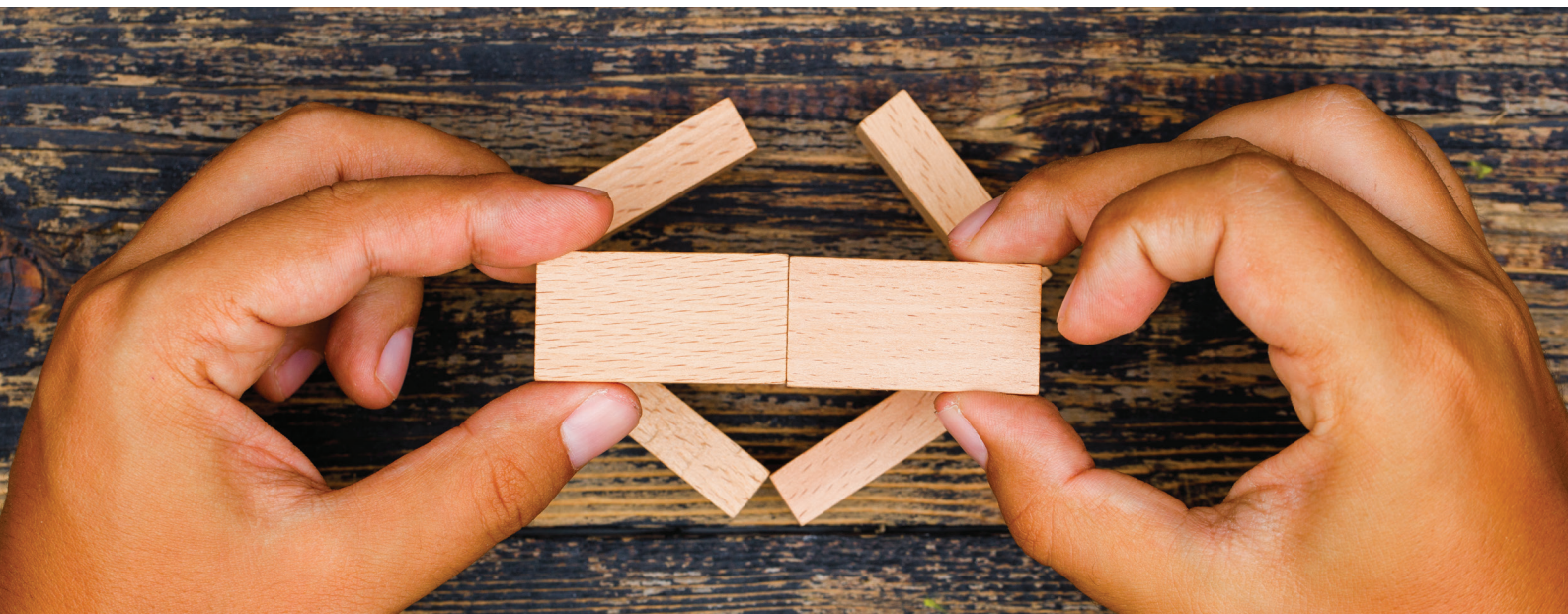


Hospitality



Beverages





## Mergers and Acquisitions

### CCI approves combination between Flipkart and Aditya Birla

On January 20, 2021 the Competition Commission of India (CCI) approved the proposed acquisition by Flipkart Investments Private Limited (**Flipkart**) of a minority stake of 7.8%, on a fully diluted basis, in Aditya Birla Fashion and Retail Limited (**Aditya Birla**) (collectively, **Parties**).

The relevant market proposed by the Parties was the broad market for B2B sales in India (**Broad Relevant Market**) or the narrower market segment of B2B sale of apparel, footwear and accessories in India (**Narrower Relevant Segment**). The CCI noted that the combined market share of the parties in the Broad Relevant Market was 0-5% and Narrower Relevant Segment was 5-10%. The CCI also noted that the presence of other players in both markets would pose competitive constraints on the Parties post transaction.

As part of the transaction, the Parties had entered into a commercial agreement for distribution of certain Aditya Birla products through Walmart's ecommerce platforms to the exclusion of certain other platforms. The CCI observed that the Walmart Group operates prominent e-commerce platforms like Flipkart, Myntra and Jabong

in India. The CCI was of the *prima facie* view that the exclusive arrangement between the Parties may lead to preferential treatment of Aditya Birla's products on Walmart's platforms in India. This may affect intra-platform competition between brands or sellers and result in the market outcome being influenced or determined by the platform instead of resulting from competition on merits.

Based on this observation, the CCI issued an advisory to the Parties to not indulge in any such conduct which could amount to leveraging their control over the e-commerce platforms in favour of the identified Aditya Birla products.

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

### CCI approves acquisition in Ecom Express by CDC Group plc. and PG Esmeralda Pte. Limited

The CCI *vide* two separate orders approved acquisitions of 38.41% and an additional 2.78% of the equity share capital in Ecom Express Private Limited (**Ecom**), a company engaged in the business of providing third party logistics services in India, by PG Esmeralda Pte. Limited (**PG**) and CDC Group plc. (**CDC**) (collectively **Acquirers**), respectively.



Post the acquisition, PG would have representation on the Board of Ecom and certain other rights in relation to matters of Ecom. However, CDC already has a representation on the Board of Ecom and has certain additional rights, and would not be acquiring any additional rights through the present acquisition.

As regards the acquisition by PG, the CCI observed that there may be potential vertical overlaps as one of the entities in which the holding company of PG has an interest, may require third party logistics services from Ecom. The CCI noted that Partners Group, to which PG belongs, has an indirect financial investment in the entities that hold Vishal Mega Mart Private Limited (VMM).

It was noted that Airplaza Retail Holdings Private Limited (**Airplaza**), a subsidiary of VMM, is engaged in the sale of products such as food and grocery; apparel and footwear; home appliances; etc. through its brick-and-mortar store and e-commerce websites

including its own website myvishal.com. For its operations, it may require third party logistics services from Ecom. However, given that neither the revenue of Airplaza from its e-commerce activities on myvishal.com website nor the market share of Airplaza in e-commerce activities was significant, the CCI did not find likelihood of any concerns of market foreclosure. It approved the combination on January 11, 2021.

Similarly, with respect to the acquisition by CDC, the CCI noted that though some entities in the portfolio of CDC have availed the services of Ecom, the nature and volume of these interfaces were insignificant. The CCI further noted that the proposed acquisition did not envisage acquisition of any additional rights in the operations or management of Ecom by CDC. The CCI, based on the above, did not find any likelihood of competition concerns and approved the transaction on February 10, 2021.

The orders of the CCI can be found [here](#) and [here](#).



# Enforcement Action

## CCI closes information against Google for integrating GMeet with Gmail

On January 29, 2021 the CCI dismissed an information filed against Google LLC and Google India Digital Services Pvt. Ltd. (**Google**) alleging abuse of dominance by them. It was alleged that by integrating Google Meet into Gmail, Google had abused/leveraged its dominant position in the email and direct messaging market to enter into the video-conferencing market in contravention of Section 4(2)(e) of the Competition Act, 2002 (**Act**).

While defining the markets, the CCI distinguished between email/video conferencing services and direct messaging services. The CCI, in its order, defined the relevant markets as (i) 'the market for providing email services in India'; and (ii) 'the market for providing specialized video conferencing services in India'. However, the CCI did not find it necessary to determine if Google is dominant in any of the above markets.

On the issue of leveraging, the CCI found that adding functionality to a product, or app, does not constitute leveraging. The CCI appears to have incorporated a 'coercion standard' whereby it noted that even though the Meet tab had been incorporated in the Gmail app, Gmail did not 'coerce' its users to use Meet exclusively and they were free to use any competing video-conferencing app. On this basis, the CCI found no contravention of the Act by Google and closed the case.

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

## CCI initiates investigation into updated policy and terms of WhatsApp

On March 24, 2021 the CCI ordered an investigation against WhatsApp Inc. (**WhatsApp**) based on a finding that WhatsApp through its 2021 Privacy Policy Update (**2021 Policy**), has *prima facie* contravened the provisions of Section 4 of the Act.

The CCI took *suo motu* cognizance of the matter based on various news reports regarding the updated 2021 Policy noting that:

- It highlighted how the personalized information of users will be shared with Facebook Inc. (**Facebook**) and its subsidiaries.
- While the previous policy of WhatsApp allowed existing users to choose whether their data would be shared with Facebook, the 2021 Policy mandated acceptance of data sharing if the users wanted to continue using WhatsApp's services.

WhatsApp contended that the terms and conditions of the 2021 Policy fall within the purview of the Information Technology Act, 2000 and data protection/privacy laws and since these issues were sub judice before various courts in India, the CCI should refrain from looking into them.

WhatsApp also contended that the 2021 Policy had not yet been implemented and therefore, taking suo moto cognizance of this policy was premature. The CCI observed that since WhatsApp had already announced the policy, the conduct had 'already taken place'. The CCI placed reliance on Section 33 of the Act which, according to the CCI, empowers it to intervene even in respect of future conduct and casts an obligation upon the CCI to 'prevent' practices having an adverse effect on competition.

Distinguishing the Vinod Gupta case<sup>1</sup> from the present matter, the CCI noted that WhatsApp in its earlier policy provided users an option to 'opt-out' of sharing user account information with Facebook within 30 days of agreeing to the updated terms of service and privacy policy. The CCI observed that the 'take-it-or-leave-it' nature of 2021 Policy required investigation in view of the market position and market power enjoyed by WhatsApp (as noted in the Harshita Chawla case<sup>2</sup>).

The CCI further noted that WhatsApp's conduct of sharing of users personalized data with Facebook or its subsidiaries for targeted ads amounted to degradation of non-price parameters of competition viz. quality, which results in objective detriment to consumers, without any acceptable justification. Further, the CCI observed that lower data protection by a dominant enterprise could lead to exploitation of consumers and

<sup>1</sup> Shri Vinod Kumar Gupta v. WhatsApp Inc., Case No. 99 of 2016.

<sup>2</sup> Harshita Chawla v. WhatsApp Inc., Case No. 15 of 2020.





have an exclusionary effect on competitors. The CCI held that such conduct *prima facie* amounted to contravention of Sections 4(2)(a)(i), 4(2)(c) and 4(2)(e) of the Act.

The order reflects the expansionist nature of CCI's investigative powers as it clearly recognizes the CCI's intervene even in respect of acts which are in contravention of the provisions of Sections 3, 4 or 6 *if such acts are about to be committed*. The CCI placed reliance on the phrase "prevent practices having adverse effect on competition" appearing in the preamble to the Act while exercising its jurisdiction.

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

### CCI dismisses information against General Insurance

On January 27, 2021 the CCI dismissed information filed by Automotive Tyres Manufacturers Association (**ATMA**) against General Insurance Corporation of India (**GIC**) for alleged violation of Sections 3 and 4 of the Act.

The CCI delineated the relevant market as the '*market for provision of reinsurance services in India*'. It observed that based on the information on record it appeared that GIC was the dominant enterprise in the relevant market. The CCI noted that ATMA had alleged a contravention of Section 4(2)(a)(ii) of the Act on account of '*excessive pricing*' without providing any basis. Placing reliance on a previously decided matter<sup>3</sup> having similar allegations, the CCI observed that setting of premium rates for reinsurance policies could be based on many factors and without proper evidence, the allegations were unsubstantiated.

The CCI noted that the regulations on account of which GIC has the right of first refusal over all reinsurance

contracts in India, have not been made by GIC and therefore, there was no case for denial of market access under Section 4(2)(c) of the Act.

The CCI considered a decision of the Delhi High Court which dealt with the same impugned conduct of GIC brought forward by the ATMA in the present matter. The CCI noted that GIC had not placed any restriction on insurance companies to offer products to their customers and that the allegation of resale price maintenance under Section 3(4)(e) against GIC was unmerited.

ATMA also alleged that GIC directed insurance companies to not cover any direct or indirect losses caused by reasons related to contagious disease like COVID-19 and this constituted refusal to deal under Section 3(4)(d) of the Act. The CCI observed this allegation was not justified since the position pre and post COVID-19 pandemic remained unchanged as far as the exclusion of contagious diseases was concerned. It further observed that the exclusion of any direct or indirect loss by infectious or contagious disease existed even prior to the onset of the COVID 19 pandemic. The CCI also observed that the Contagious Disease Endorsement was neither a direction nor a mandate to the insurance companies and that they were entirely free to offer any kind of insurance to the policy holders.

Finally, the CCI noted that ATMA had not substantiated its allegation of violation of Section 3(3) of the Act and that there was no evidence to show that GIC was used as a platform to exchange sensitive information or that GIC is otherwise facilitating any price fixing among the insurance companies. Based over the aforementioned observations, the CCI dismissed the allegations against GIC.

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

<sup>3</sup> Indian Chemical Council v. General Insurance Corporation of India, Case No. 12 of 2019.

## CCI finds no case of cartelization amongst domestic airlines

On February 22, 2021 the CCI closed a case of alleged cartelization in the domestic airline industry. The CCI based on receipt of a letter from the Lok Sabha Secretariat had taken  *suo moto*  cognizance of the matter. The CCI had analyzed the data for the period from April 2012 to March 2014 in respect of five airlines, namely Jet Airways (including JetLite), Indigo, SpiceJet, GoAir and Air India. In its analysis, the CCI observed some degree of stability in the market shares of the above companies, similarity in cost structure of the airlines and despite different base fares/fuel surcharge, similarity in prices. On this basis, the CCI had directed the DG to conduct an investigation into the matter.

The DG in its initial investigation report after examining the conduct of the airlines in four major routes had concluded that no contravention of the provisions of Section 3 of the Act was made out. This was based on information on costs of operations, flights operated, and passengers carried throughout the year on the said routes, the market share and air fare determination etc. The CCI ordered a further investigation directing the DG to look into other factors such as dynamic pricing, role of algorithms in the software used by these airlines and the impact of capacity on pricing of ticket. The DG, after finding no evidence of collusion amongst the airlines concluded once again that the parties had not violated the provisions of the Act.

The CCI in its order observed that '*a parallel conduct is actionable under the Act only when the adaptation to the market conditions is not done independently and is attributable to information exchanged between the competitors or through some other collusive conduct, the object of which is to influence the market*'. Having found no evidence on record to establish cartel amongst airlines during the period April 2012 - March 2014, the CCI found no reason to differ with the findings recorded by the DG and accordingly closed the case.

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

## CCI grants interim relief against MMT and OYO

On March 9, 2021 in a rare exercise of its powers under Section 33 of the Act, the CCI granted interim relief to

Rubtub Solutions Pvt. Ltd. (**Treebo**) and Casa2 Stays Pvt. Ltd. (**Fab Hotels**) against MakeMyTrip India Pvt. Ltd. (**MMT**) and Ibibo Group Private Limited (**Go-Ibibo**) (collectively referred as **MMT-Go**) by directing them to re-list Treebo and Fab Hotels on their online portals.

The CCI on October 28, 2019 had found MMT-Go to be *prima facie* dominant in the *market for online intermediation services for bookings of hotels in India* and to have *prima facie* contravened the provisions of Section 3 and 4 of the Act. Accordingly, the CCI had directed the DG to initiate investigations into the following allegations leveled by Treebo and Fab Hotels which *inter alia* included *Denial of Market Access to competitors of OYO; Predatory Pricing via deep discounting and charging below the average room rate and Imposition of excessive and unfair conditions*.

The CCI, in its March 9, 2021 order, placed reliance on the Supreme Court's decision in the *SAIL* case<sup>4</sup> to observe that while assessing any matter for the purposes of passing interim orders under Section 33 of the Act, the following conditions must be fulfilled:

- The CCI should be satisfied that an act in contravention to the provisions of the Act has been committed and continues to be committed or is about to be committed. This satisfaction has to be of much higher degree than while formation of *prima facie* view under Section 26(1) of the Act.
- The CCI should be convinced that it is necessary to provide the interim relief sought and whether balance of convenience lies in providing the relief.
- The CCI should be satisfied that '*there is every likelihood that the party to the lis would suffer irreparable and irretrievable damage, or there is definite apprehension that it would have adverse effect on competition in the market*'.

The CCI noted that the degree of satisfaction for forming a *prima facie* view under Section 26(1) '*is a tentative view at that stage*' as opposed to a '*definite expression of the satisfaction recorded by the Commission*' required to qualify the first condition for granting an interim relief under Section 33.

The CCI also noted that it was an admitted position that MMT-Go had delisted Treebo and Fab Hotel from their

<sup>4</sup> Competition Commission of India v. Steel Authority of India Ltd., (2010) 10 SCC 744.



platforms in April and June 2018 respectively, following an agreement with Oravel Stays Private Limited (**OYO**) (a close competitor of Treebo and Fab Hotels) and as such the first condition required to be met for a relief under Section 33 was satisfied.

In respect of the second condition, the CCI observed that the determination of convenience is comparative in nature whereby the inconvenience caused to the informant due to non-grant of relief and to the opposite party if the interim relief is granted, need to be assessed. The CCI noted that the balance of convenience lay in favor of Treebo and Fab Hotels since MMT-Go would not be put to much inconvenience even if they had to provide them access on its online portals.

The CCI further noted that under the third condition of ensuring if there is any *irreparable harm* or *definite apprehension of adverse effect on competition in the market*, if either of the conditions are met, it would be deemed satisfied. The CCI observed that denial of market access need not be complete and absolute in nature. It further held that denial of market access in any manner, that takes away the freedom of a substitute to compete effectively and on the merits in the relevant market, can amount to denial of market access. It also noted that the delisting of Treebo and Fab Hotels was not due to any breach of contractual obligations but rather emanated from an agreement between MMT-Go and OYO. Given the market power of MMT-Go and OYO and the present market conditions in the wake of a recovering sector, the CCI observed that continuation of such an exclusionary agreement may change the

competition landscape tipping the markets in favor of MMT-Go and OYO, causing an irreparable harm to competition. It is pertinent to note that the CCI also noted that in dynamic markets timing was of essence since the harm of competition will be irrevocable.

Therefore, in light of the aforementioned conditions being satisfied, the CCI held that the matter was a fit case for exercising the power of interim measures and directed MMT-Go to allow Treebo and Fab Hotels to be listed on its online portals.

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

### CCI penalizes Uttarakhand Agricultural Produce Marketing Board for abuse of dominance

On March 30, 2021 the CCI found the Uttarakhand Agricultural Produce Marketing Board (**UAPMB**) to have violated Section 4 of the Act and imposed a fine of INR 1 crores. An information was filed by International Spirits and Wines Association of India (**ISWAI**) alleging abuse of dominance by UAPMB through arbitrary and discriminatory procurement of liquor from manufacturers, in disregard to the market demands and the Excise Policy. ISWAI had further alleged that UAPMB had failed to comply with the requirement of maintaining minimum stock levels in contravention of the Excise Policy and of imposition of unfair and onerous conditions on the liquor manufacturers.



Though the CCI passed the *prima facie* order under Section 26(1) in 2016, UAPMB moved the High Court of Delhi in a writ petition seeking the order to be set aside on the grounds of UAPMB not being an 'enterprise' under Section 2(h) of the Act as a result of which, the CCI did not have jurisdiction over it. This jurisdictional challenge was ultimately dismissed by the High Court and even by the Supreme Court in appeal.

The CCI assessed the record in the matter and delineated the relevant market as the (a) *market for wholesale procurement of branded alcoholic beverages in the State of Uttarakhand*; (b) *market for distribution of branded alcoholic beverages in the licensed area of Garhwal Mandal Vikas Nigam Ltd. (OP-2) in the State of Uttarakhand*; and (c) *market for distribution of branded alcoholic beverages in the licensed area of Kumaun Mandal Vikas Nigam Ltd (OP-3) in the State of Uttarakhand*. The CCI further observed that the alcoholic beverage manufacturers were entirely dependent upon the opposite parties for access to retailers and in turn the end-consumers in the State of Uttarakhand and that they enjoyed 10% market share in their respective relevant markets owing to the Excise Policy of the State. Based on this observation and the factors under Section 19(4) of the Act, the CCI held opposite parties to be dominant in their respective relevant market.

The CCI assessed the Excise Policy of the State of Uttarakhand and observed that the provisions of the Liquor Wholesale Order and its impact with respect to dominant position and/or abuse thereof, could be scrutinized under the provisions of Section 4 of the Act. The CCI placed reliance on the decision of the Supreme Court in the matter of *Khoday Distilleries Ltd. and Others v. State of Karnataka and Others*,<sup>5</sup> and noted that while it is the prerogative of each individual State to manage the trade of liquor, once the State permits trade or business in liquor, it cannot discriminate between the persons or suppliers who are qualified to carry on trade or business.

The CCI further assessed the sales data during the relevant period and observed that the sudden change in sales pattern of certain brands of IMFL *vis-à-vis* others was indicative of changes induced on the supply or distribution side as opposed to the demand side.

Therefore, based on its assessment of the market and the changes due to the Excise Policy and the Liquor Wholesale Order, the CCI held that the unilateral conduct of UAPMB impacted the inter brand competition of the brands of India made Foreign Liquor (IMFL) being sold in the State of Uttarakhand.

The CCI further assessed the conduct of UAPMB and noted that it did not place any orders for many brands of Pernod and USL for many months despite existence of retailers' demand. The CCI held that UAPMB had limited or restricted the wholesale procurement and distribution of IMFL resulting in denial of market access to producers of certain brands of IMFL in the State of Uttarakhand. This was held to be in violation of Section 4(1) read with Section 4(2)(b)(i) and Section 4(2)(c) of the Act.

The CCI also assessed the terms of the agreement of UAPMB with Pernod and USL and took note of certain one-sided and unfair obligations. Relying on its earlier decisions in the *Surinder Singh Barmi case*<sup>6</sup> and the *Belaire case*,<sup>7</sup> the CCI observed that it was immaterial whether the inclusion of an unfair and one-sided clause had any anti-competitive effect and that the unfairness of such clause needs to be assessed as to whether it could only be imposed by a dominant entity. Accordingly, the CCI held that UAPMB being the dominant enterprise was in a position to implement the one-sided contractual obligations and had contravened the provision of Section 4(2)(a)(i) of the Act.

While assessing the conduct of OP-2 and OP-3, the CCI observed that they had placed indents with UAPMB in accordance to the Excise Policy and the Liquor Wholesale Order, and that they were entirely dependent upon UAPMB for obtaining supplies and could not directly procure from the IMFL manufacturers. The CCI as such did not deem it fit to hold OP-2 and OP-3 to be liable and complicit with UAPMB in contravention of the provisions of the Act. The CCI further assessed the financials and the mitigating factors pleaded by UAPMB and imposed a penalty of an amount of INR 1 crores under Section 27(b) of the Act.

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

<sup>5</sup> (1995) 1 SCC 574.

<sup>6</sup> In Re: Surinder Singh Barmi and The Board of Control for Cricket in India, Case No. 61 of 2010.

<sup>7</sup> Belaire Owner's Association v. DLF Limited & Ors., Case No. 19 of 2010.

# Policy Update



## CCI inaugurates regional offices

On February 26, 2021, the Union Minister for Finance and Corporate Affairs (**MFCA**) Smt. Nirmala Sitharaman virtually inaugurated the first of the CCI's Regional Offices in Chennai. The press release indicates that the Chennai Office of CCI will act as an office to facilitate enforcement, investigation, advocacy function in coordination with its Delhi office. The press release further stated that this regional office is likely to cater to the requirements of Tamil Nadu, Kerala, Karnataka, Andhra Pradesh, Telangana and the Union Territories Puducherry and Lakshadweep.

The Chairperson CCI, in his speech at the inaugural function, highlighted that in light of the wide gamut of the CCI's activities and countrywide spread of stakeholders, a need of having regional offices of the CCI was felt. The regional offices will aid in greater reach and flexibility to the CCI in carrying out its functions.

The official press release by the Ministry of Corporate Affairs can be accessed [here](#) and the speech of the Chairperson, CCI can be accessed [here](#).

We hope you enjoyed reading our Competition Update for this quarter.

We welcome any comments/queries at [insights@elp-in.com](mailto:insights@elp-in.com) or write to our authors:

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