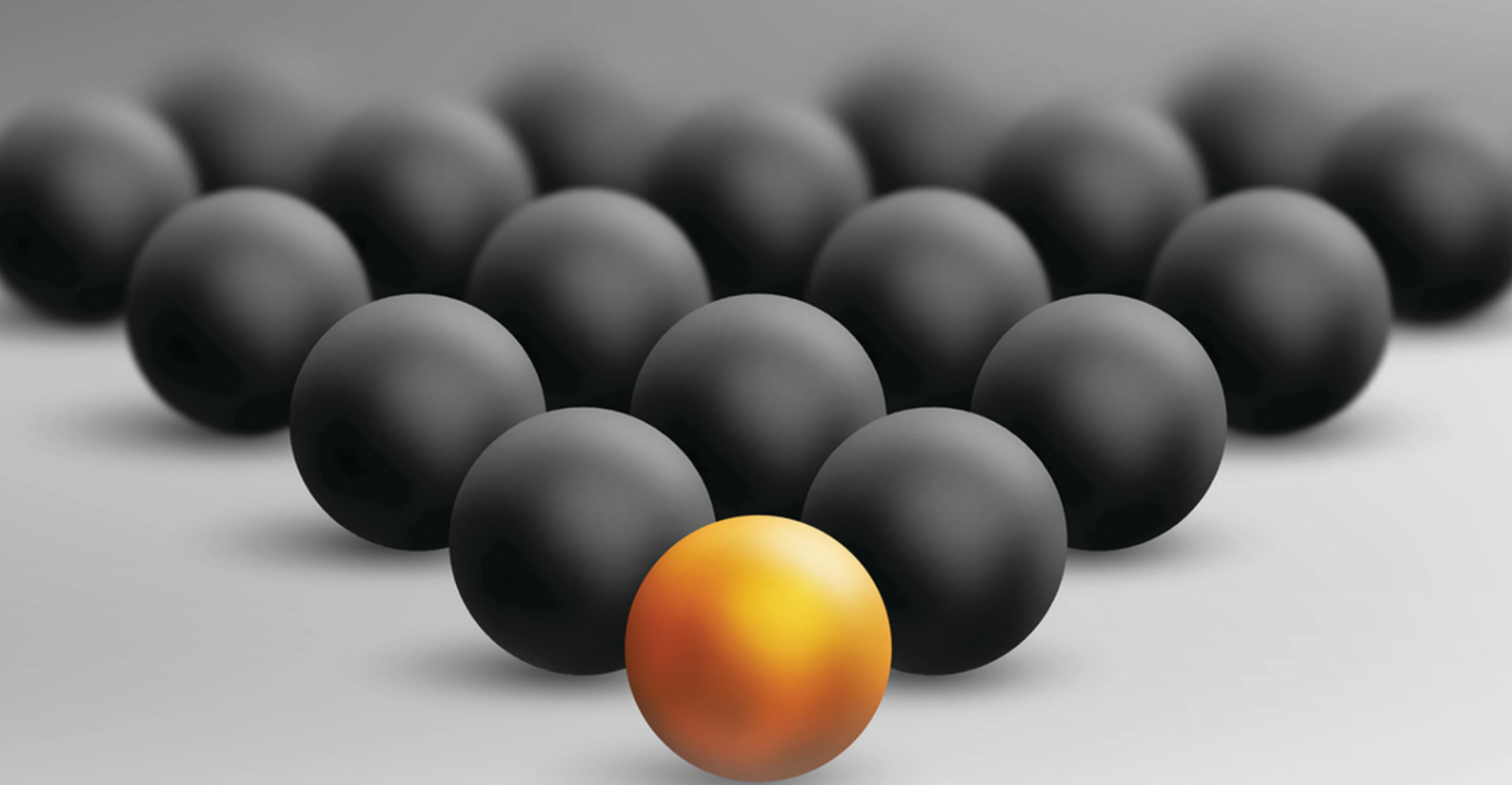




ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS

COMPETITION LAW & POLICY UPDATE

QUARTER 2 OF 2021





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The CCI approves the Reliance Retail and Future Group Transaction

The Competition Commission of India (CCI) recently published its order approving the combination between Reliance Retail Ventures Limited (RRVL), Reliance Retail and Fashion Lifestyle Limited (RRVL WOS) and Future Enterprises Limited (FEL) (collectively referred to as **parties**). The proposed combination involved the acquisition of the Retail & Wholesale Undertaking and Logistics & Warehousing Undertakings carried out through various entities of the Future Group by RRVL and RRVL WOS, through FEL. The entire Retail & Wholesale Undertaking and Logistics & Warehousing Undertakings (**Target Business**) were transferred to FEL following an internal restructuring pursuant to a composite scheme of arrangement.

The CCI noted that the products and services of the parties exhibited overlaps and observed horizontal overlaps at the broad level of market for retail or B2C retail in India and in the sub-segments of retail for (a) Food & Grocery (**F&G**); (b) Apparel, Footwear and Accessories (**AFA**); and (c) General Merchandise (**GM**) in India & in cities or towns where the parties are present and at the broad level of market for wholesale or B2B

sales in India. The CCI further observed that horizontal overlap also exists between third-party logistics (**3PL**) activity of Future Supply Chain Solutions Limited (**FSCSL**) and last mile delivery service of Grab A Grub Services Private Limited (**Grab A Grub**). The CCI noted that the logistics business of RRVL and RRVL WOS was entirely captive and had no market facing aspects to it.

The CCI, while assessing the relevant product market, observed that in the F&G segment, stores operating under the unorganized retail segment, lined up next to each other provide the experience of moving from one shelf to another shelf that was visible in a large, organized retail store for a typical Indian consumer. Therefore, the CCI noted that even though a particular kirana store (neighborhood small store) might lack one or some of the products required by a customer, the multiple small stores lined up with that kirana store are so closely located that the customer ends up fulfilling his purchasing needs via multiple stores instead of relying on just one amongst them.

The CCI noted that the unorganized retail segment may provide sufficient competitive constraint to the organized segment in F&G retail. It also observed that categorization between organized and the unorganized

segment in AFA retail was difficult and that the competition assessment was carried out for the overall AFA retail level. Similarly, the CCI also considered the GM retail level for the purpose of assessment. With respect to the relevant geographic market, the CCI considered the markets at an all India level as well as at city-wide and 5 Km catchment area level for sub-segments of the overall retail market.

The CCI assessed the sub-segments of retail and noted that the combined market share of the parties did not exceed 10% in any overlapping cities. The CCI also assessed the Wholesale or B2B sales segment on a pan-India basis as well as at product sub-category level. The CCI concluded that the proposed combination is not likely to cause AAEC either in the market for B2B sales in India at the broader level, or at the narrower levels on the basis of product segments, i.e. F&G, AFA and GM, or at city level.

In relation to vertical overlaps, the CCI analyzed the value of service procured by Target Businesses from Grab A Grub and concluded that it was not at a level that would raise any concern. Given the limited requirement of Target Businesses vis-à-vis total revenue of Grab A Grub, the CCI held that the said vertical interface was not likely to raise competition concern.

In light of the aforementioned observations, the CCI observed that the parties might not be in a position to foreclose competition in any of the segments wherein they have presence. Therefore, the CCI held that the Proposed Combination was not likely to cause AAEC and approved the combination.

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



Enforcement Action

CCI dismisses allegations of abuse of dominance against NSE

On June 28, 2021, the CCI dismissed the allegations of abuse of dominance against the National Stock Exchange of India (NSE). The Informant in the matter had alleged that NSE had given preferential market access to select brokers and had created an artificial information asymmetry and market manipulation in relation to co-location facilities in contravention to Section 4(2)(b)(ii) and Section 4(2)(c) of the Act.

The CCI considered the entire record in the matter and observed that the co-location facility, which was the alleged cause for creation of distortions, had ceased to exist as far back as 2016. The CCI further noted its decision in the matter *Adv. Jitesh Maheshwari v. National Stock Exchange of India Limited* wherein it had observed that it had the necessary jurisdiction and the mandate under the Act to delve into issues relating to anti-competitive practices. This was notwithstanding the fact that same or similar set of facts and allegations were also a subject matter of investigation before SEBI, which was the sectoral regulator. The CCI further referred to the *Bharti Airtel Case* and observed that the facts and circumstances in the present case *vis-à-vis* that of the *Bharti Airtel Case* could not be linked.

NSE had challenged the *locus* of the Informant and the CCI observed that such a challenge was irrelevant in light of the observation of the Supreme Court in *Samir Agrawal v. CCI*. The CCI also noted that the Informant having preferred a proceeding before another forum was not a ground for dismissing any information filed before it. The CCI, nevertheless noted that non-disclosure was pertinent and in disregard of the requirement of Regulation 10 of the Competition Commission of India (General) Regulations, 2009 which can be viewed seriously by it.

The CCI delineated the relevant market as the *market for providing co-location services for Algo-trading in securities to the trading members in the territory of India*. The CCI further assessed the relevant market and the market power of NSE to determine the dominance of NSE in the same. It observed NSE to be dominant in the relevant market based on the factors under the Act.

The CCI noted that at the time of introducing co-location services, SEBI had not prescribed any specific technology to be used and that NSE had a choice between two existing technologies. The CCI also observed that SEBI findings exonerated the conduct of NSE in many respects and that no fraud had been established on the part of NSE in provision of such services. The CCI therefore held that if such technology could have been prone to some kind of manipulation by certain unscrupulous persons/members, then the same conduct should not be appropriated to NSE as an abuse of its dominance under Section 4 of the Act.

Assessing the contention that the co-location facility itself is anti-competitive, the CCI observed that it could not be oblivious to the strides being taken by technology and that a robust exchange acts as a backbone of the financial system. Also, the provision of co-location facility by exchanges help increase volumes of trades manifold and provides liquidity to investors. The CCI observed that any intervention to stop the co-location facility which has been in place since 2009 and was on offer not just by NSE, but by BSE as well, would be retrograde. Noting that the SEBI had not stopped the co-location facility in any manner since its introduction and that the SEBI has implicitly and explicitly recognized the service, the CCI held that it was not in contravention of the provisions of the Act. Accordingly, the CCI dismissed the information under Section 26(2) of the Act.

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

CCI initiates an investigation against Google in the smart TV OS and related markets

On June 22, 2021, the CCI initiated an investigation against Google based on allegations of abuse of dominant position in the markets for (a) licensable smart TV Operating Systems (OSs) in India and (b) app stores for Android smart TV OSs in India.

While initiating the investigation, the CCI heavily relied on its *prima facie* [order](#) in the Android Smartphones case, particularly in context of defining markets and theory of harm like the Smartphones case, the informants again are not from the industry sectors



(where a harm has been alleged), but are two practicing advocates. The Informants also identified smart TV manufacturers Xiaomi and TCL as parties alleging that the agreements between Google and these manufacturers contravene Section 3(4) of the Act.

In the relevant markets (a) and (b) identified above, the CCI found Google to be *prima facie* dominant based on extrapolations of publicly available data. Similar to the Android Smartphones case, the CCI identified the following *prima facie* theories of harm against Google:

- The obligations imposed by Android Compatibility Commitment (**ACC**) restricts OEMs from dealing in Android forks thereby denying developers of Android forks market access in contravention of Section 4(2)(c) of the Act.
- The obligations under the ACC are akin to making the conclusion of contracts subject to acceptance by other parties of supplementary obligations. This has no connection with the subject of such contracts and are thus in contravention of Section 4(2)(d) of the Act.
- By making pre-installation of Google's proprietary apps and particularly Play Store under the Television App Distribution Agreement (**TADA**), conditional upon signing of ACC, Google reduced the ability and incentive of OEMs to develop and sell Android forks thereby limiting technical or scientific development relating to goods or services to the prejudice of consumers in contravention of Section 4(2)(b) of the Act.
- Mandatory preinstallation of all the Google applications under TADA amounted to imposition of unfair condition on the smart TV OEMs and thereby was in contravention of Section 4(2)(a)(i) of the Act.
- Leveraging Google's dominance in the relevant market of Play Store to protect the relevant markets such as the online video hosting services in which YouTube operates amounted to a contravention of Section 4(2)(e) of the Act.

Interestingly, while the complaint was filed against Google, Xiaomi and TCL, the CCI departing from its normal practice only sought comments/ objections against the complaint from Google. Assessing the allegations of *refusal to deal* and *exclusive dealing* under Section 3(4) of the Act against Google, Xiaomi and TCL, the CCI noted that a separate direction was not required and that the DG may examine these allegations during the investigation. Accordingly, the CCI directed the DG to conduct an investigation against Google.

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

CCI closed a case against Volleyball Federation of India, post an investigation

On June 03, 2021, CCI exonerated both Volleyball Federation of India (**VFI**) and a consultancy service provider for sports management, Baseline Ventures (India) Private Limited (**Baseline**) from allegations of contravention of provisions of Sections 3 and 4 of the Act made by Mr Shravan Yadav, Mr Amitsinh Tanvar and Mr Lavmeet Katariya (**Informants**).

The CCI vide its *prima facie* order on August 7, 2019, directed the DG to investigate into the allegations that the agreement entered between VFI and Baseline, granting exclusive rights to Baseline for organizing a volleyball league for men, women and beach volleyball in India for a period of 10 years is anticompetitive (**Impugned Agreement**). The Informants contended that the agreement restricted: (i) volleyball players from participating in any other league of their choice; and (ii) other enterprises from organizing any other volleyball

leagues. The Informants further alleged that many international players were denied an opportunity to play in the league organized by Baseline due to arbitrary selection of players by VFI and Baseline.

The DG in its findings concluded that VFI is an enterprise and being the sole authority at the national level which governs volleyball in India, VFI is dominant in both the relevant markets i.e. “*market for organisation of volleyball tournaments/events in India*” and “*market for services of volleyball players in India*”. Upon examining the Impugned Agreement, the DG found that through some clauses therein, VFI has abused its dominant position. VFI, also, by entering into an Impugned Agreement with Baseline has contravened the provisions of the anti-competitive agreement under the Act, with regards to organizing volleyball tournaments and leagues in India.

The CCI considered the objections/suggestions of VFI and Baseline. On the issue of VFI being an enterprise, the CCI suggested that VFI is a legal person and is involved in revenue generating activities which is sufficient to hold it as an enterprise under the Act. On merits, the CCI observed that the sport of volleyball is not comparable with other established sports which have gained popularity over the years. The CCI noted that there was no bar on the empaneled volleyball players in representing the country in national events and VFI was committed to ensure that the league season will not clash with the calendar of the national event when held, which was of prime importance. The CCI acknowledged the submission of VFI that considering the present state of the low popularity of the sport, another league was not even feasible and that is why no attempt has been made by any other organizers in all these years, to introduce a league. The CCI noted VFI's contention and concluded that players of volleyball, much less the Informants, were not denied any effective opportunity to participate either in the Volleyball League or any other tournament of volleyball, held in the country or abroad during the relevant period. There is also nothing on record to indicate that formation of any other league for volleyball or any tournament during the period was thwarted either directly or indirectly by VFI, as was observed in certain cases, which were brought before the CCI in the past in respect of other sporting events and where the CCI had to intervene.

Accordingly, the CCI closed the matter and urged VFI to allow equal access, opportunity, and level playing field to organizers, players, and other stakeholders of volleyball, bearing in mind its powers and responsibilities as the regulator of the sport.

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

CCI directs an investigation while also granting interim measures (in a rare exercise of its powers against the Amateur Baseball Federation of India)

On June 3, 2021, by way of separate orders, the CCI, on the basis of an information filed by the Confederation of Professional Baseball Softball Clubs (**Confederation**), directed an investigation against the Amateur Baseball Federation of India (**ABFI**) and issued an interim injunction against it.

The Confederation alleged that ABFI abused its dominant position in violation of Section 4 of the Act by dissuading all state-level baseball associations and players from engaging with bodies and leagues not recognized by it, and warning players of strict action for non-compliance.

The CCI noted that in the ‘*market for organization of baseball leagues/events/ tournaments in India*’ ABFI is dominant by virtue of its admitted apex position in the baseball ecosystem coupled with linkages/ affiliations with continental and international organizations.

The CCI found that the ABFI, by engaging in the alleged conduct *prima facie* acted in violation of Section 4 of the Act and hence directed the DG to investigate the same. The CCI also directed the DG to examine if the alleged conduct resulted in limitation or control of provision of services thereby leading to a contravention of Section 3 of the Act.

The CCI also found this to be a fit case for exercise of its powers to issue interim measures. The CCI, therefore, restrained the ABFI from issuing any communication to its affiliated State Associations, dissuading them, in any manner whatsoever, from allowing their players from participation in tournaments organized by any Associations/ Federations/ Confederations which are not



purportedly ‘recognized’ by ABFI. The CCI further directed ABFI not to threaten the players who want to participate in such events. Till date the CCI has passed around 60 orders under Section 33 (power to issue interim orders), however, interim relief to the informants has been granted only in less than 10 cases.

The orders of the CCI are available [here](#) and [here](#).

CCI closes allegations of cartelization against Airline Companies

On June 3, 2021, the CCI dismissed the allegations of cartelization against five airlines companies – Jet Airways (India) Limited (**Jet**), SpiceJet Limited (**SpiceJet**), Go Airlines (India) Limited (**Go Air**), InterGlobe Aviation Limited (**Indigo**) and Air India Limited (**Air India**) (collectively referred as **Airline Companies**).

Ms. Shikha Roy (**Informant**) had alleged a contravention of Section 3(3) of the Act by the airline companies by increasing the prices of tickets arbitrarily to exploit the passengers during extraordinary conditions in general and the Jat Agitation in the month of February 2016 in particular. The CCI had *prima facie* found that there was a general increase in the ticket prices on certain routes, especially in respect of tickets sold near the departure date during that time and this increase was noted to operate within a small-time frame. The CCI had further observed that with the use of algorithms, there exists a high possibility of collusion with or without the need of human intervention or coordination between competitors. Accordingly, the CCI directed an investigation by the DG under Section 26(1) of the Act.

It is pertinent to note that the Informant in the present matter did not file any response or suggestions to the DG Report and since the proceedings before the CCI are *in rem*, the CCI decided to proceed with the matter even in the absence of any response from the Informant. The CCI had noted that the DG investigated various factors and concluded that there was no uniformity between the airline companies with respect to pricing. The DG also investigated the possibility of collusion among the airline companies by use of algorithms in-built in their software ticket pricing system. The CCI noted that the airline companies were asked to explain the mechanism of dynamic pricing of their respective airlines. The DG concluded that the algorithm of one airline is different from the algorithm of another airline due to the fact that the inputs provided to software companies regarding the historical behavior of flights are different from airline to airline. After consideration of the regulatory framework for pricing of tickets under Rule 135 of Aircraft Rules, 1937, the CCI concluded that there was no contravention of Section 3(3) of the Act.

The CCI observed that existence of an *agreement* is a *sine qua non* for determination of contravention of Section 3(3) of the Act. While the CCI observed that the widespread use of algorithms in determination of price could pose anti-competitive effects by making it easier to achieve and sustain conclusion, it found no evidence on the record to suggest any collusion or concerted behavior amongst the airline companies. The CCI further noted that the algorithms used by each airline are custom made suited for their needs particularly. The CCI also noted that the final call regarding the inventory is

taken by the respective route analysts of different airlines. The CCI observed that there is no evidence on record to establish a cartel amongst the airlines during the period of Jat Agitation, i.e., 18th to 23rd February 2016. Accordingly, the CCI closed the matter under Section 26(6) of the Act.

Pertinently, the CCI has previously in the case of Samir Agarwal had an opportunity to determine whether use of common algorithms by the two cab aggregators Ola and Uber could be considered to be a case of cartelization amongst the drivers. The decision of the CCI, now confirmed by the Supreme Court also, did not find cartelization amongst the said cab aggregators.

The order of the CCI in Shikha Roy vs. Jet Airways, can be accessed [here](#).

CCI closes a case against textile manufacturers for alleged bid rigging on lack of plus factors

On May 5, 2021, CCI dismissed a complaint against two textile manufacturers namely Sankeshwar Synthetics Private Limited (**Sankeshwar**) and KKK Mills (**KKK**) for alleged bid rigging in the tender for procuring underplant woollen.

The informant had alleged that both Sankeshwar and KKK had quoted identical prices, which was revealed from the minutes of the meetings of the technical evaluation committee. The identical quotes/rates by the two bidders raised suspicion of bid-rigging and collusion amongst them. The CCI observed that other than mere existence of an identical rate there is no other evidence to buttress the allegations of collusion or suggest any inter se relationship between Sankeshwar and KKK.

The CCI *inter alia* concluded that: (i) mere existence of price parallelism or quoting identical prices is not sufficient to hold the parties responsible for bid rigging; and (ii) price parallelism must be accompanied by some plus factor to substantiate the presence of collusion, or any agreement between bidders. Accordingly, the CCI dismissed the case at the *prima facie* stage

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

CCI holds consensual nature of the agreement does not restrict CCI from investigating allegations of abuse of dominance

On May 4, 2021, the CCI closed three separate cases against Greater Noida Industrial Development Authority (**GNIDA**) and New Okhla Industrial Development Authority (**NOIDA**) for alleged abuse of their dominant position, which had been clubbed together by the CCI.

The information alleged that GNIDA and NOIDA had abused their dominant position by *inter alia* imposing unfair and one-sided conditions in the lease deeds with the members of the project developers. They also did not disclose that the land allotted to the project developers had encumbrances. GNIDA challenged the maintainability of the case on the ground that the CCI does not have jurisdiction as: (i) the lease deeds are private contracts and as such the nature of disputes is contractual which ought to have been filed before the appropriate forum and not before the CCI; (ii) Informants are involved in forum shopping; and (iii) it is not an 'enterprise' under the Act.

The CCI while rejecting the jurisdictional challenge raised by GNIDA observed that the present case relates to allotment of land by GNIDA to developers for development of group housing societies. It held that while GNIDA was performing statutory functions it was engaged in an economic activity and therefore was an enterprise under the Act, as only sovereign functions of the government are exempted from the provisions of the Act.

With respect to the contention of GNIDA that the lease deeds were private contracts entered into between the parties and that consequently, the nature of disputes is contractual in nature and the same ought to have been filed before the appropriate forum, the CCI observed that a dominant undertaking in abuse of its dominant position could impose unfair or discriminatory conditions/ price upon the parties who are contracting with it.

According to the CCI, if GNIDA's plea were to be accepted, dominant undertakings would virtually acquire an immunity from antitrust actions which is neither the intent nor the purport of the legislature. The CCI also found no force in the submission of GNIDA that

the developers had entered into the lease deeds consensually and are thus barred from raising any objections to the same under the Act. The CCI observed that merely because an agreement has been consensually entered into, does not restrict a person from approaching the CCI nor does it restrict the CCI from investigating, assessing and rectifying any anticompetitive conduct of a dominant entity.

On the issue of dominance, GNIDA pleaded that the relevant market should include all kinds of land (i.e. institutional, industrial, commercial and residential) in the same market, since vis-a-vis a real estate developer who is the consumer in this case, they are substitutable/interchangeable products. Objecting to this contention, the CCI opined that a consumer looking for a property for residential purposes will not substitute it with a commercial property, if the prices of residential property were to increase.

The CCI concluded that the relevant product market may be appropriately confined to allotment of land for development of group housing projects alone. The CCI further opined that GNIDA operated independently in the relevant market and all developers who wish to participate in schemes and setup projects in Greater Noida area are bound to abide by GNIDA's scheme documents and the policies.

Applying the same principles, the CCI found both GNIDA and NOIDA to be dominant in the relevant market of '*markets for allotment of land for development of group housing projects in Greater Noida and Noida*'. However, on the issue of abuse of dominant position, the CCI *inter alia* noted that in relation to non-disclosure of encumbrance on the land, the status of the land is transparently made available to the developers in a non-discriminatory basis. The CCI observed that every trade relation relies on the principle of Caveat Emptor i.e. Buyer Beware, i.e. that every purchaser/buyer or in this case lessee, is expected to ensure that he/she must make reasonable inspection of the property being transferred. The CCI based on this observation concluded that the developers cannot be absolved of their own lack of due diligence while entering into an agreement with GNIDA or NOIDA.

The CCI, however, refrained from dealing with the policy issues which were not commercial or economic in nature

and suggested that they be challenged before an appropriate forum. The CCI also noted that a delay in performing obligations in respect of one project, on the part of GNIDA cannot be considered as an abusive behaviour under the Act. Separately, the CCI observed that the lease deeds dated back to 2010 and 2014 and the informants have not offered any justifiable reasons for approaching the CCI at a belated stage. Accordingly, the CCI dismissed the cases.

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

CCI orders investigation against Tata Motors

On May 4, 2021, the CCI ordered an investigation into the alleged anti-competitive conduct of Tata Motors Ltd. (**Tata Motors**), Tata Capital Financial Services Limited (**Tata Capital**) and Tata Motors Finance Ltd. (**Tata Motors Finance**), collectively '**Tata entities**', on receiving two separate but similar complaints. The information alleged that Tata Motors is a dominant entity in the commercial vehicles (**CVs**) segment and the business model run by it, encompassing both manufacturing and financing of CVs is anti-competitive and abusive to the detriment of authorised dealers of Tata Motors in contravention of Sections 3 and 4 of the Act respectively.

The CCI delineated the relevant market as the market for '*manufacture and sale of commercial vehicles in India*' where Tata Motors holds a dominant position as per its Annual Report. Among the Tata entities, the CCI only found merit in the allegations of contravention of Sections 3 and 4 of the Act levelled against Tata Motors with respect to the relevant market. These allegations pertained to clauses under the dealership agreements between Tata Motors and its dealers through which the CCI *prima facie* found Tata Motors to have:

- coerced dealers to bill vehicles as per its own needs and requirement in contravention of Section 4 of the Act;
- imposed an overarching restriction on dealers to not start, acquire or indulge in any new business (of product or services) even if it is not related to the automobile industry in contravention of Section 4 of the Act; and
- imposed territorial restrictions on dealers in the nature of an 'exclusive distribution agreement' as provided for under Section 3(4)(c) of the Act.

On this basis, the CCI directed the DG to conduct an investigation against Tata Motors.

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

CCI holds that Informant cannot decide the process or manner of investigation

On April 15, 2021, the CCI closed an information filed against four authorized liquor distributors in the state of Uttar Pradesh (i.e. Flora and Fauna Housing & Land Developments Pvt. Ltd., Patiala Kings Liquor Pvt. Ltd., Royal beverages Pvt. Ltd. and Kiwi Wines and Beverages Pvt. Ltd.) (collectively 'Distributors'), Chadha Holding Pvt. Ltd. and the Government of Uttar Pradesh.

The CCI held that the investigation conducted by the DG had failed to establish the alleged violations of Section 3 and Section 4 of the Act by the above parties. The informant in the matter, Starlight Bruchem Ltd, a licensed manufacturer of country liquor in the state of Uttar Pradesh, had alleged that the Distributors were the only authorized distributors in the state of Uttar Pradesh and were operating under a mutual agreement to source the liquor only from certain manufacturers. As per the informant, such conduct of the Distributors was leading to the exclusion of other manufacturers of country liquor, in violation of provisions of Section 3 of the Act.

It was further alleged by the informant that the Distributors were part of the Chadha Holdings Pvt Ltd group, and this allowed the Chadha group to exercise absolute control over the purchase and sale of country liquor in the state of Uttar Pradesh. It was alleged that the Chadha Holdings Pvt Ltd was abusing this dominant position by indulging in practices, with regard to purchase and sale of country liquor, which were selective and discriminatory and hence in violation of Section 4 of the Act.

In respect of the State of Uttar Pradesh, the informant alleged that the State had abused its dominant position by formulating and implementing its excise policy, such as mandatory sale of liquor to distributors only and restricting manufacturers from participation for grant of distributorship. These policies according to the informant were unfair and discriminatory against the distilleries / manufacturers and in violation of Section 4 of the Act.

The CCI based on the investigation conducted by the DG observed that there was no merit in the allegations made by the informant against the Distributors and Chadha Holdings Limited. In respect of the allegations against the State of Uttar Pradesh, the CCI noted that "*policy formulation is in the realm of sovereign activities and cannot be a subject matter of examination under the enforcement mandate of the Commission*". The CCI further, in respect of an application by the informant to summon documents, interestingly held that under the scheme of the Act an informant only "*sets the machinery of law into motion*" and can only render assistance to the DG or the CCI in the investigation or inquiry. It observed that an informant under the scheme of the Act cannot be considered to be a litigant and hence cannot decide or "*dictate the process, mode or manner of investigation*". With the above observations the CCI closed the matter.

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

CCI dismisses allegation of abuse of dominance against CICTPL

On April 9, 2021, the CCI dismissed the allegations of abuse of dominance against Chettinad International Coal Terminal Pvt. Ltd. (CICTPL) and Kamarajar Port Limited (KPL) (collectively called the OPs). The Tamil Nadu Power Producers Association (TNPPA) had alleged that the OPs had unfairly imposed Coordination and Liasoning Charges (C&L charges) on the importers in contravention of Section 4(2)(a)(i) and Section 4(2)(d) of the Act. The CCI found it highly implausible that the importers would not have the knowledge of the charges paid to a third-party service provider and passed the *prima facie* order under Section 26(1) of the Act directing the DG to investigate the matter.

The CCI assessed the material on record and before defining the relevant market, it noted that while KPL was made a party to the proceedings, there were neither any specific allegations nor any investigative findings against it. Accordingly, the CCI exonerated it from the proceedings. The CCI observed that the relevant product market was *provision of common user coal terminal services at sea-port* and that the relevant geographical market was *in and around Kamarajar Port which includes*

common user coal terminals at Krishnapatnam Port. The CCI further observed that the presence of Krishnapatnam Port posed significant competitive constraints on CICTPL, so much so that the latter could not be held as dominant in the relevant market.

Since the dominance of CICTPL was not established, the CCI noted that it was not required to assess the allegations levied against it, but for the sake of completeness, the CCI went on to assess the allegations. The CCI noted that several members of TNPPA (importers) had stated that such charges were mandatory and agreed that these services were indeed mandatory in nature and that they were imposed upon the importers, at least for the period immediately after the closure of the Chennai Port. The CCI examined the linkages between the third-party service providers and the Chettinad Group and noted that while the third-party service providers were not part of the group, its affairs were managed and controlled by the Chettinad Group. With the aforementioned observations in mind, the CCI held that while the actions of CICTPL were opportunistic, the same could not be called an abuse arising out of dominance as CICTPL had not been found to be in a dominant position. The CCI accordingly dismissed the matter.

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

CCI closes case against Government Department of the State of Tamil Nadu

On April 8, 2021, the CCI closed a case against the Superintending Engineer, Construction and Maintenance, Highways Department of the State of Tamil Nadu (OP) for alleged contravention of Section 4 of the Act. OP is a government department, established to maintain and improve roads under the control of the Government of Tamil Nadu.

The complainant in the case, an advocate, had levelled general allegations of unfair conditions being imposed in the invitation of tender process by the State Department. The CCI firstly, relying on a previous order of the COMPAT noted that the nature of activity being performed by the OP (being a department engaged in the activity of developing and maintaining roads in the State of Tamil Nadu) fell within the ambit of the term 'enterprise' under Section 2(h) of the Act.

The CCI, given the nature of facts of the case did not define the precise relevant market but analyzed the

conduct of the OP for any potential abuse of the provisions of the Act. The CCI noted that the methodology adopted by the OP for the bidding process was a result of a policy decision taken by the Government of Tamil Nadu announced in their Legislative Assembly in FY 19-20. With respect to unfair conditions being imposed in the invitation to tender process, the CCI noted that without express violation of the provisions of the Act, a procurer/consumer, based on its requirement and other commercial considerations, has the freedom to specify the kind of service, machineries, time lines, mode and the manner in which it requires the same; and the same cannot be dictated to the procurer.

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

The Delhi High Court dismissed Facebook/WhatsApp's petitions against CCI's order directing investigation into WhatsApp's Privacy Policy

On April 22, 2021, a single judge bench of the Delhi High Court dismissed Facebook's and WhatsApp's petitions against the CCI's order to investigate WhatsApp's 2021 privacy policy update. The Court also dismissed Facebook's plea to be impleaded in the DG's investigation. The Court noted that the CCI's impugned order under Section 26(1) of the Act shows that Facebook will be an integral part of the DG's investigation and the allegations in relation to sharing of data by WhatsApp with Facebook would necessarily require the presence of Facebook in such an investigation.

Facebook/WhatsApp challenged the CCI's exercise of jurisdiction over WhatsApp's Privacy Policy which is already under review by the Delhi High Court and the Supreme Court. On this point, the Court observed that merely because of the pendency of proceedings before the Supreme Court and the Delhi High Court, the CCI cannot be said to be without jurisdiction. The Court also noted that while a challenge to WhatsApp's 2021 update has been raised before the Supreme Court, it has not yet taken cognizance of the same.

The order of the Delhi High Court is available [here](#).

Facebook/WhatsApp filed an appeal against this order before a Division Bench of the Delhi High Court. Meanwhile, the DG issued a notice to WhatsApp in

furtherance of its investigation. Facebook/WhatsApp approached a Vacation Bench of the Delhi High Court seeking to stay the DG's notice and restrain the DG from taking any action in furtherance of the CCI's investigation order during the pendency of their appeal before the Division bench. While the Vacation Bench did not stay the DG's notice or the investigation, it urged the DG to bear in mind that the investigation is subject to judicial consideration by the Division Bench.

The order of the Vacation Bench dated June 21, 2021 is available [here](#).

Challenges raised by Amazon and Flipkart against CCI's Investigation dismissed by the Karnataka High Court

On June 11, 2021, a Single Judge of the Karnataka High Court dismissed the writ petitions filed by Amazon Seller Services Private Limited (**Amazon**) and Flipkart Internet Private Limited (**Flipkart**) seeking *inter alia* quashing of the order of the CCI dated 13 January 2020. The CCI had passed the order against Flipkart and Amazon under Section 26(1) directing the DG to investigate into the allegations of contravention of Section 3(1) read with Section 3(4).

On February 14, 2020, the court granted an interim stay on the *prima facie* order of the CCI. Upon final hearing, the court considered all the averments on record and delineated three issues for consideration. While assessing the rival contentions of the parties, the court observed that an order passed under Section 26(1) of the Act is an *administrative direction* of the CCI to one of its wings departmentally without entering upon any adjudicatory process. The court further observed that at the stage of Section 26(1) there is no requirement under the Act for issuance of any notice to any party before or at the time of formation of an opinion by the CCI.

The court further noted that the CCI had assessed the information in detail and had applied its mind while passing the order. The court observed that Amazon and Flipkart had pleaded in extension, elaborate arguments, addressing the merits of the matter, whereas in a writ under Article 226 of the Constitution of India, the High Court could only examine the decision-making process except in cases of human rights violations. The court further observed that while jurisdiction under Article 226 is very large, it is not so large as to convert it into a court of appeal and examine for itself the correctness of a decision. Based over its assessment of the impugned

decision of the CCI, the court observed that the CCI had fulfilled the condition that the order directing investigation be supported by '*some reasoning*'. Therefore, the court held that it would be unwise for it to prejudice the issues raised by Amazon and Flipkart which could scuttle the investigation. Accordingly, the court dismissed the petitions. The order of the Karnataka High Court can be accessed [here](#).

Gujarat High Court directs CCI to reconsider its direction for re-listing of FabHotels and Treebo on MMT-Golbibo platform

The Division Bench of the Gujarat High Court through its order dated June 14, 2021 disposed off the appeals preferred by Casa2Stays Private Limited (**FabHotels**) and Rubtub Solution Pvt. Ltd. (**Treebo**). These appeals were preferred by FabHotels and Treebo against the decision of the Single Bench of the Gujarat High Court for seeking directions for a stay on the operation of the order granting interim relief, passed by the CCI under Section 33 of the Act. The CCI in its order had directed MakeMyTrip and Go-Ibibo (collectively MMT-Go) to relist the inventory of rooms of FabHotels and Treebo on their hotel bookings platform. This order was passed by the CCI in respect of an information alleging violation of Section 3 (allegation of anticompetitive agreement amongst MMT-Go and Oravel Stays Limited (OYO) and 4 (allegation of abuse of dominance by MMT-Go) of the Act.

OYO being aggrieved by the order of the CCI had challenged the direction on the grounds of violation of principles of natural justice. It stated that despite it being a party directly affected by the directions of the CCI, it was not granted an opportunity to make submissions before the CCI passed its order. The Single Bench of the Gujarat High Court being of the *prima facie* view that the allegations merit consideration, granted an interim stay on the operation of the order passed by the CCI till the matter is finally disposed off by the High Court.

Before the Division Bench of the High Court, the parties however, indicated that the CCI was willing to grant an opportunity to OYO to make its submissions before the CCI and the CCI may pass a fresh order thereafter. In light of the consensus reached between the parties, the High Court disposed off both the appeals.

The order of the Gujarat High Court is available [here](#), with case details as C/LPA/407/2021

Policy Update

CCI is assessing the Model concessions agreements in Infrastructure and Public Services Sector

The Chairperson of the CCI on May 20, 2021, during his address in the 12th Annual Day of the CCI highlighted that the CCI has been engaged with the Niti Ayaog for over a year for competition assessment of model concession agreements. He highlighted that concession agreements in respect of the Infrastructure and public service delivery sector, such as railways, ports, airports, coal, national highways, education infrastructure etc. are currently under consideration / assessment.

Chairperson, CCI also highlighted that the aim of the assessment of these agreements is to mitigate competition concerns which may arise in structuring, granting and implementing concession agreements of these concession agreements by the government. The assessment, according to the Chairperson, would help in preempting any competition intervention or concerns in these agreements at a later stage.

The video recording of the Annual Day ceremony can be accessed [here](#)

CCI issues a discussion paper on Blockchain Technology and Competition

In April 2021, the CCI in collaboration with Ernst & Young, published a discussion paper on Blockchain Technology and Competition. The paper discusses several key aspects around the blockchain technology and provides guidance about competition law to the blockchain stakeholders thereby encouraging compliance with competition law.

The paper explains competition law concepts as provided under the Act in the context of blockchain technology. In each instance, the paper identifies issues for further deliberation. In setting out the way forward, the CCI notes that with strong advocacy and if feasible, through regulatory sandbox, it may be possible to code and integrate competition law requirements into blockchain applications, which would benefit both the

blockchain's stakeholders and promote competition in India.

The paper concludes by setting out certain guidelines for compliance. Some of these are provided below:

- Blockchain applications should not be used to exchange information among competitors. This includes recent data on prices, cost or output information of competitors.
- Blockchain or smart contracts should not be designed to enable enforcement of any collusive (including imposing punishment in case of deviation from collusive agreement) or anti-competitive conduct of any form.
- Stakeholders need to be mindful of the provisions related to Section 3(4) of the Act while creating any smart contract or blockchain application between parties that are part of a production chain, such that these do not result in or are likely to result in appreciable adverse effect on competition.
- Any enterprise operating or participating in a blockchain, which is in a position of dominance (as defined in Section 4 of the Act), should avoid potentially anti-competitive behaviour such as fixing unfair or discriminatory prices or conditions or provision of services, limiting or restricting production/development of goods or services or denial of market access of goods or services.

The CCI's discussion paper is available [here](#).

CCI releases its Annual Report for 2019-20

The CCI released its Annual Report for the financial year 2019-20, completing a decade of its establishment. The report highlights some of the key data, developments and trends that the year witnessed. For instance, the year 2019-20 saw the inception of the 'Green Channel' route, with the CCI receiving 10 notices in the first year itself. The merger control regime in India completed a decade in 2020. The CCI has since then received more than 800 combination filings and reviewed over 110

cases since January 2019. Specifically, 2019-20 saw 82 new combination filings with the Commission approving 81 of them.

Under the antitrust regime, since its inception, till 31 March 2019, the CCI has received more than 1000 cases. The year 2019-20 saw the CCI registering 60 new information in respect of antitrust cases and passed final orders in 93 matters.

Another highlight for the year 2019-20 was the CCI proactively conducting a market study in the e-commerce sector in order to identify emerging market trends, parameters of competition in digital trade, new business models, etc. The CCI is currently also studying the telecommunications sector, the pharmaceutical sector, digital mergers and acquisitions, and private equity investments in India.

The Commission organized more than 100 advocacy programs to reach out to various stakeholders and also organized a function themed 'Ten Years of Competition Law Enforcement' on August 23, 2019 to commemorate its decadal journey.

We hope you have enjoyed reading our update. For any queries/comments please write to us at insights@elp-in.com or write to our authors:

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