



COMPETITION LAW & POLICY NEWSLETTER

Quarter 4 of 2021

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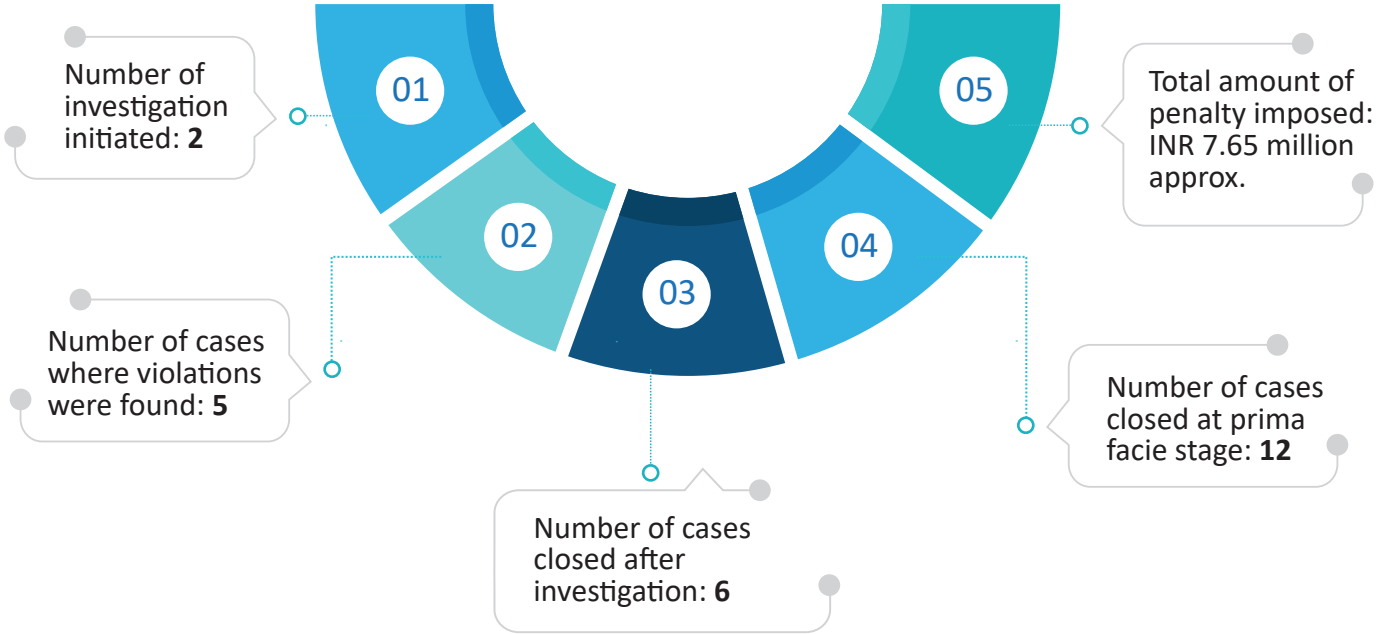
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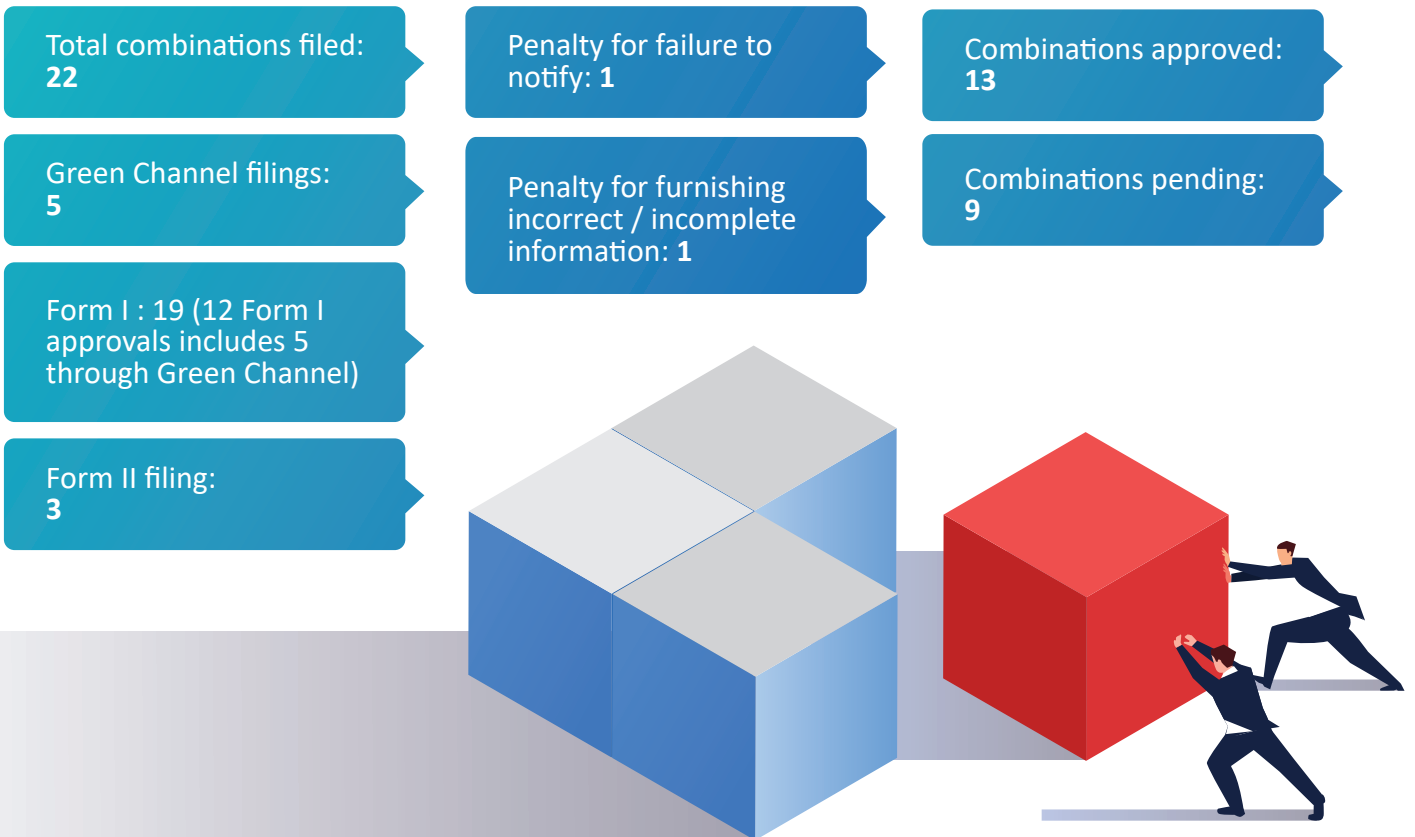
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KEY ENFORCEMENT MATTERS

#1 CCI finds suppliers of Axle Bearings guilty of cartelization, refrains from imposing monetary penalty

Background and Allegations

- The case was initiated on information filed by the Eastern Railways against five Research Designs and Standards Organisation (RDSO) approved vendors who were engaged in the manufacture and supply of axle bearings.
- It was alleged that an internal investigation revealed that some vendors, had quoted the same price for the axle bearings used in EMU trains in response to three tenders floated between 2012 and 2014.
- During the investigation, three more firms/vendors were arrayed as opposite parties in the matter.

Key Findings and Conclusion

The CCI analyzed the bids in question and held that there is overwhelming evidence to conclude that there was an agreement/arrangement/understanding amongst the suppliers to share quantities offered in the tenders issued by different Railway zones. The CCI found that these arrangements reflected the rigging of price bids by the suppliers for the three Eastern Railway tenders.

Based on the evidence on record, the CCI concluded that the firms and their respective officials had indulged in cartelization in contravention of the provisions of section 3(3)(d) read with section 3(1) of the Act. It further issued a cease and desist order against the firms.

The CCI also analyzed evidence which reflected that the firms had discussed quantity allocation amongst themselves, with respect to the tenders issued by the Indian Railways for the procurement of axle bearings. The evidence showed that the vendors had discussed a compensation mechanism in the event that some of them did not win the agreed quantities.

The CCI, however, considering the cooperative and non-adversarial approach adopted by firms in acknowledging their involvement as well as the economic stress caused to the MSME sector in the wake of COVID-19, refrained from imposing any monetary penalty.

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

2 CCI to investigate the Table Tennis Federation of India and Others

The CCI has directed an investigation into alleged anticompetitive practices adopted by the Suburban Table Tennis Association (**TSTTA**); Maharashtra State Table Tennis Association (**MSTTA**); and Table Tennis Federation of India (**TTFI**) (collectively **OPs**).

TT Friendly Super League Association (**Informant**), an NGO created for the promotion of Table Tennis (**TT**) in India filed an information against the OPs alleging contravention of Sections 3 (anticompetitive agreements) and 4 (abuse of dominant position) of the Act.

It is alleged that the TSTTA had circulated a notice addressed to players/parents/coaches/clubs, asking them not to join or play matches organized by any unaffiliated organizations. The notice further stated that the players/clubs not adhering with above directions would not be allowed to participate in any of the tournaments that the district body or State body organizes, and non-adherence would also result in suspension/non-acceptance of the entries in TT tournaments. As a consequence of the notice, many suburban players refused to register or join as members of the Informant.

While dismissing the submission of the OPs that they were not an 'enterprise', the CCI observed that the *"thrust of the definition of the term 'enterprise' is on the economic nature of the activities discharged by the entities concerned. It is immaterial whether such economic activities were undertaken for profit making/commercial purpose or for philanthropic purpose."*

While defining the relevant market as *'market for organization of table tennis leagues/events/ tournaments in India'*, the CCI observed that as a result of the ecosystem of TT at the national level, the OPs prima facie appear to hold a dominant position in the market.

The CCI also observed that the notice issued by the TSTTA and the memorandum of association of TTFI appeared to be restrictive in nature, and found it a fit case for investigation under Sections 3 and 4 of the Act.

Vide a separate order, the CCI also restrained the TSTTA from issuing any communication to players/parents/coaches/clubs, restricting or dissuading them from joining or participating in tournaments organized by Associations/Federations/Confederations which are not purportedly 'recognized' by the TSTTA. The CCI specifically directed the TSTTA to not threaten players who wish to participate in such events.

The Order can be accessed [here](#) and the order granting interim relief can be accessed [here](#)

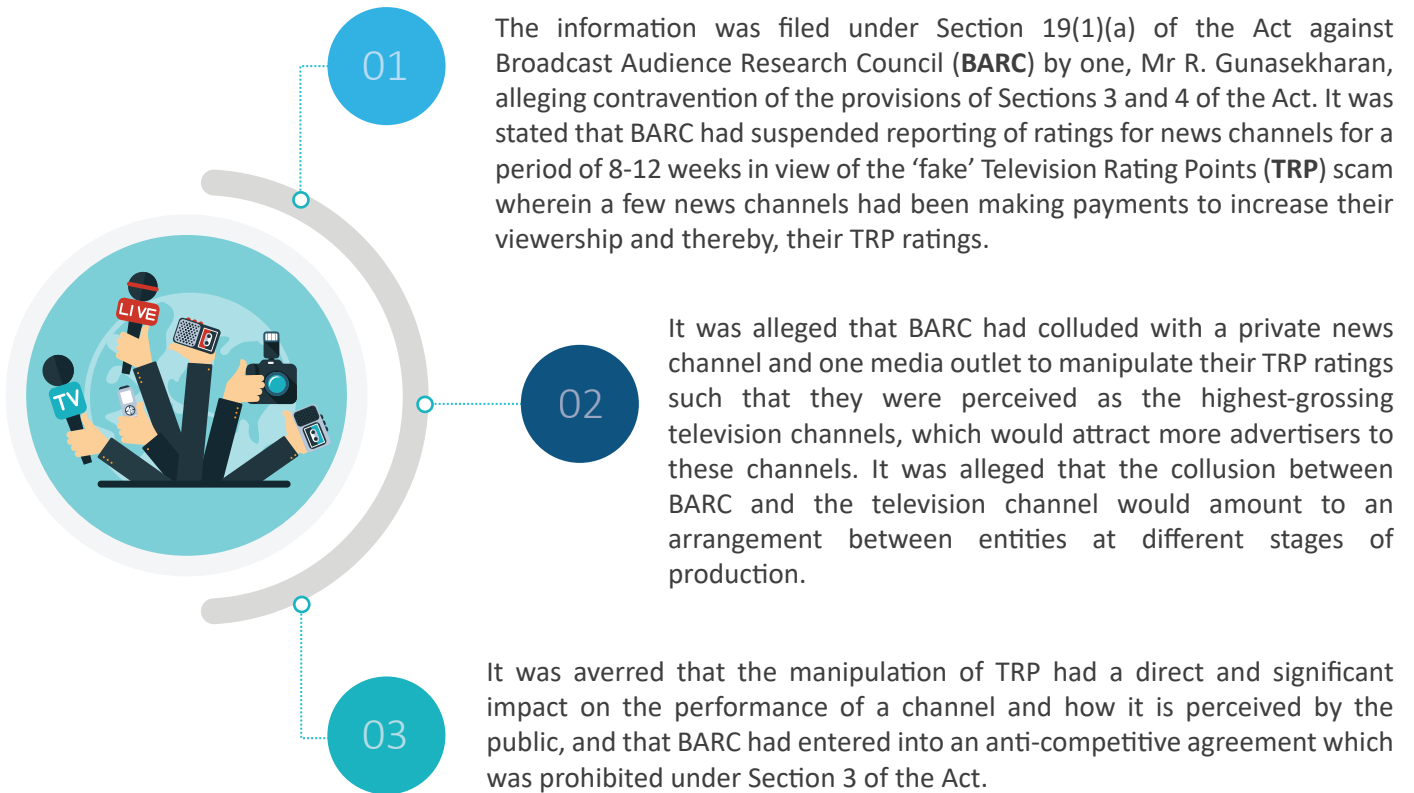
Other Noteworthy facts

The CCI has previously imposed a penalty of INR 6,92,350/- and passed a cease and desist order against the [All India Chess Federation \(AICF\)](#) for imposing restrictions on chess players, preventing them from participating in tournaments not recognised by AICF.

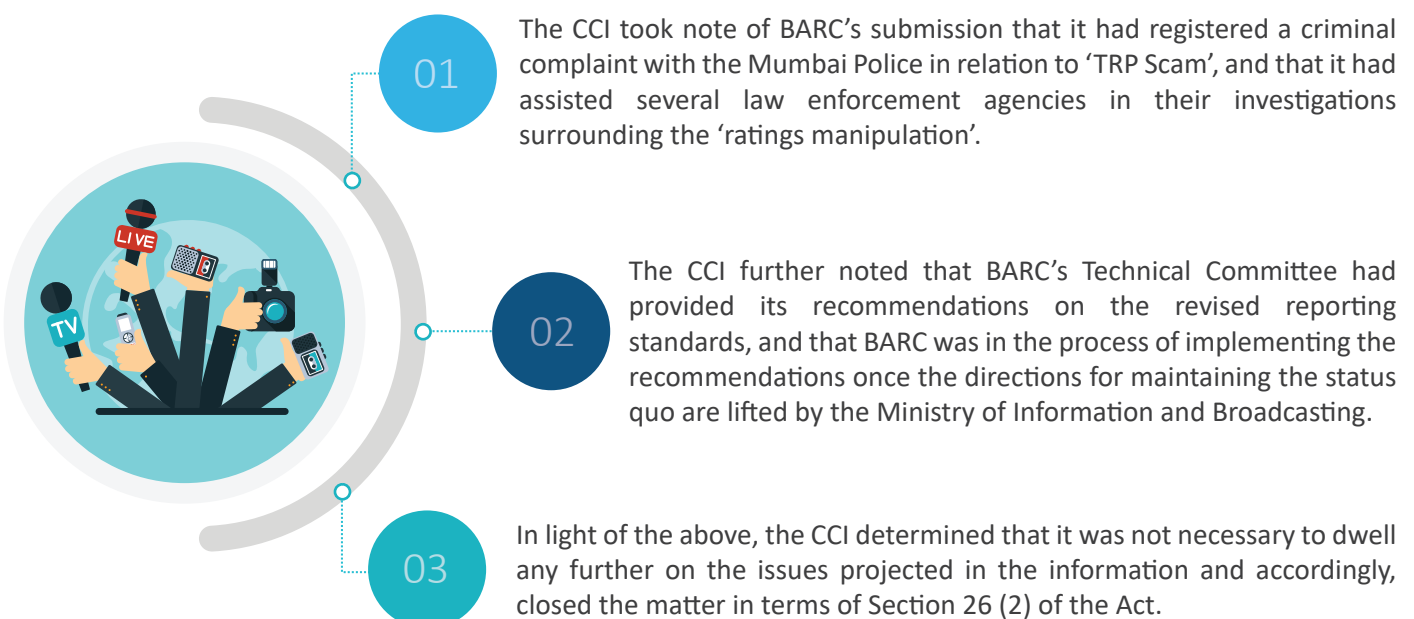
In another case relating to the [Volleyball federation of India \(VFI\)](#), the CCI closed the matter after investigation and noted that nothing on record indicated that the formation of any other league for volleyball or any tournament during the relevant period was thwarted either directly or indirectly by VFI.

#3 CCI dismissed a case against BARC in the 'Fake TRP' Case

Background and Allegations



Key Findings and Conclusion



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

#4 CCI finds six firms guilty of bid rigging and cartelization in a tender floated by the FCI

Background and Allegations

The case was initiated based on a reference filed by the Food Corporation of India (FCI) against four firms, namely, Shivalik Agro Poly Products Ltd; Climax Synthetics Pvt Ltd.; Arun Manufacturing Services Pvt Ltd.; and Bag Poly International Pvt Ltd. alleging that they had entered into anticompetitive agreements in violation of Section 3 of the Act.

The FCI alleged that the four firms had quoted either identical rates or cosmetically differing rates in response to a tender floated by the FCI to procure Low Density Polyethylene covers (LDPE) that are used for protecting the food grain stocks from rain and fumigation.

During the investigation, two more parties, i.e., Shalimar Plastic Industries and Dhanshree Agro Poly Product, were also arrayed as opposite parties by the CCI.

Key Observations on Substantive and Procedural Aspects

The CCI held that the standard of proof required to prove an understanding or an agreement under the Act follows '*preponderance of probabilities*' and not '*beyond reasonable doubt*'. Since there is rarely any direct evidence of an action in concert, the CCI is required to determine whether those involved in such dealings had some form of an understanding.

The CCI also clarified, from a procedural point of view, that it is only when the evidence is directed to be led by way of oral submissions that the CCI or the DG may grant an opportunity to the other party or parties to cross-examine the person giving the evidence, if considered necessary or expedient.

In case of agreements as listed in Section 3(3)(a) to (d) of the Act, once it is established that such an agreement exists, it will be presumed that the agreement has an appreciable adverse effect on competition and the onus to rebut the presumption would lie upon the parties.

Conclusion

The CCI found the six firms to have indulged in cartelization and bid rigging in contravention of the provisions of Section 3(1) of the Act read with Section 3(3)(d). While the CCI issued a cease-and-desist order against the six firms, it refrained from imposing any monetary penalty since four out of six firms had filed leniency applications admitting their conduct. The CCI also observed that the firms were micro, small and medium enterprises (MSMEs) with limited staff and turnover, and that an imposition of penalty in the prevailing economic circumstances may render these firms economically unviable and may even result in their exit from the market, which would further reduce competition in the market.

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

5 Penalty imposed on paper manufacturers for indulging in cartelization

Background and Allegations

The CCI issued an order under Section 27 against 10 companies manufacturing paper from agricultural waste and recycled wastepaper, as well as the industry association for indulging in anti-competitive conduct in contravention of Section 3 of the Act. The case was initiated *suo motu* by the CCI on the basis of certain material found during ongoing investigations of two other cases.

Key Findings and Conclusions

The CCI observed that:

Independent decision-making ability of competitors is affected even by merely attending meetings where commercially sensitive information like *pricing* is discussed.

Where a number of players are operating in an industry, it is not necessary to implicate and implead each and every player in order to establish a cartel.

Once it is established that an agreement under Section 3 (3) of the Act exists, it will be presumed that the agreement has or is likely to have an appreciable adverse effect on competition within India, and the onus to rebut the presumption would lie upon the parties.

The paper manufacturers had indulged in cartelization by fixing prices of writing and printing paper which was achieved through meetings convened under the umbrella of their trade association. The CCI found that price discussions, roadmaps for coordinated price increase and monitoring of decisions taken in such meetings were discussed during these meetings.

The CCI held that the paper manufacturers as well as the association to be in contravention of Section 3 of the Act. However, considering that the pandemic had impacted the paper industry significantly, the CCI only imposed a symbolic penalty of INR 5 lakh each on the 10 paper manufacturers, and a penalty of INR. 2.5 lakh on the association for providing its platform for anti-competitive activities, noting that any significant penalty on these firms may render them economically unviable.

Further, the Commission also directed the paper manufacturers and the association to cease and desist from indulging in anti-competitive conduct in the future.

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

#6 Apple under Scrutiny for Alleged Abuse of Dominance



- The CCI has directed investigation into the alleged anticompetitive practices of Apple Inc. and Apple Distribution International India Limited (collectively **Apple**).
- Together We Fight Society, a non-government organization, has alleged that Apple used anti-competitive restraints and abused its dominant position in markets for - (i) non-licensable smart mobile operating system; (ii) app store for apple smart mobile operating system in India; and (iii) for apps facilitating payment through Unified Payment Interface (**UPI**):
 - by imposing unreasonable and unlawful restraints on app developers from reaching users of Apple's mobile devices, mandating that access be made only through Apple's own AppStore;
 - by mandating app developers to use the single payment processing option, as offered by Apple;
 - by charging excessive commission of 30% for app purchases and in-app purchases, as payment processing fee;
 - by enforcing, in an unfair and arbitrary manner, the AppStore review guidelines, including by restricting the app developers from using the information obtained within the app and restricting the app developers from using their own mechanisms for unlocking any content or functionality of the app; and
 - foreclosing the market for 'in-App payment processing on iOS devices' by mandating the exclusive use of payment processing system offered by Apple.
- The CCI noted that Apple's ecosystem is non-licensable and a closed source, unlike Google's Android ecosystem, for instance. It also noted that the ecosystem was vertically and exclusively integrated throughout the value chain, wherein it provides its app, AppStore and smart devices.
- It was also observed that the apps and app stores are developed for working only on one operating system/ecosystem, and cannot be used on the other operating system/ecosystem. Hence app/ app store developers had to develop separate apps/app store for both operating systems/ecosystems, unless they wish to forego the customers using the other operating system/ecosystem. The CCI noted that app stores are a crucial component of these ecosystems, as consumers download apps only through these app stores, to access content and access the internet. Based on the above, the CCI observed *prima facie* that the relevant market should be the '*market for app stores for iOS in India*', which is consistent with its *prima facie* findings in its previous orders also.
- Having defined a relevant market, the CCI observed that the AppStore provided by Apple was the only available app store for the users to download the apps on their iOS/Apple devices and was also the only means for the app developers to distribute their apps to their customers who used iOS /Apple devices, due to the closed ecosystem model of Apple.
- Based on the above, the CCI concluded that Apple *prima facie* appears to be dominant in the relevant market identified above, as the app store provided by it is the monopoly app store in the relevant market identified above.

- As regards the allegations, the CCI *prima facie* observed, amongst others, that:
 - App Store Review Guidelines imposed an unfair restraint on the ability of app developers to offer cost-effective subscription models to app users;
 - Mandatory use of Apple’s in-app purchase processing system for paid apps & in-app purchases restricts the choice available to the app developers from using any other cost effective payment processing system;
 - Tying of distribution service and payment processing service for in-app purchases, limits the ability of the app developers to offer payment processing solutions of their choice;
 - Higher fees charged for payment processing would increase the cost for Apple’s competitors and might affect their competitiveness as compared to Apple’s own apps;
 - AppStore Review Guidelines specifically prohibits developers from offering third party app stores and this results in denial of market access for app distributors and app store developers;
 - Due to Apple being the intermediary for the in-app payment processing, it may have access to the data of the users of its downstream competitors and can use such information for improving its own services. However due to the policies of Apple, the downstream competitors may themselves not have access to such information and Apple may leverage its dominant position to enter/protect its downstream market.
- Based on the above the CCI directed an investigation into the alleged practices of Apple under Section 4 of the Act.

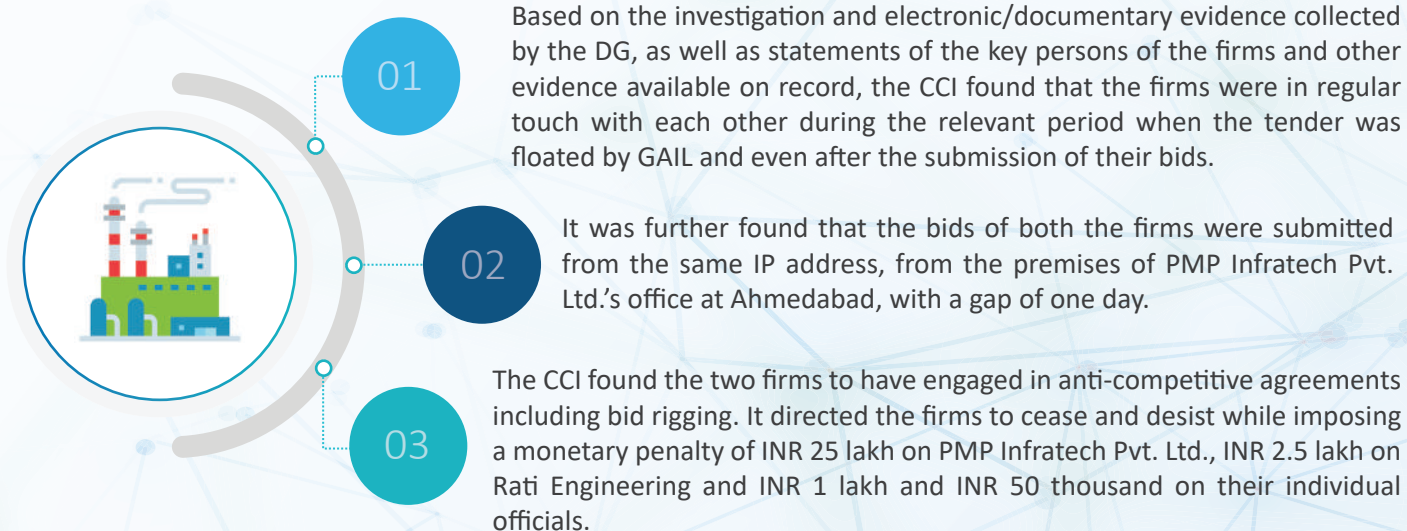
The decision of the CCI is available [here](#).

7 CCI finds bid rigging in GAIL Tender; Imposes Monetary Penalty on Two Firms

Background and Allegations

An investigation was initiated by the CCI in 2019 on an information filed by the Gas Authority of India Limited (**GAIL**), against *PMP Infratech Pvt. Ltd.*, and *Rati Engineering*, for alleged bid-rigging in response to a tender floated by GAIL in 2017–18 for the restoration of well sites located in Ahmedabad and Anand areas of Gujarat.

Key Observations & Conclusion



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

Quick bites on CCI's Closure Orders under Section 26(2) of the Act

Title	Brief
<p><i>C Prabhu Daniel Vs. M/s Tamil Nadu Theatre and Multiplex Owners Association</i></p>	<p>It was alleged that M/s Tamil Nadu Theatre and Multiplex Owners Association (Association) was demanding a written undertaking from producers to not premiere their movies on any OTT platform for a period of 30 days from the theatrical release. It was alleged that such a restriction had constrained the potential of OTT platforms to become an alternate or additional medium of movies exhibition and thereby compete with single screens and multiplexes.</p> <p>However, since no material was adduced to support the allegation, no case of contravention of provisions of Act was found against the Association and matter was closed by the CCI.</p>
<p><i>Shri Mohd. Gayoor Haider Vs. Ghaziabad Development Authority and Another</i></p>	<p>The CCI held that an allegation of non-handing over of an allotted residential plot by builder to an allottee was in nature of an individual civil dispute rather than a competition issue and thus, the case against Ghaziabad Development Authority was closed by the CCI.</p>
<p><i>Mr. Anand Moudgil Vs. Orbit Aviation Private Limited</i></p>	<p>It was alleged that Orbit Aviation Private Limited was imposing restrictions on the informant from re-entering into business of running buses, by invoking non-compete clause under the sale of asset (busses) agreement.</p>
<p><i>Harshit Vijayvergia and Another Vs. Indian Railways</i></p>	<p>Two law students had alleged that the Indian Railways was abusing its dominant position by charging higher ticket fares under garb of the COVID-19 pandemic as well as restricting operations of trains in market, even though it being in a dominant position had a special responsibility to not charge excessively in the name of the pandemic</p> <p>The Indian Railways submitted that the decision to increase the prices was a policy decision taken <i>“to discourage people undertaking unnecessary travel in COVID pandemic”</i>, and this decision also supported the decisions of Central Government and some State Governments taken during the pandemic. Considering the above submission, the CCI held that Indian Railways had disclosed sufficient reasons for its decision of increasing the fares and it did not find any merit in the allegations. The matter was hence closed.</p> <p>The CCI ordered the matter to be closed on the ground that no material was placed on record which would demonstrate the presence of any entry barriers due to purported non-compete clause.</p>

MERGERS & ACQUISITIONS

#1 CCI Lays Down the Test for Accounting Intra-Group Sales in Proposed Acquisition of Parexel International Corporation (Parexel/Target) by Phoenix

- The transaction pertained to the acquisition of 100% equity shareholding of Parexel International Corporation by Phoenix Parentco, Inc. Pertinently, Phoenix Parentco Inc. is a special purpose vehicle jointly controlled by EQT Fund Management S.à r.l. and the Goldman Sachs Group, Inc.
- It was submitted by the parties that Parexel International Corporation is mostly engaged in intra-group activities, where almost all of its turnover is generated through sale of its services and products to its overseas group entities. It was further submitted that intra-group turnover should not be included for assessing the applicability of the *De-minimis* exemption.
- The CCI while rejecting the submission of the parties, based on the facts of the case, laid down the following criteria for determination of the turnover for the purpose of intra-group transactions:

- *In a transaction, where 'X' is acquiring the ultimate parent entity of a group viz. 'A', the same would lead to indirect acquisition of all group entities of A. In this case, the value of all intra-group sales can be excluded for the purpose of Section 5 as well as De-Minimis exemption, to avoid double counting.;*
- *No intra-group sales should be excluded, if only one of the group entities of A viz. 'M' is acquired by X (without any direct or indirect acquisition of other group entities of A). This is because, the issue of double counting does not arise and the standalone financials of the target (i.e. M) alone is to be considered.;*
- *If two or more companies within a group is acquired, then, only the value of sales between them alone can be excluded for the purpose of Section 5 and De-Minimis exemption.*
- *For determination of turnover in India, the relationship between the revenue and India is a relevant factor in exclusion of intra group sales. The exclusions mentioned in (a) and (c) above may be warranted when the intra-group sales are of: (i) domestic nature (i.e. sales originating and terminating in India); and/or (ii) the supply is from or to India and further sales (by the buyer in the intra-group sale) is within India.*

- The CCI based on the above test and facts of the case concluded that the parties could not have claimed the *De-minimis* exemption and the proposed combination was hence notifiable.
- It observed that the activities of Parexel International Corporation and one of the portfolio entities of Goldman Sachs Group overlapped in respect of the clinical research organization services, however their combined market share and incremental market share were not significant.
- Based on the facts available on record the CCI concluded that the proposed transaction was not likely to have any appreciable adverse effect on competition in India.

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

#2 CCI Imposes a Penalty of INR 200 crores on Amazon



- The CCI through its order dated 17 December 2021 has directed Amazon.com NV Investment Holdings LLC (**Amazon**) to file a fresh notice under Form-II, in respect of its investment in Future Coupons Private Limited (**FCPL**).
- It further directed that the approval granted by it to the above investment transaction on 28 November 2019 shall remain in abeyance till disposal of the notice under Form-II.
- The CCI had on 04 June 2021, based on an application by FCPL issued a show-cause notice to Amazon in respect of the investment transaction. It was alleged in the show-cause notice that Amazon had misrepresented before the CCI that the transaction pertaining to the shareholder's agreement relating to Future Retail Limited (**FRL**) was not related to the investment transaction notified before the CCI, while Amazon in a separate proceeding had claimed that agreement in respect of FRL was an integral part of the investment transaction.
- The CCI observed that as per the requirements under the Act, the relevant regulations and the Form for notification before the CCI, the parties have to specifically disclose all inter-connected steps leading to the final transaction. Amazon, in its notification of the investment transaction, had failed to disclose that the negotiation of the shareholder's agreement in relation to FRL was also a part of the final transaction leading to the stake in FCPL, and hence failed in fulfilling the requirements under the law.
- It further observed that an assessment of a proposed combination, in contrast to an investigation of anticompetitive practices is ex-ante i.e., it is undertaken prior to the proposed combination taking effect. The scheme of the Act and the relevant regulations framed thereunder aim to establish a trust-based regulatory system, wherein the parties seeking approval provide true, correct and complete details for the proposed combination. A suppression or misrepresentation by the parties is a deliberate disregard to the based regulatory approach under the Act and an approval obtained on the basis of such suppression/misrepresentation would amount to the same being obtained by way of fraud.
- Based on the internal documents of Amazon, the CCI observed that the intended purpose of the proposed transaction included strategic alignment and partnership between Amazon Group and FRL which information was withheld from the CCI in the notification for approval of the proposed transaction. Additionally, Amazon misrepresented that the shareholder's agreement in relation to FRL was not part of the transaction relating to acquisition of stake in FCPL.
- In the light of the above the CCI concluded that Amazon had suppressed the actual scope and purpose of the proposed transaction, which included acquisition of an indirect strategic interest in Future Retail Limited, and hence imposed a penalty of INR 2 crores on Amazon.
- It also imposed a penalty of INR 200 crores on Amazon for failing to notify that the shareholders agreement in relation to FRL and the related business arrangements, were also a part of the proposed transaction and not independent arrangements.

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

OTHER KEY DEVELOPMENTS

CCI releases its market study on the pharmaceutical sector in India

On 18 November 2021 the CCI released its report on "*Market Study on the Pharmaceutical Sector in India: Key Findings and Observations*" (**Study**).

The CCI, during its decade old enforcement regime, has mostly dealt with anti-competitive vertical restraints stemming from the distribution chain in the pharmaceutical industry. The Study focuses on several aspects of the pharmaceutical industry including distribution channels, role of trade associations, trade margins, online pharmacies and the prevalence of branded generic drugs in India and its implications for competition.

Given that the pharmaceutical sector is heavily regulated, the Study aims to explore the areas of interface between regulation and competition with a view to ascertain CCI's advocacy priorities.

The key focus areas identified in the Study are:

- Competition in generic drugs
- Prevalence of branded generics in India and its implications for generic competition and drug prices
- Pharmaceutical distribution landscape

A full coverage on the Study is available on our publication segment and also accessible [here](#).



Links to Recent Publications by Competition Law Team:

- [ELP Quarterly Update - Competition law & policy Q3 of 2021](#)
- [CCI's Market Study on the Pharmaceutical Sector](#)
- [How Should the CCI Market Its 'Market Studies'? A Case for Incentivizing Industry Participation'](#)
- [Importance of Disclosures Before the CCI And Key Takeaways](#)
- [ELP Knowledge Series – Part 2 of 2021](#)
- [ELP Quarterly Update - Competition Law & Policy Q2 of 2021](#)
- [CCI eases regulatory compliance, recapitulates the practice of signing pleadings by any authorized employee](#)
- [ELP - Knowledge Series – Part 1 of 2021](#)
- [Quarterly Update – Competition Law & Policy- Q1 of 2021](#)

Recognitions





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