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COMPETITION LAW NEWSLETTER

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Inside

After a quiet May with only 4 decisions published, the Competition Commission of India (**CCI**) more than made up for it in June, with a whopping 14 orders passed. The Karnataka and Gujarat High Courts also pitched in during what is normally holiday season for judges and lawyers. We cover all the notable decisions in this edition of the L&L Competition Law Newsletter.

Karnataka HC dismisses petitions filed by Amazon, Flipkart against CCI probe

A much awaited decision of the Karnataka High Court came through on 11.06.2021 in the high profile case of Amazon and Flipkart. A single-judge bench[1] dismissed two petitions filed by e-commerce giants Amazon and Flipkart against the probe ordered into alleged malpractices such as (i) preferential treatment to sellers affiliated with them; (ii) predatory pricing through deep discounting; and (iii) exclusive agreements with smartphone manufacturers for exclusive launches of certain models on their platforms, in violation of Section 3(4) of the Competition Act, 2002 (**Act**).

The investigation ordered by the CCI in January 2020 had been stayed by the Karnataka High Court in light of an ongoing investigation under the Foreign Exchange Management Act, 1999. Thereafter, the CCI approached the Supreme Court seeking vacation of the interim order passed by the High Court, but was directed to exhaust available remedies at the High Court before invoking the jurisdiction of the Supreme Court (covered in our January 2020 and November 2020 newsletters).

Amazon and Flipkart filed a writ petition before the Karnataka HC challenging the 26(1) order.

After lengthy arguments, the single judge ruled in favour of the CCI, and rejected the contentions of the petitioners noting *inter alia* that:

(i) No prior notice was required before passing of the impugned order, which was in the nature of an administrative direction (relying on the Supreme Court's 2010 decision in *CCI v. SAIL)*;

(ii) The impugned order was passed after according sufficient reasons, and sufficient evidence had been placed on record to justify the investigation into the alleged violation of Section 3(4) read with 3(1) of the Act;

(iii) CCI being a market regulator was not bound by the principle of *res judicata*, and its refusal to initiate an investigation into alleged abusive practises of Flipkart in 2018 (which was later overturned by the NCLAT) could not be used to invalidate the present investigation. Proceedings under the Act concerns rights *in rem*;

(iv) While the Supreme Court had directed that the CCI await the Telecom Regulatory Authority's findings on certain issues in its 2018 decision in *Bharti Airtel v. CCI*, unlike telecom, e-commerce is not regulated by any specific legislation or sectoral regulator. Moreover, in other decisions the Supreme Court had also permitted investigations to continue in parallel. The issues relating to exclusive agreements, deep discounting, preferred sellers raise competition concerns fall within the CCI's jurisdiction; and

(v) *Locus standi* and motive of the informant are irrelevant, in line with the Supreme Court's finding in *Samir Agarwal v. CCI* (covered in our January 2021 newsletter).

The Court also fell back on the basic principle that its power to review an authority's decision in exercise of its writ

[1] *Amazon Seller Services Pvt. Ltd. and Anr. v. CCI*, W.P. No. 3363 of 2020 and W.P. No. 4334 of 2020.

jurisdiction is limited and it must not "*convert itself into a Court of appeal and examine for itself the correctness of the decision impugned and decide what is the proper view to be taken or the order to be made.*"

The decision has already been appealed by Amazon and Flipkart before the Division Bench of the High Court.

Gujarat High Court sets aside the interim directions passed by CCI against MakeMyTrip and directs a fresh hearing

On 09.03.2021, the CCI in a rare move had passed interim directions against online travel agency MakeMyTrip and GoIbibo (**MMT-Go**) to relist FabHotels and Treebo on its platform during the pendency of the ongoing investigation for abuse of dominance arising out of the agreement between MMT-Go and the OYO chain of hotels (covered in our April 2021 newsletter).

However, this was challenged by OYO on the ground that the CCI had failed to hear them on the matter. *Vide* order dated 23.03.2021, a single judge of the Gujarat High Court had stayed the CCI's interim directions.

On appeal from the said order, a division bench of the Gujarat High Court on 14.06.2021[2] remanded the matter back to the CCI for a fresh hearing on the application for interim directions.

Meanwhile, MMT-Go had also challenged the CCI's interim directions in appeal before the National Company Law Appellate Tribunal (**NCLAT**). However, the High Court noted that since the CCI's order was being set aside, the appeal would become infructuous.

CCI approves acquisition of BigBasket by Tata entity

Vide order dated 28.04.2021 the CCI approved the acquisition of 64.3% shareholding by Tata Digital Limited (**TDL**) in Supermarket Grocery Supplied Private Limited (**BigBasket – B2B**) which, in turn, would acquire sole control over Innovative Retail Concepts Private Limited (**BigBasket – B2C**).

An assessment was undertaken in respect of the organized and unorganized market for (i) food and grocery, (ii) household products and (iii) personal and beauty care products, at both the B2B and B2C levels, on a pan-India basis as well as in cities where the Tata Group operates Trent Ltd. (**Trent**), a B2B and B2C seller of the relevant products. An analysis of the B2C level also included an assessment of online sales pan-India as well as cities wherein there was an overlap of BigBasket – B2C and Trent.

The CCI concluded that the acquisition is unlikely to cause an appreciable adverse effect on competition in any of the markets since the combined as well as the incremental market shares are not significant enough to cause any competition concerns. Further, even in cities wherein Trent and BigBasket – B2C have a significant combined market share, the incremental market share was not more than 1 percent.

The same outcome resulted from an assessment of vertical overlaps as the market shares were not significant enough to raise any competition foreclosure concern at any level.

Lastly, an assessment of the transfer of technology services relating to digital payments services from TDL to BigBasket – B2C was also found to not pose any concerns. The same was in light of the

[2] Casa2 *Stays Private Limited v. Oravel Stays Private Limited and Ors.*, LPA No. 407 of 2021.

presence of market players such as Amazon Pay, PhonePe and Mobikwik, amongst others. Accordingly, the CCI unconditionally approved the transaction.

CCI dismisses allegations of cartelization against 5 airlines

The CCI *vide* order dated 03.06.2021 passed under Section 26(6) of the Act dismissed allegations of cartelization made against 5 domestic airlines. The complaint related to an increase in air fares to exorbitant rates during a series of agitations in February 2016, particularly between the Delhi-Chandigarh and Delhi-Amritsar routes.

Jet Airways was excused from the proceedings having gone into insolvency. Upon carrying out an investigation with respect to the other 4 airlines, the Director General (**DG**) found no contravention.

The CCI, while carrying out its assessment of the investigation report, noted that no uniformity in price increases could be made out which would be indicative of collusive behaviour. It was also noted that there had been a sudden increase in demand for airline tickets on account of other modes of transportation becoming unavailable due to the agitations. An examination of e-mails of key personnel across airlines also did not reveal any communications which would be indicative of collusive information exchanges. Accordingly, the CCI noted that no evidence on record existed which would suggest any concerted action between the airlines to fix ticket prices or otherwise in coordinating supplies.

On the aspect of the use of algorithms to determine pricing, the CCI's observations were in line with its previous order dated 22.02.2021 regarding the use of algorithms in determining airline ticket prices (covered in our March 2021 newsletter). The CCI noted that different airlines use different software to arrive at optimal pricing using different algorithms. The inputs regarding the historicity of flights are provided by the airline itself, and the final call for inventory allocation is undertaken by route analysts of different airlines.

CCI initiates investigation into Google for its conduct in the smart TVs OS and related markets

As part of the latest round in a series of antitrust challenges faced by Google, the CCI *vide* order dated 22.06.2021 ordered an investigation into Google with respect to its conduct in the smart televisions (**TVs**) operating system and other related markets.

Referring to the CCI's order dated 16.04.2019 (***Google – Android OS Licensing***), wherein the CCI found the manner of licensing of Android OS for mobile devices to be *prima facie* in contravention of the prohibition on abuse of dominance, the Informants alleged that Google followed similar practices of imposing restrictive and abusive covenants in the market for smart TV operating systems and also the market for app store for Android smart TV operating systems in India.

While assessing the market for smart operating systems, agreeing with the submissions of the Informant, the CCI was of the view that the market can be segregated into the market for licensable smart TV operating systems and the market for non-licensable OEM exclusive use smart TV operating systems. Stating the same to be in conformity with Google – *Android OS Licensing,* the CCI also noted that it had also delineated a separate market for the app store on Android.

The CCI was of the view that such a delineation was required herein as well since such an app store is the only place where

users can download apps onto their smart TVs. It was noted that although smart TVs come pre-installed with entertainment apps like Netflix, Amazon Prime and YouTube, users may want to install other apps which makes an app store very relevant since user demands for apps will vary in light of preferences and evolve over time. Further, smart TV OEMs can only pre-install a limited number of apps on account of limited technological memory thereby further underscoring the need for such an app store.

With respect to the market for licensable TV operating systems, the CCI noted that Google has a market share of almost 90 percent therein based on data available to the CCI. Further, its operating system is used by 7 out of top 10 smart TV OEMs. "*Profound network effects*" were also stated to be operating in the relevant market which were stated to be resulting in entry barriers for the competitors. Based on such factors, the CCI found Google to be *prima facie* dominant in the market for licensable smart TV operating systems.

With respect to market for app store for Android smart TV operating systems, the CCI noted that Play Store is a 'must-have' app for users to be able to access other apps. The same, seen light of the fact that app stores are an important consideration for both OEMs and users, in conjunction with the fact that Play Store appears to come pre-installed with every Android TV, lead to the CCI concluding that Google is *prima facie* dominant in the instant market for the app store as well.

Having established *prima facie* dominance, while assessing alleged abuse of such dominance, the CCI noted that Google enters into two agreements with Android TV licensees, namely, the Television App Distribution Agreement (**TADA**) and the Android Compatibility Commitment (**ACC**). It was noted that these impose the following covenants, amongst others, in respect of smart TV OEMs:

i. In order to preinstall Google's proprietary apps, device manufacturers have to commit to comply with the ACC for *all* devices based on Android manufactured/ distributed/ sold by them. They will also have to preinstall the entire suite of Google Apps;
ii. OEMs must place Google applications on the default Home Screen;
iii. Google Play Store will be the only application or service that shall have permission to install applications; and
iv. OEMs shall not deal with Android Forks, *i.e.,* a copy of the Android source code which is then independently further developed upon, in any of the devices they sell commercially.

As was seen in *Google – Android OS Licensing*, Google submitted that the licensing of the Android operating system is not conditional upon signing such agreements relating to distribution of Play Store along with the device. However, with a similar response, the CCI stated that Play Store is a must have app for user functionality, in the absence of which device marketability gets restricted. Therefore, it was concluded that since the license to pre-install Play Store is dependent on entering into the TADA and ACC, such agreements become *de facto* compulsory for the OEMs.

The CCI came to the *prima facie* conclusion that Google abused its dominance by way of the strictures imposed on the OEMs and directed the DG to conduct a detailed investigation. This is the third ongoing investigation against Google following *Google – Android OS Licensing* and Google Pay.

CCI finds two film producers associations guilty of cartelization

The CCI *vide* order dated 22.06.2020 arrived at a finding of cartelisation against the Tamil Film Producers Council and Telugu Film Chamber of Commerce. An investigation was mounted in 2018 pursuant to allegations

of (i) collective boycott of the production, supply, exhibition, distribution and technical development of Tamil and Telugu firms in Tamil Nadu with an aim to bring down/abolish Virtual Print Fees (**VPF**) levied by certain digital service providers (**DSP**s); and (ii) refusal to deal with several stakeholders in the Tamil film industry.

The DG noted that there was sufficient evidence in the form of circulars and e-mails indicating that the associations had restricted the release of films in Tamil Nadu, which adversely affected the DSPs and other stakeholders in the Tamil film industry.

In its analysis, the CCI agreed with the findings of the DG, noting that owing to the nature of membership of trade associations, competitors must be careful to not fall foul of the law regulating competition in the market while interacting with each other on such fora. The right to form associations / protest could not be interpreted in a manner so as to justify decisions taken which resulted, directly or indirectly, in determination of prices, limiting or controlling the value chain or sharing of the market. The CCI also held that trade associations may also be held liable for abuse of dominant position.

As the participation in strikes by the members of the associations was minimal and movies continued to be released even during the period of the collective boycott, the CCI refrained from imposing any monetary penalty in the matter, and advised the associations to educate their members on competition law.

CCI dismisses allegations of anti-competitive conduct against taxi unions in the State of Goa

Vide order dated 22.06.2021, the CCI dismissed allegation of anti-competitive conduct against taxi unions in the State of Goa.

The CCI had taken *suo moto* cognisance of the case based on newspaper reports mentioning alleged concerted action on part of the taxi unions/ associations in the State of Goa to prevent the entry of app-based taxi aggregator companies like Uber and Ola in the State and directed the DG to investigate.

The DG during its investigation observed that there were five types of taxis in India: Black and Yellow taxis, shared taxis, radio taxis, app-based taxi aggregators and self-drive cars. Further, in Goa, there were no fare meters and organised groups of taxi operators control the rates as well as the routes.

Although the DG found that app-based services such as Uber and OLA had attempted to enter the market, they were unable to do so. The DG noted that the local taxi unions had opposed the entry of app-based taxi aggregators using various tools like strikes, protests, going off-road, etc. and concluded that the conduct of the taxi unions was in violation of Section 3(1) read with Section 3 (3)(b) of the Act.

The CCI however disagreed with the DG holding that the material relied on included uncorroborated and unconfirmed YouTube videos, Facebook blogs, and news clippings. Moreover, it turned out that Uber had not applied for any license for starting app-based taxi services in the State, and although OLA's authorised representative that stated that the reasons behind its exit from Goa were the threats received from the taxi owners' associations and vandalization of its assets, no evidence was produced in support of the said statement. Therefore, it could not be conclusively inferred that the reason behind non-entry of Ola and Uber in the Goan market was due to the conduct of the unions.

The CCI also noted that despite opposition from the unions, the State Government had permitted the operations of app-based taxi

operators in March 2019. Accordingly, the CCI dismissed the case.

CCI dismisses allegations of abuse of dominance and refusal to deal against Volleyball Federation of India

Vide order dated 03.06.2021, the CCI dismissed allegations of abuse of dominance and refusal to deal made against the Volleyball Federation of India (**VFI**) and sports consultancy and marketing company Baseline. The informant's grievances arose from an agreement between VFI and Baseline, wherein: (i) Baseline was granted the exclusive right to organise volleyball tournaments in India for 10 years, thereby foreclosing entry of other professional leagues into the game; and (ii) VFI undertook to restrict players from competing in tournaments organised by other entities in India or abroad if the dates of such events coincided with Baseline's volleyball league.

Interestingly, post-initiation of the investigation by the CCI, the agreement was amended to modify several clauses, and ultimately was terminated a few months thereafter.

During its investigation, the DG identified the following relevant markets: (i) "*market for organisation of professional volleyball tournaments/events in India*" to assess restrictions on organisation of volleyball events; and (ii) the "*market for services of volleyball players in India*", to assess restrictions on volleyball players who are part of Baseline's league and precluded from participating in other national / international events for the next 10 years. The DG noted that VFI dominant in both relevant markets in light of their dual role as custodian of volleyball in India and *de facto* regulator granting affiliation / organising events. The DG concluded that VFI's refusal to deal with competitors of Baseline for 10 years, and the restriction placed on players, was a contravention of Section 4 and 3(4)(d) of the Act.

The CCI agreed with the DG's findings with respect to the relevant market and dominance. However, on the issue of whether VFI had abused its dominance, the CCI was persuaded by the argument that the exclusivity granted to Baseline to organise leagues in association with VFI was done with an aim to promote and develop interest in volleyball in India, and offering such commitments was the only way to incentivise agencies like Baseline to come on board. As the addendum addressed all potential competition concerns, and the agreement itself was also called off subsequently, the CCI decided to close the matter without a negative finding.

CCI dismisses complaint alleging abusive conduct by NSE

The CCI *vide* order dated 28.06.2021 dismissed allegations of abuse of dominance against the National Stock Exchange of India Ltd. (**NSE**).

The informant alleged that NSE had granted preferential market access to select brokers thereby creating artificial information asymmetry and market manipulation in relation to provision of co-location facilities, in violation of Section 4(2)(b)(ii) and Section 4(2)(c) of the Act.

An earlier complaint on the same issue had been filed in 2018, which the CCI dismissed given that the investigation by the Securities and Exchange Board of India (**SEBI**) into the matter was ongoing. However, now that the investigation had been completed and SEBI had given its finding, the argument that an appeal was pending in the Securities Appellate Tribunal (**SAT**) was brushed aside. Noting that a similar set of facts can give rise to two different cause of actions under two different legislations, and distinguishing

Bharti Airtel, the CCI held that **"***there was nothing to suggest that mere pendency of an appeal before Hon'ble SAT necessitates the Commission to place any moratorium on its statutory functions, if an infraction of the provisions of the Competition Act is observed in the facts and circumstances of the matter....***"** and it was for the Commission **"***to satisfy itself at that stage based on the facts and issues involved, as to whether to proceed with the investigation and inquiry, if so warranted, or await any finding from the sectoral regulator, should it be germane and have a bearing on the ultimate decision of the Commission*.**"**

In determining whether the provision of co-location facilities by NSE is in violation of the provisions of Section 4 of the Act, the CCI defined 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***"**. While assessing NSE's dominance, the CCI observed that NSE in comparison to other stock exchanges had considerable market share by virtue of the volume of the trade handled at its exchange. It was further observed that even if the scope of the relevant market was expanded to non-algorithmic based trading, the market dynamics would not vary substantially. The CCI had previously held NSE to be dominant in (i) *MCX Stock Exchange Ltd. v. NSE* in the **"***currency derivative segment in India***'**; and (ii) *UPSE Securities Ltd. v. NSE* in the **"***securities market in India***"**, this position of strength was further accentuated by its performance globally. Accordingly, NSE was found to be dominant in the relevant market.

NSE submitted that the SEBI had not prescribed any specific technology to be used in relation to co-location services when it was first introduced by NSE in 2009, at which point a choice between the Transmission Control Protocol / Internet Protocol (TCP/IP) and Multicast tick by tick (MTBT) technology was extended to brokers. The greater efficiency of the MTBT technology led to the phasing out of the TCP/IP offering, which the CCI held could not be termed as abusive. NSE was within its right to make a *bona fide* choice of a particular technology, coupled with the fact that no instance of fraudulent conduct had been observed by SEBI in this regard. Therefore, no case of contravention of Section 4 of the Act was made out against them.

With respect to the allegations that offering co-location facilities is in itself anti-competitive, the CCI took into account the role of these facilities in increasing the volume of trade, providing liquidity to investors and the fact that these facilities are offered by several major exchanges across the globe. Further, as SEBI had explicitly recognised the co-location facilities being offered and had not made any attempt to restrict operations till date, the CCI concluded that no case was made out.

CCI initiates investigation against Amateur Baseball Federation of India and passes interim directions

Vide order dated 03.06.2021, the CCI initiated an investigation against Amateur Baseball Federation of India (**ABFI**).

The informant, a not-for-profit organisation working for the promotion and development of baseball and softball in India, filed a case against ABFI, recognised as a National Sports Federation by Ministry of Youth Affairs and Sports, responsible for the promotion of baseball and conducting Zonal, National, and International Baseball Tournaments in India.

As per the informant, it had organised a club-level baseball championship and had received 14 registrations for the event. However, a letter was sent by ABFI to the Presidents/ Secretaries of State Baseball Associations prohibiting them from dealing with bodies and leagues not recognised by it.

Further, ABFI threatened disciplinary action if any player took part in the leagues and tournaments not recognised by it. Consequently, several clubs who had registered for it even withdrew their participations and the event had to be cancelled. Although the event was rescheduled to a later date ABFI subsequently announced an event of its own overlapping with the rescheduled event.

The CCI delineated the relevant market as '*market for organization of baseball leagues/events/ tournaments in India*'. On the issue of dominance, the CCI observed that ABFI is recognised as a National Sports Federation, affiliated to the Asian and World federations, and has 26 affiliated State Associations across the country. Accordingly, due to its apex position and linkages/ affiliations with continental and international organizations, the CCI considered ABFI to be dominant in the relevant market.

On abuse of dominance, the CCI noted that ABFI's conduct was *prima facie* restrictive, and merited a further investigation. The CCI noted that the impugned conduct may also be examined by the DG within the framework of Section 3 of the Act, as its communications seem to limit or control provision of services, which comes within the ambit of Section 3(1) read with Section 3(3) of the Act.

Separately, on the same date, the CCI passed an order granting interim relief to the informant. The CCI observed that it in appropriate cases, it is empowered under Section 33 of the Act to temporarily restrain any party from carrying on acts prohibited by the Act until the conclusion of inquiry or until further orders, *without even giving notice to such party*.

Referring to the Supreme Court's judgment in *CCI v. SAIL*, the CCI noted that a *prima facie* view had already been taken regarding the abusive conduct by ABFI, and it was necessary to issue the order of restraint as the harm caused to the informant would cause irreparable and irretrievable damage and would have adverse effect on competition in the market. Accordingly, the CCI restrained ABFI from issuing any communication to its affiliated State Associations dissuading them from allowing their players from participation in tournaments organised by the associations not 'recognised' by ABFI. ABFI was further directed not to threaten the players who wanted to participate in such events.

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