



# COMPETITION LAW NEWSLETTER

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## Inside

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CCI initiates investigation on delivery companies - Zomato and Swiggy, while dismissing abuse of dominance allegations on Zomato.

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CCI dismisses the allegations of abuse of dominance filed against Inox by Cryogas

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CCI orders investigation into allegations of abuse of dominance against Star India and Disney - Bombay High Court directs CCI to not take coercive steps.

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CCI dismisses allegations of anti-competitive conduct against Amazon and Cloudfare

And more..

In this edition of the L&L Competition Law Newsletter, we cover six significant orders passed by the Competition Commission of India ('CCI') in the months of March and April.

## CCI opens investigation against Zomato and Swiggy on issues of anti-competitive conduct while dismissing allegations of abuse of dominance against Zomato

CCI vide its order dated [04.04.2022](#) has directed the initiation of investigation against Zomato Limited ("Zomato") and Bundl Technologies Private Limited ("Swiggy") upon finding their conduct to be *prima facie* anticompetitive on the following issues: i) violation of platform neutrality; ii) imposition of price parity clauses and iii) exclusivity in conjunction with minimum guaranteed revenue obligations.

Acting on an information filed by the National Restaurant Association of India ("NRAI") against Zomato and Swiggy, CCI took note of the allegation of following anti-competitive practices:

- i) bundling of food delivery services with food ordering services;
- ii) imposition of data masking and not sharing the customer-data with restaurant partners;
- iii) preferential treatment by way of acting as an intermediary as well as a participant on their own platforms;
- iv) imposition of price parity clauses which prevent the restaurant partners from charging lower prices than on these platforms;
- v) exclusivity in conjunction with minimum guaranteed revenue obligations;
- vi) delayed payment cycle and imposition of one-sided clauses in the agreement;
- vii) charging of exorbitant commissions owing to their superior bargaining power etc. tantamount to anti-competitive practices.

On the allegations of bundling of food delivery services with food ordering services, CCI found it to be in the interests of end-consumers and that NRAI not being able to substantiate its claims of bundling causing appreciable adverse effect on competition ("AAEC"), CCI was of the *prima facie* opinion that engaging in the practice of bundling is not anticompetitive. With respect to data masking, the Commission agreed with the arguments of Zomato & Swiggy that the same is done in order to protect the identity of the end-consumers, no investigation was ordered on this issue as well. On allegations in relation with delayed payment cycle, imposition of one-sided clauses in the agreement, charging, of exorbitant commissions, CCI was of the *prima facie* opinion that these issues are not in the nature of being anti-competitive, and thus, did not deem these issues to be worthy of an investigation.

On a separate information filed against Zomato alleging abuse of its dominant position by raising food delivery charges and collecting exorbitant charges from the customers for delivery, CCI, *vide* its order dated [04.04.2022](#), dismissed the calls for investigation on these issues.

## CCI dismisses the allegations of abuse of dominance filed against Inox by Cryogas

CCI, vide order dated [08.03.2022](#), found that there existed no *prima facie* case in the allegations made by Cryogas Equipment Private Ltd. (**Cryogas/Informant**) against Inox India Private Limited (**Inox**) regarding Inox's alleged attempt to abuse its dominant position in the relevant market for supply of LNG semi-trailers in India.

Inox is one of the largest manufacturers of cryogenic liquid storage and transportation tanks in India. Upon the approval received by Cryogas from the relevant authority, Inox filed a civil suit against Cryogas alleging infringement of copyrights. Following which, Cryogas filed an Information with the CCI alleging that Inox had abused its dominant

position in the relevant market by maliciously instituting sham litigation, and denied market access to Cryogas, by writing letters to (a) relevant regulatory authorities; (b) a potential customer of Cryogas; and (c) a government company/PSU. The aforementioned letters intimidated the regulatory authority and the customers about the pendency of the Impugned Suit and requested them to (a) withdraw the approvals granted to Cryogas; and (b) dissuaded them from entering into any business collaborations with Cryogas. Inox also served a legal notice upon one of the vendors of Cryogas, i.e., a fabricator, alleging breach of a non-disclosure agreement entered into between the service provider and Inox, for taking on work with Cryogas.

CCI took note of all the submissions made by both the parties in this regard and noted that allegations in the present case largely emanated from the Suit instituted by Inox against Cryogas for the alleged infringement of its copyright of the drawings of LNG semi-trailer by Cryogas.

From the purview of competition law, CCI observed that litigations are termed as 'sham' when they are instituted by a dominant market player with the *malafide* intent of causing anti-competitive harms. For quashing of such sham litigations, the case must be proved to be (a) baseless, and (b) possess mens rea.

It was noted by the CCI that the copyright infringement claims filed by Inox required a proper examination of material features and ought to be based on appreciable evidence. Also, due to the need of subject matter competence, the infringement claim must remain untouched by the CCI.

The CCI, while deciding not to initiate an investigation observed that the aforesaid suit filed by Inox against CEPL, at this stage, cannot be said to be fraught with any lack of *bonafide*. In this background, the CCI did not find a fit case to launch an investigation given that the civil suit was pending in court.

The CCI, therefore, restricted itself to issuing an advisory on the alleged communications issued by Inox, and stated that while Inox was within its right to inform third parties of

the pending litigation, it must “*be mindful in issuing communications or acting in any manner perceived to be having any anti-competitive overtones. It is axiomatic that the entities, subject to their legal rights, behoove competition on merits and not eschew the same in the interest of the market and its stakeholders.*” The fact that the entities to whom the letters were addressed were not small players but established entities in their own field also weighed with the Commission, and Inox was let off with this warning.

## CCI orders investigation into the allegations of abuse of dominance against Star India/Disney for providing discriminatory discounts to its customers - Bombay High Court directs CCI from taking coercive action till next date of hearing.

Vide order [dated 28.02.2022](#), CCI directed the initiation of investigation against Star India Pvt Ltd, Disney Broadcasting (India) Ltd, Asianet Star Communications Pvt Ltd upon finding their conduct to be *prima facie* abusive by indulging in the conduct of offering discriminatory discounts to distributors. It was alleged that the OPs provided differentiated discounts to its customers as opposed to TRAI Regulations and the New Regulatory Framework directing uniform discounts.

The CCI noted that the relevant product market is “*market for provision of broadcasting services in the State of Kerala*” and being mindful of the vernacular language and consumer preferences.

While evaluating the allegations raised by the informant, CCI noted that the viewership of Star’s channels were almost four times that of its closest competitor, and thus it was *prima facie* dominant in the relevant market.

Regarding the differentiated discounts, CCI observed that OPs have been engaged in providing heavy discounts to the Informant's competitors as opposed to the maximum permissible limits enforced by TRAI. CCI further noted that as a result of such a conduct, the Informant has been forced to price its channels at a higher price as compared to its competitors, which resulted in the loss of customers. CCI concluded that such a conduct of OPs prima facie appears to be an abuse of dominance and violation of Section 4 of the Act because it results in the imposition of unfair conditions and denial of market access, and consequently ordered an investigation.

Surprisingly, despite its experience in the [Bharti Airtel / Jio](#) matter, the CCI chose not to address the obvious question of jurisdiction nor call on the OPs for their view or hold a preliminary conference prior to ordering the investigation. Further, against the CCI order, the broadcasters moved to the Bombay High Court which has vide order dated 8 April 2022, directed the CCI from taking any coercive steps till the next date of hearing, i.e., 6 June 2022. However, the bench directed the petitioners, to furnish the Director General such documentary material and information as requisitioned by him.

## Amazon dodges two investigations

The CCI vide order dated [03.03.2022](#) rejected the allegations of anti-competitive vertical arrangements regarding 'deep discounting' and 'lack of platform neutrality' made by the All India Online Vendors Association against Amazon Seller Services; Amazon Wholesale India; Amazon Retail; Cloudtail India; and Prione Business Services.

The case fell flat on account of the Informants' inability to furnish certain additional information after multiple opportunities and notices. Additionally, CCI also noted that the Informant had not filed the certificate under Section 65B of the Indian Evidence Act, which requires the submission of an affidavit certifying the veracity of the electronic document. Consequently, the Commission held that the information is

devoid of admissible/requisite evidence and lack actionable material.

In a separate *suo-motu* case initiated on the basis of a Reuters report, the CCI had sought certain information from Amazon Seller Services Pvt. Ltd. (ASSPL) where it was alleged that Amazon was abusing its dominance by using the data pertaining to individual sellers operating on ASSPL's online marketplace to operate 'a systematic campaign of creating knockoffs and manipulating search results to boost its own product lines in India.'

Amazon submitted that (i) ASSPL is not engaged in owning and selling products on its platform; (ii) ASSPL does not possess any indirect or direct shareholding in any third party sellers; (iii) any seller can choose to be an Amazon brand seller and such seller itself has to manufacture products of Amazon brand or appoint other parties to manufacture/import/procure the products; (iv) ASSPL is a multi-product and multi-category marketplace and it does not have any incentive to provide preferential treatment to Amazon brands over others since their success is directly proportional to wide availability of products; (vii) ASSPL has optional paid service for all the sellers to promote their products under the 'sponsored' tags which the customers can easily see; and (viii) ASSPL provides Seller Data Protection Policy to its employees which distinguishes between non-public, seller-specific information which is aggregated and is not related to any particular seller.

The CCI was persuaded with these arguments and decided not to proceed and closed the matter vide its order of [11.03.2022](#).

## CCI approves Air India's acquisition by Tata Sons

The CCI vide [order dated 20.12.2021](#) approved Air India's acquisition by Tata Sons. Tata Sons, by way of a newly incorporated subsidiary, acquired the 100% equity share capital and sole control over the management and operations of Air India and Air India Express Limited along with 50%

equity share capital and joint control over the management and operations of Air India SATS Airport Services Private Limited.

In an unusual order, the CCI went on to provide 'context' of Air India and the instant transaction. This included an elaboration of Air India's troubled financial health, repeated attempts by the Government of India to sell its interest in Air India and two failed disinvestment attempts.

However, a point of consternation is the manner of redactions in key portions relating to the CCI's assessment, to the extent that discerning and appreciating the CCI's rationale in a complete manner is hindered. While redacting business sensitive information in public orders is an established practice at the CCI, it is noted that submissions of the acquirer with respect to a large number of points have been redacted such that the CCI's subsequent rationale cannot be fully discerned.

Further, an acquisition by a group having direct horizontal and vertical overlaps in a market with increasing consolidation further increases the need for clarity on the regulator's assessment processes and considerations employed therein.

The CCI refrained from undertaking a substantive analysis of important vertical markets such as ground handling services. While making a cursory reference to other market players, the CCI concluded that there is likely to be no appreciable adverse effect on competition caused, without setting out the market shares in such markets – either existing or incremental. Such an approach can also be in respect of other vertical markets such as in-flight catering.

While there are arguments to be made in favor of the disinvestment of the Government of India's interest in Air India in a sector facing significant financial turmoil, a more elaborate analysis by the CCI would have significantly added to antitrust jurisprudence in India.

*This newsletter is only for general informational purposes, and nothing in this newsletter could possibly constitute legal advice (which can only be given after being formally engaged and familiarizing ourselves with all the relevant facts). However, should you have any queries, require any assistance, or clarifications with regard to anything contained in this newsletter (or competition law in general), please feel free to contact the Competition Law Team at [competitionlaw@luthra.com](mailto:competitionlaw@luthra.com) or any of the contacts listed below. © L&L Partners 2022. All rights reserved.*

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