

# Competition & Antitrust



exceeding expectations  
SINCE 1985





This newsletter is authored by the Competition & Antitrust team at Lakshmikumaran & Sridharan. It includes original articles and research pieces on competition law. It also reviews recent case laws and details regulatory as well as news updates on the subject.



## ARTICLE



### The Evolving Dynamics of Competition Regulation in Digital Markets

Digital markets have grown from being considered an extension of brick and mortar markets to an alternate market unto themselves in less than half a decade. To keep up, regulators across the world including, the Competition Commission of India ("**CCI**") have conducted extensive market studies into the e-commerce sector in the past year to understand the nuances of the digital markets and the many issues posed by them to free and fair competition in India. The CCI so far has looked into anti-competitive vertical agreements and abuse of dominance issues aside from regulation of combinations in digital markets in India. Moreover, the e-commerce sector (including Amazon, Flipkart, Swiggy, Makemytrip, to name a few), digital advertisements segment (Google) and recently, digital payments sector (Whatsapp Pay) have spiked the CCI's interest.

In this article, Charanya Lakshmikumaran & Neelambara Sandeepan discuss the evolution of competition jurisprudence with respect to the digital markets and the road ahead.

[READ MORE](#)

---

# ***RATIO DECIDENDI***

## **1. Ashiana Housing not found dominant however the CCI senses concern**

### **KEY POINTS**

Within the real estate sector, different categories of residential properties are not necessarily substitutable and therefore form separate relevant markets. Further, certain industrial practices though not within the realm of the CCI may require regulatory intervention.

### **BRIEF FACTS**

Mr. Devinder Sharma (a resident of Ashiana Utsav, a retirement home built by Ashiana Housing) filed an information against Ashiana Housing Limited ("**Ashiana Housing**") and Ashiana Maintenance Service LLP ("**Ashiana Maintenance**"), collectively ("**Ashiana**").

The informant stated that there is no retirement home complex in Lavasa, Pune apart from Ashiana Utsav therefore, Ashiana Housing is dominant in the market for, '*provision of services for development and sale of retirement homes including independent residential units and apartments in Lavasa*'. The informant alleged that Ashiana has abused its dominant position by imposing unfair terms and conditions in the agreements entered into by them, *inter alia*, by

- i. holding a discretionary right to make alterations or carry out additional construction anywhere in Ashiana Utsav;
- ii. imposing unfair terms and conditions in the sub-lease agreement by indulging in unauthorized use of the common area;
- iii. unauthorized use of the common area for housing construction employees which creates unhygienic conditions and adversely affects the privacy of the senior citizens, apart from being a health concern given the COVID-19 pandemic;
- iv. not forming a residential association in breach of the sub-lease agreements; and
- v. charging high maintenance fee to the residents.

### **OBSERVATIONS OF THE CCI**

In respect of the relevant market, the CCI noted that within the real estate

sector 'retirement homes' may be taken as a separate category of residential units which are equipped with certain features such as unique doorknobs, handrails in bathrooms, and infrastructure with wheelchair access etc., which are designed especially for senior citizens. As such, only people within certain age groups are allowed to possess such units. Moreover, Ministry of Housing and Urban Affairs ("**MoHUA**") also considers 'retirement homes' as a separate category and has released 'Model Guidelines for Development and Regulation of Retirement Homes'. Further, within the larger category of retirement homes, standalone houses, villas etc. is a distinct product compared to residential flats/apartments. The CCI noted that a person intending to buy a retirement home in Pune may not prefer to purchase the same in other areas because of factors such as price, distance to locations frequently commuted, locational preferences, availability of transport facilities etc. Thus, the relevant market in the present case was defined as the *'market for provision of services of development and sale of retirement homes in the form of residential flats in Pune District'*.

The CCI observed that besides Ashiana there were various other competitors/players operating in the said relevant market including, Paranjpe Schemes Limited, Vascon Engineers Private Limited, Manisha Constructions, and Gagan Properties which indicated that consumers were not dependent on Ashiana alone for retirement homes. Consequently, Ashiana was not dominant in the said relevant market.



## JUDGEMENT

In view of the above findings, the CCI held that no case of contravention of the provisions of Section 4 of the Competition Act, 2002 ("**Competition Act**") is made out against Ashiana. However, the CCI also clarified that they had not examined the impugned conduct of Ashiana on merits due to absence of market power and the observations made in the order were not any reflection on such alleged abusive behaviour. As such, the parties are free to approach appropriate forum to address their grievances. The information was, accordingly, dismissed under Section 26 (2) of the Competition Act. [*Devinder Sharma v. Ashiana Housing & Anr.*, Case no. 22 of 2020]

---

## 2. CCI dismisses case against Delhi Metro Rail Corporation for abuse of dominance

### KEY POINTS

A government owned corporation is an enterprise within the meaning of the Competition Act if it engaged in an economic activity and can be investigated for violation of provisions of the Competition Act.

### BRIEF FACTS

Dhiraj Gupta, a sole proprietor secured the license for parking rights at three stations operated by the Delhi Metro Rail Corporation ("**DMRC**"). It is alleged that the DMRC was abusing its dominant position by violating certain terms of the licensing agreement such as,

- i. providing parking lots with damaged infrastructure resulting in reduced usage of parking lots;
- ii. postponing its obligations under the contract while accepting the monthly license fee;
- iii. imposing a lock-in period which prevented the informant from exiting the contract;
- iv. forcing the informant to follow obligations under the contract with the threat of blacklisting from future tenders and forfeiture of the security deposit; and
- v. fixing predatory prices for parking.

### OBSERVATIONS OF THE CCI

The first issue addressed by the CCI was whether the DMRC constitutes an enterprise within the meaning of the Competition Act. It noted that the DMRC was providing Mass Rapid Transport System ("**MRTS**") in the National Capital Region and is engaged in the development, maintenance and management of modern metro system for mass urban transportation. The aforesaid activities of DMRC are economic activities and are not sovereign functions therefore, the DMRC is covered within the definition of 'enterprise' in terms of Section 2(h) of the Competition Act.

While defining the relevant market, the CCI observed that with a view to facilitate metro commuters, park and ride facilities have been made available at most of the metro stations, since inception of services by DMRC. Parking facility has been made available at the metro stations for the convenience of

passengers by outsourcing the services of parking management. Thus, the relevant product market is 'procurement of services for provision of parking lot management'. Given that the informant's parking lots were situated in Delhi, the relevant market was delineated as the market for 'procurement of services for provision of parking lot management in Delhi'.

The CCI observed that provision of mass urban transportation is the primary business of DMRC and provision of parking services is one of its residual activities. To assess as to whether DMRC is a dominant procurer of parking lot management services in the aforesaid relevant market, data of parking lots owned but outsourced for management to third parties by Delhi Municipal Corporations (North, South, East), New Delhi Municipal Council and Delhi Cantonment Board was compiled and compared with DMRC. On review of such comparison chart, the CCI was of the view that the DMRC does not seem to have the ability to operate independently in the aforesaid relevant market. As such, in the absence of dominance, the examination of the issue of abuse of dominance by DMRC does not arise.



## JUDGEMENT

The CCI found no case of contravention of the provisions of Section 4 of the Competition Act against DMRC in the instant case as it was not found to have a dominant position in the relevant market and therefore it is non sequitur that there was an abuse of dominant position. The matter was thus closed forthwith in terms of the provisions of Section 26(2) of the Competition Act. [In Re: M/s Dhiraj Gupta v. Delhi Metro Rail Corporation Limited, Case No. 24 of 2020]

---



### 3. CCI dismisses allegations of anti-competitive agreement and unilateral conduct against Hexagon India

#### KEY POINTS

In the absence of any material on record which can suggest collusion, no case of anti-competitive agreement can be made out. In addition, for a case of abuse of dominance, one must take into consideration the market structure and the number of major players including, global players operating in the market.

#### BRIEF FACTS

The informant, SOWIL Ltd. ("**SOWIL**") is a small-scale provider of engineering consultancy for highway development works, railway works, bridges, structures, tunnelling, building, water resources and buildings etc.

Hexagon India is a subsidiary of Hexagon AB, Sweden. It is involved in, amongst other activities, sales & distributaries of equipment of Hexagon AB, Sweden and is also engaged in distribution of Safe Rail System ("**SRS**"), a ground-penetrating radar ("**GPR**") system for rail track ballast health monitoring manufactured by Ingegneria Dei Sistemi ("**IDS**"), Italy (a subsidiary of Hexagon AB, Sweden).

The Ministry of Railways issued a tender dated 26.06.2019 for the SRS for monitoring the health of ballast bed. SOWIL reached out to Hexagon India for procuring the SRS. It was submitted by SOWIL that the SRS marketed by Hexagon India was the only GPR system in the world that fulfilled the technical eligibility criteria of the tender.

During negotiations, SOWIL asked Hexagon India for a quotation for the purpose of bidding in the aforementioned tender. Thereafter, SOWIL sought clarification regarding installation support, maintenance support etc. However, SOWIL has alleged that it inadvertently received an internal e-mail of Hexagon India seeking approval from an internal authority to charge SOWIL 80% higher than the price received from IDS for spare parts and charging two times for the training.

SOWIL also stated that even after being offered a 17% discount, the final quote was still 200% higher than the price charged by Hexagon India/IDS elsewhere in the world. As such, SOWIL alleged that Hexagon/IDS had put a virtual embargo for its global associates/partners/clients to participate in the GPR tender which amounted to creating a non-competitive environment for the said bid/tender.

Further, given that no Indian company has any experience in this regard, it would



necessarily have to partner with an international company having requisite experience. It was also alleged that Hexagon enjoys a dominant position in the world for rolling stock mounted GPR for ballast inspection at high speed GPR system, and it has abused its dominant position by charging an exorbitant price for the same.

## OBSERVATIONS OF THE CCI

The CCI reached out to the Research Design & Standards Organization (“**RDSO**”) of the Indian Railways for their inputs. Based on their response, the CCI observed that besides Hexagon India, there are at least 4 other major global players in the market for rolling stock mounted GPR for ballast inspection in India. In view of this market structure and the number of global players operating in the market, Hexagon India does not appear to command any market power and it is unnecessary to delve further into the alleged abusive behaviour in terms of the provisions of Section 4 of the Competition Act. The CCI also observes that SOWIL has not provided any evidence with regard to collusive conduct and as such there is nothing on record that Hexagon India has colluded with any other entity in respect of any RDSO tender.



## JUDGEMENT

In the absence of any material on record which can suggest collusion, no case of contravention of the provisions of Section 3(1) read with Section 3(3) of the Competition Act is made out. Lastly, so far as allegation relating to the restriction imposed by Hexagon India on other global associates/partners/clients to participate in the GPR tender of RDSO is concerned, SOWIL has not provided any evidence to support the said assertion. In view of the above discussion, the CCI decided to dismiss the information. [*In Re: SOWIL Limited v. Hexagon Geosystems India Pvt. Ltd.*, Case no. 14 of 2020]

---

## 4. Allegation of abuse of dominance against Yamaha dismissed

### KEY POINTS

An alleged illegal termination of a dealership agreement by a manufacturer who does not command a dominant position does not attract the abuse of dominant position provisions of the Competition Act.

### BRIEF FACTS

Vijay Chaudhary ("**Dealer**") was an authorised dealer of India Yamaha Motor Private Limited ("**Yamaha**") since 1972 for selling its motorcycles and scooters. The dealership agreement was terminated in August 2017 by Yamaha. The Dealer alleged that Yamaha abused its dominant position by:

- i. not providing copy of duly filled and executed dealership agreement to the Dealer;
- ii. terminating his dealership of 45 years without citing any plausible or justifiable reason(s);
- iii. appointing another dealer in its place; and
- iv. closing the Dealer's Pymidol account way before the termination notice due to which the Dealer could not punch the warranties of around 400 customers. The above actions of Yamaha resulted in great financial loss to the Dealer.



## OBSERVATIONS OF THE CCI

For assessing the allegation of abuse of dominance, the CCI first defined the relevant market. It was noted that Yamaha is engaged in the manufacture and sale of motorcycles and scooters. From the point of view of the dealership, a dealer stocks scooters as well as motorcycles of Yamaha. However, motorcycles and scooters may not be regarded as substitutable in terms of characteristics and consumer preference and may constitute two different relevant product markets. Therefore, two separate relevant markets were defined in the present case as the market for "*manufacture and sale of scooters in India*" and the market for "*manufacture and sale of motorcycles in India*".

The CCI took into account the market statistics for the year 2017 in relation to the two relevant market. The CCI came to the conclusion that Yamaha did not have significant market power and in fact, its market share was less than 10% in both the markets. Further, these markets were dominated by various established players such as Hero MotoCorp Limited, Honda Motorcycles & Scooters India Private Limited, TVS Motor Company, and Royal Enfield. CCI further noted that its assessment would not change, even if the geographical market was restricted to the State of Rajasthan (where the Dealer's dealership was located).



## JUDGEMENT

The CCI held that since it could not be said that Yamaha was in a dominant position in the relevant market, the question of abuse of dominant position did not arise. Accordingly, the information was directed to be closed forthwith under Section 26(2) of the Competition Act. [*In Re: Mr. Vijay Chaudhry and M/s India Yamaha Motor Private Limited, Case No. 27 of 2020*]

---

## 5. Amazon not found dominant in the market for online fashion merchandise

### KEY POINTS

Anti-competitive agreements and abuse of dominance issues against e-commerce platforms ought to be analyzed individually in respect of each product on a case by case basis. In the absence of dominance, issues of sale of counterfeit products on an e-commerce platform do not raise competition concerns however, must be addressed through other regulatory channels.

### BRIEF FACTS

An information was filed by Lifestyle Equities C.V ("**Lifestyle**") against Amazon Seller Services Private Limited ("**Amazon**") and Cloudtail India Private Limited ("**Cloudtail**"). Lifestyle which owns the clothing brand Beverly Hills Polo Club ("**BHPC**") alleged abuse of dominance and entering into anti-competitive exclusive agreements by Amazon in contravention of provisions of Section 3(4) and Section 4 of the Competition Act.

It was asserted by Lifestyle that Amazon was dominant in the market for '*online fashion retail in India*' and abused its dominant position by selling counterfeit/unauthorized products of the BHPC brand on its marketplace at extremely low prices, resulting in predatory pricing. Further, Lifestyle itself did not sell any of its products on Amazon's website. Such low pricing on the Amazon market place has resulted in consumers shifting their purchase of BHPC products from Lifestyle's website to Amazon's website, which is allegedly selling counterfeit products. Lifestyle alleged that such practices of Amazon have resulted in an appreciable reduction in its brand appeal.

In relation to the allegation of exclusivity, it was alleged that Cloudtail was a preferred seller on Amazon's marketplace. Further, the sale of products at highly discounted prices by Cloudtail created high entry barriers in the online retail space for other retailers. Moreover, Amazon was not behaving as a neutral marketplace. Instead, Amazon favoured its preferred sellers/labels by giving them higher search ranking and better customer reviews to the disadvantage of the other sellers. As a result, Lifestyle, or other apparel manufacturers who intend to sell products through Amazon's website are constrained to sell through Amazon's preferred sellers (such as Cloudtail).

## OBSERVATIONS OF THE CCI

CCI noted that Amazon operates a marketplace that facilitates trade between buyers and sellers. Such markets are characterized by cross-side network effects since sellers would want to sell products on a marketplace that has a high number of buyers and vice versa. Accordingly, for its preliminary assessment, CCI defined the relevant market from the perspective of a seller as the '*market for service provided by online platforms for selling fashion merchandise in India*'. In this market, while Amazon and Flipkart collectively occupied around 35% market share, more than 50% of market share was held by dedicated fashion marketplaces such as Myntra, Ajoio, Koovs, etc. Further, Flipkart, Amazon's close competitor had a comparable market position and resources. Accordingly, the CCI concluded that Amazon was not dominant in this market.

Regarding the alleged anti-competitive exclusive agreements between Amazon and fashion brands such as Allen Solly, US Polo Association, and Adidas, CCI noted that: (a) none of their contracts was exclusive; and (b) there were plenty of online intermediation channels available for such brands to reach consumers. CCI also rejected the informant's reliance on another case involving similar issues of vertical agreements concerning preferential listing, discounts, etc., in the online smartphone market.





## JUDGEMENT

CCI held that the market dynamics of smartphones and fashion products in India are different, with fashion being more diverse and dispersed. Further, unlike the case concerning the smartphones, there was no allegation of platform-specific exclusive launch of fashion products by brands, accordingly, there was no concern of the consumer's choice being affected and inter-platform competition. CCI concluded that since Amazon was not dominant in the market for service provided by online platforms for selling fashion merchandise in India, no case was made out under Section 3(4) of the Competition Act. Regarding the allegation of online sale of counterfeit products on Amazon, CCI noted that since Amazon was not dominant in this market the issue of online sale of counterfeit products would not attract antitrust scrutiny. However, Lifestyle could raise the issue of counterfeit products through other regulatory instruments due to the adverse implications that it otherwise has on sellers and buyers. In the absence of any appreciable adverse effect on competition that could have been caused by Amazon's conduct, CCI closed the case under Section 26(2) of the Competition Act. [*Lifestyle Equities C.V. and another v. Amazon Seller Services Private Limited and others*, Case no. 09 of 2020]

**UPDATE:** The CCI's order has been appealed by Lifestyle before the National Company Law Appellate Tribunal on the grounds of violation of principles of natural justice.

---

## NEWS NUGGETS

### **Supreme Court of India (“Supreme Court”) directs CCI to approach Karnataka High Court (“Karnataka HC”) with plea for vacating stay order**

A three-judge bench of the Supreme Court on October 26, 2002 rejected the CCI's challenge to the Karnataka HC's stay on the investigations directed by the CCI against Amazon and Flipkart. In January, 2020, the CCI has ordered investigation into allegation of, inter alia, exclusive arrangements, predatory pricing and preferential treatment by Flipkart and Amazon specifically in relation to the sale of mobile phones on their respective platforms. The Karnataka HC in the impugned order of February 14, 2020 granted a stay in favor of the two e-commerce platforms.

While dismissing the special leave petition, the Supreme Court has remanded the matter to the Karnataka HC and directed it to decide the same within a period of six weeks.

---

### **Google set to undergo antitrust proceedings in the United States**

The United States Justice Department has completed its investigation and charged Google of '*abuse of market power in the online search and advertising market by engaging in exclusionary practices*'. This is expected to be the beginning of a line of antitrust proceedings in the United States against big tech companies such as Apple, Amazon and Facebook which are under investigation by both the Justice Department and the Federal Trade Commission.

Interestingly in India, the CCI in 2018, held Google to be dominant in the same market and imposed a fine of INR 136 crore for its actions.

---

# TEAM PROFILE



**L BADRI  
NARAYANAN**

PARTNER  
(Advisory, Corporate,  
Competition and Regulatory)

Badri specialises in Corporate, Competition and Regulatory matters. He is qualified to practice as a lawyer in India and New York. He advises on various issues involving consortiums and joint ventures such as contract manufacturing scenarios, valuation, secondment, royalties and license fee arrangements. He has represented parties before various fora in tax and commercial disputes. He practiced as a patent attorney in the United States before moving to L&S.



**CHARANYA  
LAKSHMIKUMARAN**

PARTNER  
(Disputes, Competition and  
Regulatory)

Charanya has over a decade of experience working in the fields of intellectual property, taxation and regulatory litigation. She is an Advocate-on-Record designated by the Supreme Court and was a former associate in the chambers of the Attorney General of India. Charanya regularly appears before the Supreme Court and focuses on competition and regulatory litigation before the NCLT and the NCLAT.



**NEELAMBERA  
SANDEEPAN**

JOINT PARTNER  
(Competition and Antitrust)

Neelambera advises on the full range of competition law matters including cartel enforcement, abuse of dominance, leniency applications, merger control, audits and compliance. She appears before the CCI, NCLAT and various High Courts. Neelambera has represented clients in high-profile, precedent setting behavioral cases (Cement Cartel case) and advised on complex M&A transactions. She has previously worked at the WTO in Geneva.



**ADITYA  
BHATTACHARYA**

JOINT PARTNER  
(Disputes, Competition and  
Regulatory)

Aditya has worked with L&S since 2010 and regularly appears before the Supreme Court of India, various High Courts, the Competition Commission, NCLT and the NCLAT. His practice is focused on litigation emanating from the manufacturing sector, including matters of taxation, competition and regulatory issues.



**RISHABH  
CHOPRA**

JOINT PARTNER  
(Competition and Antitrust)

Rishabh advises companies across various sectors on competition law issues such as anti-competitive/restrictive practices, cartel investigations and market dominance. Along with the team, he is also adept in running bespoke competition compliance programs, audits and trainings for various clients. He also leads the firm's initiatives on business development, communication and account management.



## LOCATIONS

### NEW DELHI

5 Link Road, Jangpura Extension,  
New Delhi 110 014

PHONE: 011-4129 9800

---

B-6/10, Safdarjung Enclave,  
New Delhi 110 029

PHONE: 011-4129 9900

E-MAIL: Lsdel@lakshmisri.com

### MUMBAI

2<sup>nd</sup> Floor, CNERGY IT Park,  
Old Standard Mill,  
Appa Saheb Marathe Marg,  
Prabhadevi,

Mumbai 400 025

PHONE: 022-2439 2500

E-MAIL: Lsbom@lakshmisri.com

### CHENNAI

2, Wallace Garden, 2<sup>nd</sup> Street,  
Chennai 600 006

PHONE: 044-2833 4700

E-MAIL: Lsmads@lakshmisri.com

### BENGALURU

World Trade Center,  
No. 404-406, 4<sup>th</sup> Floor, South Wing,  
Brigade Gateway Campus,  
No. 26/1 Dr. Rajkumar Road,  
Malleswaram West,  
Bengaluru 560 055

PHONE: 080-4933 1800

E-MAIL: Lsblr@lakshmisri.com

### HYDERABAD

'Hastigiri', 5-9-163, Chapel Road,  
Opp. Methodist Church, Nampally,  
Hyderabad 500 001

PHONE: 040-2323 4924

E-MAIL: Lshyd@lakshmisri.com

### AHMEDABAD

B-334, SAKAR-VII,  
Nehru Bridge Corner, Ashram Road,  
Ahmedabad 380 009

PHONE: 079-4001 4500

E-MAIL: Lsahd@lakshmisri.com

### PUNE

607-609, Nucleus,  
1 Church Road, Camp  
Pune 411 001

PHONE: 020-6680 1900

E-MAIL: Lspune@lakshmisri.com

### KOLKATA

2<sup>nd</sup> Floor, Kanak Building,  
41, Chowringhee Road,  
Kolkata 700 071

PHONE: 033-4005 5570

E-MAIL: Lskolkata@lakshmisri.com

### CHANDIGARH

SCO No. 59, 1<sup>st</sup> Floor,  
Sector 26, Madhya Marg,  
Chandigarh 160 026.

PHONE: 0172-492 1700

E-MAIL: Lschd@lakshmisri.com

### GURUGRAM

OS2 & OS3, 5<sup>th</sup> Floor,  
Corporate Office Tower,  
AMBIENCE Island, Sector 25-A,  
Gurugram 122 001

PHONE: 0124-477 1300

E-MAIL: Lsgurgaon@lakshmisri.com

### PRAYAGRAJ (ALLAHABAD)

3/1A/3, (Opp. Auto Sales)  
Colvin Road, Lohia Marg,  
Prayagraj 211 001

PHONE: 0532-242 1037/242 0359

E-MAIL: Lsallahabad@lakshmisri.com

### KOCHI

1<sup>st</sup> Floor, PDR Bhavan,  
Palliyil Lane, Foreshore Road,  
Ernakulam,  
Kochi 682016

PHONE: 0484-486 9018/486 7852

E-MAIL: Lskochi@lakshmisri.com

### JAIPUR

2<sup>nd</sup> Floor (Front side),  
Unique Destination, Tonk Road,  
Near Laxmi Mandir Cinema Crossing,  
Jaipur, Rajasthan 302 015

PHONE: 0141-456 1200

E-MAIL: Lsjaipur@lakshmisri.com

[www.lakshmisri.com](http://www.lakshmisri.com)



Lakshmi  
& Sridharan  
attorneys

exceeding expectations  
SINCE 1985

DISCLAIMER: This update is meant for informational purpose only and does not purport to be advice or opinion, legal or otherwise, whatsoever. The information provided is not intended to create an attorney-client relationship and is not for advertising or soliciting. Lakshmi & Sridharan or its associates are not responsible for any error or omission in this update or for any action taken based on its contents.

To unsubscribe, please mail to [update@lakshmisri.com](mailto:update@lakshmisri.com)

© 2020 Lakshmi & Sridharan. All rights reserved.