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An e-update to clients from Lakshmikumaran & Sridharan

MARCH 2021

Competition & Antitrust

Lakshmikumaran & Sridharan attorneys

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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

CCI's market study into the telecom sector in India: Key observations

Since 2016, the Indian telecom sector has witnessed a massive shake-up following the entry of Reliance Jio, and its subsequent emergence as the market leader, and an intense period of price based competition. More recently, the price based competition has been replaced by a similarly intensive competition based on the quality and variety of services provided by telecom operators to their respective customers. Consumer preferences have shifted from traditional SMS and voice services to internet data services and this has forced the major players within the sector to re-think their position with respect to Over-the-Top (**"OTT"**), which were initially seen as a threat to the traditional telecom services. In January, CCI published a report detailing findings from a study that it had carried out to assess the market dynamics and recent developments. Additionally, the report also highlights potential competition concerns within the sector, both present and future, as well as offer solutions to address these concerns through regulatory changes.

In this article, Neelambera Sandeepan (Joint Partner) and Shikhar Tyagi (Associate) break down the major findings of the CCI report and discuss the existing as well as potential competition concerns that CCI may have to deal with in the near future.

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RATIO DECIDENDI

1. CCI finds the Federation of Publishers and Booksellers Associations in India to be in contravention of Section 3 of the Act.

KEY POINTS

The practice of restricting the maximum discount and issuing advisories for members to not participate in certain procurement advertisements amounts to anti-competitive conduct, especially if coercive action is taken by the governing body to ensure adherence by its members.

BRIEF FACTS

The information was filed by M/s International Subscription Agency (**"Informant"**) alleging a contravention of Section 3(3)(a) read with Section 3(1) of the Act by the Federation of Publishers and Booksellers Associations in India (**"FPBAI"**) and its Goods Offices Committee (**"GOC"**). FPBAI is the pan-India association for the books industry to discuss their problems at a national and international level and GOC is a committee formed by FPBAI to establish uniform terms for supply of books and journals to libraries, to ensure fair working margins to booksellers, and provide efficient service to libraries.

The Informant alleged that the GOC had acted beyond its mandate and used coercive action against various members of FPBAI who refused to comply with its directive to (i) not to offer discounts beyond the prescribed limit, and (ii) refrain from participating in procurement advertisements which had conditions requiring suppliers to make huge bank deposits / bank guarantees, requiring suppliers to complete supply order by end of the year, penalty clauses for non-completion of orders on time, requiring delivery through air-mail free of cost, etc.

OBSERVATIONS OF THE CCI

Whether FPBAI has indulged in practices that are in contravention of any of the provisions of the Act?

(i) By restricting the maximum discount that members could offer, FPBAI indirectly determined sale prices of books, journals, etc., sold by FPBAI members which was in contravention of the provisions of Section 3 (3) (a) read with

Section 3 (1) of the Act.

(ii) By issuing advisories directing members to refrain from participating in procurement advertisements, which have conditions not in accordance with the conditions expected by FPBAI, FPBAI indirectly limited and controlled supply of books, journals, etc., in the market for supply of books, e-resources and print journals in India. FPBAI controlled members adherence to its advisories by threatening them with expulsion from the association, which would render the expelled member ineligible for future supply contracts. Therefore, FPBAI coerced members to adhere to its advisories in contravention of the provisions of Section 3 (3) (b) read with Section 3 (1) of the Act.

CONCLUSION

The CCI held that the practices of FPBAI of (i) discount control policy; and (ii) controlling the terms of procurement, were not merely recommendatory in nature, but rather FPBAI coerced its members to abide by the same by issuing notices / seeking explanations, for violating such policy and advisories. Further, the CCI was of the opinion that both, the former and current President of FPBAI GOC had played an active role in formulating as well as enforcing such anti-competitive practices carried on by FPBAI. Hence, CCI held that both Mr. Sunil Sachdev (former president) and Mr. S.C. Sethi (current president), were guilty of engaging in anti-competitive conduct of FPBAI, in terms of the provisions of Section 48 of the Act.

In furtherance of the above, CCI imposed penalties of ₹2,00,000 on FPBAI and ₹1,00,000 each on the concerned individuals under Section 27(b) of the Act. *(In Re: M/s International Subscription Agency and Federation of Publishers' and Booksellers' Associations in India, CCI Case No. 33 of 2019; Order dated 23rd February 2021)*

2. CCI directs closure of investigation into alleged cartelization in the airlines industry.

KEY POINTS

Mere price parallelism does not amount to cartelization, if: (i) the market prices have fluctuated, at times with significant margins, (ii) new players are easily able to establish themselves; (iii) all players offer more or less similar kinds of services, and (iv) the prices depend on a variety of factors.

BRIEF FACTS

The case was initiated *suo motu* after CCI received a request from the Lok Sabha secretariat to examine any evidence of cartelization within the airlines sector.

CCI sought information from Jet Airways (including JetLite), Indigo Airlines, SpiceJet, GoAir, and Air India for four major routes *viz.* Delhi-Bombay-Delhi, Delhi-Bangalore-Delhi, Delhi-Hyderabad-Delhi, and Delhi-Pune-Delhi from April 2012 to March 2014. Based on a preliminary examination of the information submitted by the airlines, CCI formed the *prima facie* view that the airlines were maintaining some degree of stability in their markets in both lean and peak seasons. Further, the cost structure of the airlines appeared to facilitate price collusion, and despite differences in base fares and airlines fuel surcharge, the end fares charged by all the airlines for tickets, were almost similar.

Therefore, CCI directed the DG to investigate further into the airlines Industry. Initially, the DG investigated the matter and concluded that there was no contravention of the provisions of the Act. However, CCI was of the opinion that a few more aspects could be examined by the DG, and it directed the DG to conduct further investigation into the matter.

OBSERVATIONS OF THE CCI

Whether the airlines have indulged in cartelization by way of an agreement or understanding amongst themselves?

CCI noted the following observations in the DG's initial report:

(i) There were significant variations in the market shares and positions of the different airlines between 2010-16, with no sign of stability or parallelism in the market.

(ii) Dynamic pricing is the acceptable norm within the airline sector and price parallelism was a natural outcome and not the result of any agreement or concerted action. Further, new entrants were able to gain a strong foothold in this market which reflected the high level of competition existing within the sector.

Therefore, based on the findings listed above, the DG concluded in the initial report that there was no contravention of the Act within the airlines sector. Upon receiving directions for further investigation, the DG prepared a supplementary report with the following observations:

(i) All airlines use similar software programs to predict demand and assign seats to fare buckets. However, manual intervention had an important role in determination of the final prices and hence, it could be stated that the software merely facilitated decision making and nothing else.

(ii) Different airlines follow different bucket systems and no fixed inventory is allocated to each bucket. Further, the number of seats allocated to each bucket depends on a large number of different factors (enumerate below).

(iii) Analysis of the air fares for the period April 2012 to March 2014 led to the observation that the price of the ticket depends on a variety of factors such as the number of flights on that route, timing, seating capacity, etc. When customers book flight tickets closer to departure, the prices merge with each other in order to sell at the highest price. However, the balance between unsold inventory and competitive prices finally determines the price of the ticket.

(iv) Capacity utilization plays a role in pricing as the aim of each airline is to sell the air tickets at their maximum capacity and at the maximum price per seat. However, the capacity analysis of these airlines did not reveal anything substantial to infer concerted action.

CONCLUSION

Therefore based on the findings of the DG in the initial and supplementary report, CCI held that there was no corroborative evidence to suggest that there was stability or parallelism or any possibility of communication to fix prices or any form of meeting of minds for the formation of a cartel. Therefore, given the facts and circumstances of the case, no contravention of the provisions of the Act could be ascertained. Accordingly, the matter was closed in terms of Section 26(6) of the Competition Act. *(In Re: Alleged Cartelization in the Airlines Industry, Suo Motu Case No. 03 of 2015, dated 22nd February 2021)*

3. CCI dismisses allegations of abuse of dominance by Delhi based mall developer

KEY POINTS

An inquiry into whether certain practices by a firm amount to abuse is not required to be undertaken when the concerned firm does not hold a dominant position in the relevant market by virtue of there being other prominent firms within the relevant market that provide the same service.

BRIEF FACTS

An information was filed before CCI by a tenant of the commercial complex 'West End Mall'. In the information, it was alleged that the developer of the complex, PP Buildwell Pvt. Ltd. (**"Buildwell"**), and its associate company, Classic Care Utilities (**"CCU"**), were extorting unreasonable and exorbitant fees from the mall tenants under the guise of maintenance. The informant submitted that the behaviour of Buildwell and CCU amounted to a contravention of Section 4 of the Act.

Further, the information stated that Buildwell imposed restrictions that prevented the tenants from engaging any maintenance agency other than CCU. The informant alleged that this enabled Buildwell to carve out a monopoly for CCU wherein the tenants had no option except to avail the maintenance services provided by CCU.

Additionally, the informant also submitted that the tenants have no option to take individual electricity supply since Buildwell had made the electrification design in such a way that no electricity company agrees to provide separate connection to the unit owners directly.

OBSERVATIONS

Whether Buildwell has abused a dominant position in imposing restrictions on providing maintenance and utilities within the mall?

CCI noted that the transaction between the Informant and Buildwell was concerning a commercial space in Delhi. Commercial spaces are acquired for different requirements, scope and prospects in comparison to residential spaces. Therefore, CCI opined that the relevant market should be delineated as 'the market for provision of services for development and sale of commercial/ office space' within Delhi.

Further, CCI also noted that Buildwell was just one of many developers of commercial properties in Delhi that offer similar services for development and sale of commercial spaces. This included heavy-weight players such as DLF Ltd., Delhi Development Authority, Ansal API, TDI Infrastructure Ltd. etc., which pose significant competitive restraints to Buildwell. Accordingly, CCI opined that the informant and other erstwhile buyers were not dependent upon Buildwell for commercial / office spaces. Further, CCI held that none of the factors stated under Section 19(4) of the Act seem to support Informant's claim of dominant position enjoyed by Buildwell.

CONCLUSION

In view of the foregoing, CCI was of the opinion that there existed no prima facie case and the information filed was directed to be closed forthwith against the Opposite Parties under Section 26(2) of the Act. *(Mr. Bhushan Girdhar v. P.P. Buildwell Pvt. & Anr., CCI Case No. 40 of 2020; Order dated: 1st February, 2021)*

4. CCI dismisses allegations of cartelization and abuse of dominance in the banking industry for providing home loan services

KEY POINTS

(i) Existence of large number of players in the home loan market shows that ICICI Bank (**"ICICI"**) cannot operate independently in the market and, hence cannot be considered to be in a position of dominance in the relevant market.

(ii) In the absence of any evidence indicating an agreement or meeting of minds amongst banks, collusion cannot be established.

BRIEF FACTS

A An information was filed before CCI alleging that ICICI was engaged in conduct that was in contravention of the provisions of Sections 3 and 4 of the Act. The informant stated that he had availed a Home Equity Loan Facility from ICICI for a period of ten years at a specified floating interest rate. During the loan tenure, there was an increase in tenure of loan from 10 to 20 years and an increase in rate of interest against the agreed terms. It was averred that ICICI never sent any communication to the informant with regard to increase in interest or tenure of the Equated Monthly Installment (**"EMI"**).

Further, the informant alleged that all banks had formed a cartel whereby they were using such unilateral one-sided clauses in loan agreements, without taking consent of the borrower, to increase the EMI whenever the interest increased.

OBSERVATIONS OF THE CCI

Whether ICICI had abused its dominant position in the home loan market?

CCI noted that there exist several public and private sector banks, Non-banking Finance Companies and Housing Finance Companies operating in the home loan market in India. The existence of a large number of players in the home loan market meant that ICICI could not operate independently in the market and, hence could not be considered to be in a position of dominance in the relevant market as identified above. Therefore, in absence of dominance, the issue of abuse of dominance would not arise.

Whether the banks have formed a cartel to provide home loans by universal inclusion of the above-mentioned clause ?

CCI observed that the informant had not identified any bank / entity which might be involved in cartelisation with ICICI, nor had the informant provided any material which showed that the inclusion of a similar clause, by a bank / entity other than ICICI was an outcome of collusion.

Thus, in the absence of any information / material showing collusion amongst any bank(s) / entity(s) with ICICI, CCI was of the opinion that no case of contravention of the provisions of Section 3 of the Act was made out against the OP.

CONCLUSION

Therefore, CCI held that there was nothing on record to form even a prima facie view that the provisions of either Section 3 or 4 of the Act have been contravened by ICICI and the matter was subsequently closed. *(Pramod Mahajan v. ICICI Bank, CCI Case No. 52 of 2020; Order dated: 27th January 2021)*

5. CCI dismisses allegations of abuse of dominance against Google LLC.

KEY POINTS

Merely adding more functionality to an internet-based app in the name of product improvement and enhancing benefit to consumers would not amount to leveraging dominance if the users are not compelled to utilize the new features to the exclusion of all other services offering similar and competing features.

BRIEF FACTS

An information was filed before CCI alleging that Google LLC's (**"Google"**), integration of its video calling app 'Meet App' into the email app 'Gmail' amounted to abuse of dominant position by Google in the market for internet-related services and products.

OBSERVATIONS OF THE CCI

Whether the informant had locus standi to file the information against Google?

CCI noted that antitrust proceedings under the Act are inquisitorial in nature and deal with matters of public interest. Therefore, any member of the public can approach CCI with information pertaining to anti-competitive behaviour.

Whether Google is leveraging its dominant position in the market for email services by integrating its Meet App into the Gmail App?

CCI noted that users of Google's Gmail App were not forced to sign up for and use the Google Meet feature. Google imposed no adverse consequences on the users of Gmail App for not using the Google Meet feature and the users had the freedom to choose any of the competing video calling apps.

Therefore, CCI was of the opinion that that regardless of whether Gmail was a dominant app or not in the relevant market of providing email services in India, the conduct of Google did not appear to leverage its dominant position in the relevant market.

CONCLUSION

The CCI was of the view that no case was made out against Google for contravention of the provisions of Section 4 of the Act and the information was ordered to be closed. *(Baglekar Akash Kumar v. Google LLC & Anr., CCI Case No. 39 of 2020; Order Dated: 29th January 2021)*

6. CCI dismisses allegations of abuse of dominance by the General Insurance Corporation of India

KEY POINTS

The markets for insurance and reinsurance exist as separate markets and insurance companies have the commercial freedom to price their policies as they deem fit according to the market conditions and decisions taken in the reinsurance market do not place any restriction on insurance companies to offer products to their customers (**"policyholders"**).

BRIEF FACTS

An information was filed before CCI against the General Insurance Corporation of India (**"GIC Re"**), which is a reinsurance company, i.e., a company engaged in the business of providing insurance for insurance companies. It was the informants' primary contention that GIC Re, had abused its dominant position in the Indian reinsurance market by exorbitantly increasing the reinsurance premium being charged to general insurance companies through a circular dated 12th September, 2019.

The informant also alleged that directions issued by GIC Re under the Contagious Disease Endorsement (**"endorsement"**) for insurance companies to exclude coverage for infectious / contagious diseases from all continuing insurance policies was grossly anti-competitive and within the purview of, 'refusal to deal' under the provisions of Section 3(4)(d) of the Act.

Further, it was also alleged that GIC Re dictated the discount rates that insurance companies could offer to policy holders, which fell within the purview of 'resale price maintenance', under the provisions of Section 3(4)e of the Act. Finally, the Informant also alleged that GIC Re compels insurance companies to follow its regulations , which clearly evidence the fact that the insurance companies that engage with GIC Re were engaged in a 'hub and spoke' cartel.

OBSERVATIONS OF THE CCI

Whether the increase in premium rates by GIC Re amounted to abuse of dominance?

Held: CCI noted that there exist only two reinsurance companies in the Indian domestic reinsurance market, GIC Re and ITI Reinsurance Ltd. GIC Re is the dominant enterprise in the segment with: (i) 90% of the market share on the basis of net written premium during FY 2017-18, (ii) 80% of the market share on

the basis of segment wise premium on reinsurance accepted during FY 2018-19. Additionally, CCI noted the existence of factors that established the dominant position of GIC Re in the domestic reinsurance market: (i) a statutory provision of 5% cession with GIC Re, (ii) size and resources of the enterprise, (iii) size and importance of the competitors, (iv) economic power of the enterprise including commercial advantage over competitors, (v) dependence of consumers on the enterprise and countervailing buying power.

However, CCI dismissed the contention that GIC Re had abused its dominant position on the grounds that the informant had alleged that an increase in the premium rates by GIC Re amounted to "unfair / excessive pricing" without providing any basis or evidence to substantiate its allegations. Further, CCI noted that the allegation pertaining to abuse of dominance by increasing in premium rates affected by the GIC Re circular had already been examined and dismissed by it previously in *Case No. 12 of 2019, Indian Chemical Council and General Insurance Corporation of India.*

Whether GIC Re has enforced restrictions that prevent other reinsurance service providers from being able to operate on a level playing field?

The informant had alleged that certain regulations have been enforced that would restrict other reinsurance service providers from being able to operate on a level-playing field with GIC Re. In this regard, CCI noted that such regulations had not been made by GIC Re and therefore, proceedings, if any, could not be initiated against GIC Re.

Whether GIC Re engaged in 'resale price maintenance' by dictating the discount rates that could be offered by insurance companies to policy holders?

While discussing whether GIC Re had engaged in resale price maintenance by prohibiting reinsurance support for insurance policies offered below the specified minimum rates, CCI noted that the Delhi High Court had already analyzed the issue in an earlier decision and clarified that the impugned circular indicates GIC Re would not re-insure the risk at a rate lower than as indicated in the said Circular. The rates as specified therein only pertain to the insurance premium chargeable by GIC for re-insurance. Thus, the insurance companies were free to offer lower rates to the insured. However, for the purposes of re-insurance, the insurance companies are required to pay the premium as indicated in the circular. Accordingly, CCI was of the view that allegations of resale price maintenance by GIC Re were not established.

Whether GIC Re engaged in 'refusal to deal' by directing that insurance companies exclude coverage for infectious / contagious diseases from all continuing insurance policies?

GIC Re had directed insurance companies to not cover any direct or indirect losses caused by reasons related to contagious disease like COVID-19. However, CCI observed that the exclusion of direct or indirect losses by any infectious or contagious disease existed even prior to the current pandemic. The endorsement by GIC Re was merely an elaboration of the pre-existing terms and conditions from the preceding years.

Further, CCI also noted that the said endorsement was not a direction or a mandate to insurance companies / cedants and thus had no bearing on insurance policies issued by insurance companies to policyholders which are separate and independent contracts. Therefore, the endorsement could not be termed as a 'refusal to deal' on the part of GIC Re.

Whether GIC Re was engaged in a Hub and Spokes Cartel with the insurance companies?

CCI noted that the informant had failed to adduce any material in support of its allegation that insurance companies were using the GIC Re as a platform to exchange sensitive information, including information on prices which may facilitate price fixing. Therefore, the allegation of cartel arrangement between GIC Re and insurance companies were also not made out.

CONCLUSION

CCI held that the impugned circular neither prevents an insurance company from offering premium at lower rates to a policy holder, nor does it prevent an insurance company from opting for an alternate reinsurance company, other than GIC. Therefore, insurance companies retain the freedom to decide their premium rates as well as their reinsurer. Therefore, no case was made out against GIC Re for contravention of the provisions of either Section 3 or Section 4 of the Act and the Information was ordered to be closed. *(Automotive Tyres Manufacturers Association v. General Insurance Corporation of India, CCI Case No. 21 of 2020; Order dated 27th January, 2021)*

7. CCI finds no evidence of bid coordination in tenders issued by the Department of Printing, Ministry of Urban Development.

KEY POINTS

(i) The mere fact that participants to a tender have common directors / shareholders is not sufficient evidence to return a finding that the parties are engaging in bid-rigging.

(ii) Commercial transactions between related parties, such as sale / purchase of goods and loan exchanges, that are duly reflected in the annual reports would not amount to any discrepancy or contravention of any provision of the Act.

BRIEF FACTS

CCI initiated proceedings suo motu after receiving several complaints alleging cartelisation amongst three companies participating in the same tenders floated by the Department of Printing, Ministry of Urban Development (**"DOP"**). In the complaints, it was alleged that the three companies namely, Chandra Prabhu Offset Printing Works Pvt. Ltd. (**"Chandraprabhu"**), Saraswati Offset Printers Pvt. Ltd. (**"Saraswati"**) and United India Tradex Pvt. Ltd. (**"Tradex"**) had conspired to fix rates in bids submitted in tenders floated by the DOP.

On examination of bank statements of Chandraprabhu, CCI found that more than INR 10 Cr. had been transferred by Chandraprabhu to Tradex between 2014 and 2018. Further, in the same time period, Chandraprabhu had also transferred approximately INR 68 Lacs to Saraswati. CCI also noted that the bank statements revealed that payments had also been made by both Tradex and Saraswati in favour of Chandraprabhu.

Additionally, CCI discovered that although the three companies were competing for the same three tenders, Chandraprabhu and Tradex had two directors and shareholders in common. Even the Annual Reports of Chandraprabhu stated that Tradex was an enterprise over which Key Managerial Personnel of Chandraprabhu had significant influence.

While forming a *prima facie* opinion, CCI noted that it was predetermined amongst the three companies that Chandraprabhu would submit the lowest bid. All three tenders (i) for packaging and dispatch of confidential documents; (ii) packing and dispatch of question papers; and (iii) delivery of question papers and printing/packing of OMR sheets, were awarded to Chandraprabhu. Therefore, CCI

was of the *prima facie* opinion that further investigation by the DG was required into the conduct of the three companies.

OBSERVATIONS OF THE CCI

Whether Chandraprabhu, United India Tradex and Saraswati coordinated in rigging bids in the three tenders?

CCI noted the following findings in the DG's report:

(i) All three tenders were awarded to Chandraprabhu as it had the lowest bid.
(ii) As per the provisions of the Companies Act, 2013 Chandraprabhu and Tradex were related parties with two common directors holding a 60-40% share in Tradex and a 25% shareholding each in Chandraprabhu.

However, the DG's report also submitted that the fund transactions among the three parties were either related to sale of paper, printing work orders or loan transactions. There were no revealed discrepancies in any of these fund transactions. Further, as per the evidence, the closed linkages between the parties were shown to be legitimate business dealings, fund transactions, loan exchanges, sharing of work orders and personal acquaintances among the parties, and there was no evidence that would establish a contravention of Section 3(3) of the Competition Act.

CONCLUSION

CCI agreed with the report of the DG and held that there was no corroborative evidence to suggest that the concerned parties had joined hands to manipulate the process of bidding in respect of the three tenders. Further, no contravention of section 3(3) of Competition Act could be ascertained given the facts and circumstances of the case. Therefore, CCI ordered the matter to be closed in terms of Section 26(6) of the Competition Act. *(In Re: Alleged bid-rigging in Tenders invited by Department of Printing for printing, packing and dispatch of confidential documents, Suo Motu Case No. 03 of 2019; Order dated 12th February 2021)*

8. CCI holds that the Bar Council of India is not an 'enterprise' within the definition of the Act

KEY POINTS

An entity falls within the definition of the term 'enterprise' only if it is engaged in any economic and commercial activity specified within Section 2 (h) of the Act.

BRIEF FACTS

An information was filed before CCI alleging contravention of the provisions of Section 4 of the Act by the Bar Council of India (**"BCI"**). The information was filed by a 52-year-old executive engineer (**"the informant"**) in the Central Public Works Department (**"CPWD"**), who planned to opt for voluntary retirement and pursue legal education.

The Informant alleged that a maximum age limit was imposed under the Rules of Legal Education, 2008. This limit barred people above the age of 30 from enrolling for law degree, thereby creating an indirect barrier for new entrants in the profession of legal services.

It was the case of the informant, that as the elected body of advocates in India, BCI was in charge of regulating the legal services profession as well as legal education. BCI enjoyed a dominant position in controlling legal education within India. Therefore, by imposing a maximum age restriction on new entrants, BCI had misused its dominant position in contravention of Section 4 of the Act.

OBSERVATIONS

Whether BCI falls within the definition of an 'enterprise' under Section 2(h) of the Act?

CCI relied upon a previous decision in the case of *Dilip Modwil and Insurance Regulatory and Development Authority (CCI Case 39 of 2014)*, wherein it had held that any entity can qualify within the definition of the term 'enterprise' if it is engaged in any activity which is relatable to the economic and commercial activities specified therein. It was further observed that regulatory functions discharged by a body are not per se amenable to CCI's jurisdiction under the Act. CCI noted that BCI was a statutory body established under Section 4 of the Advocates Act, 1961 to carry out regulatory functions in respect of the legal profession as well as legal education. Such regulatory functions involve formulating rules for legal education, which also includes the power to set a

maximum age limit for new entrants into legal education. When discharging its regulatory functions, BCI would not fall within the definition of 'enterprise' under Section 2(h) of the Act. Consequently, the allegations made in relation to discharge of such non-economic, regulatory functions would not merit an examination within the provisions of Section 4 of the Act.

CONCLUSION

Therefore, CCI was of the opinion that there exists no prima facie case under the provisions of Section 4 of the Act and the information filed was directed to be closed forthwith under Section 26(2) of the Act *(Thupili Raveendra Babu v. Bar Council of India & Ors., CCI Case No. 50 of 2020; Order dated 20th January 2021)*

9. CCI grants interim relief to FabHotels and Treebo, directs MakeMyTrip and Go-Ibibo to re-list them

KEY POINTS

(i) In deciding applications for interim relief under Section 33 of the Act, CCI must form a higher degree of satisfaction than the prima facie requirements under Section 26(1) of the Act.

(ii) Denial of market access need not be complete or absolute in nature to result in an adverse effect on competition within the market; and denial of market access in any manner that takes away freedom from a substitute to compete effectively would amount to denial of market access under the provisions of the Act.

BRIEF FACTS

Vide an order in Case No. 14 of 2019, dated 28th October 2019, CCI had directed the DG to investigate allegations that MakeMyTrip India Pvt. Ltd. (**"MMT"**) and Ibibo Group Pvt. Ltd. (**"Go-Ibibo"**) had abused their dominant position in the market for "online intermediation services for booking hotels in India" by imposing restrictive conditions on hotels that wanted to list their services on the respective portals of MMT and Go-Ibibo. Further, CCI had also directed the DG to investigate allegations that Oravel Stays Pvt. Ltd. (**"OYO"**) had entered into an anti-competitive vertical agreement with MMT and Go-Ibibo, whereby MMT and Go-Ibibo had agreed not to list any of OYO's competitors on their respective platforms. On a preliminary examination, CCI formed the *prima facie* opinion that OYO had entered into an agreement in contravention of Section 3(4) of the Act in the market for "franchising services for budget hotels in India".

Subsequently, CCI clubbed the information in the present case with an information filed in Case No. 01 of 2020 by Rubtub Solutions Pvt. Ltd. (**"Treebo"**) which involved similar facts. Further, CCI also accepted an application filed under Regulation 25 of the Competition Commission of India (General) Regulations, 2009 (**"General Regulations"**), seeking impleadment of Casa2 Stays Private Ltd. (**"FabHotels"**) as a party to the proceedings in Case No. 14 of 2019. Both Treebo and FabHotels are direct competitors of OYO within the market for "franchising services for budget hotels in India".

Finally, during pendency of the investigation before the DG, Treebo and FabHotels (collectively referred to as the **"Applicants"**) approached CCI for granting interim relief under Section 33 of the Act, in the nature of directions to MMT and Go-Ibibo to relist properties of the applicants on their respective portals.

OBSERVATIONS

Whether the definition of relevant market in the present case should be expanded for deciding the present application to include direct booking channels and not be restricted to the 'market for online intermediation services for booking of hotels in India'?

CCI dismissed the contention raised by MMT and Go-Ibibo that the relevant market be expanded to include all direct booking channels. CCI opined that from a competition standpoint, relevant market comprises all products / services which are regarded as substitutable by the consumer, by reason of their characteristics, price and intended use. The services provided by online booking modes through third party platforms, such as the facility to search, compare and book at the same place, is characteristically distinct from the services that the offline mode such as travel agents provide. Thus, CCI held that the relevant market delineated at the prima facie stage i.e. the 'market for online intermediation services for booking of hotels in India' does not require any change for deciding the interim relief applications.

Whether delisting of their properties from the MMT and Go-Ibibo platforms has resulted in irreparable damage to Treebo and FabHotels.

While performing its function as a market regulator, the CCI is not concerned with competition between individual entities but the market as a whole. Anti-competitive conducts often affect the market on a continuous basis. Specially acts of exclusion are continuous in nature and accordingly, where CCI restrains a party from engaging in a particular conduct that has affected the market adversely, it cannot be compartmentalised as a mandatory injunction. CCI referred to the judgement in SAIL, where SC had laid down the following criteria to be observed by CCI while deciding requests for interim relief under Section 33 of the Act:

(i) CCI must record its satisfaction in clear terms that an act in contravention of the stated provisions has been committed and continues to be committed or is about to be committed;

(ii) it is necessary to issue the order of restraint; and

(iii) there is every likelihood that if the impugned act were to continue – (a) the applicant would suffer irreparable and irretrievable damage, or(b) it would have adverse effect on competition in the market.

CCI noted that the facts presented before it by Treebo and FabHotels were more compelling than mere *prima facie* evidence required under Section 26(1) of the Act. Properties belonging to the applicant are no longer available on the MMT and Go-Ibibo platforms although they used to be present on the respective

platforms prior to execution of the agreement between Go-Ibibo, MMT and OYO. Further, the balance of necessity lay in favour of the applicants since MMT and Go-Ibibo would not be put to much 'inconvenience' even if they have to relist the applicants on their respective platform. Moreover, since MMT and Go-Ibibo were dominant platforms in the market for "online intermediation services for booking hotels in India", non-accessibility to the two platforms would significantly hamper the online visibility of the applicants. Therefore, it was necessary for CCI to issue an order directing MMT and Go-Ibibo to relist properties belonging to the applicants on their respective platforms.

Finally, CCI noted that denial of access to a dominant online intermediation could be lethal to the business of the applicants who rely on such intermediaries to reach the end-consumers. Denial of market access need not be complete or absolute in nature to result in an adverse effect on competition within the market; and denial of market access in any manner that takes away freedom from a substitute to compete effectively would amount to denial of market access under the provisions of the Act.

CONCLUSION

CCI held that all three conditions for issuing interim relief, as laid down in SAIL, were met since:

(i) the facts presented by the applicants were more compelling than evidence required under Section 26(1) of the Act;

(ii) It was necessary for CCI to issue the interim relief as the balance of necessity lay in favour of the applicants as an absence from the online platforms of MMT and Go-Ibibo would significantly hamper their online presence; and

(iii) Denial of access to a dominant online intermediary would result in an adverse effect within the market.

Therefore, CCI issued an order under Section 33 of the Act and directed MMT and Go-Ibibo to restrain from indulging in the exclusionary act; and relist properties belonging to the applicants on their online platforms. *(Federation of Hotel & Restaurant Associations of India & Anr. v. MakeMyTrip Pvt. Ltd. & Ors., CCI Case No. 14 of 2019; and Rubtub Solutions Pvt. Ltd. v. MakeMyTrip Pvt. Ltd. & Anr., CCI Case No. 01 of 2020; Order dated 9th March, 2021)*

10. CCI finds evidence of bid-rigging by connected parties in Pune Zila Parishad's tenders for Picofall-cum-Sewing Machines

KEY POINTS

(i) Although CCI and the DG have the powers to investigate the representatives of the tenderer / procurer to understand and ascertain the tender design, tendering mechanism including the eligibility of the bidders in terms of tender conditions by requisitioning the relevant records. This is, however, not to suggest that the procurer itself could be proceeded against in an inquiry for violation of the provisions of the Act in respect of the tenders floated by it, where bid rigging is alleged to have taken place. Any lack of due diligence or non-compliance with the procurement procedure has to be dealt with administratively in accordance with the relevant and extant mechanism by appropriate authorities.

(ii) In cases pertaining to allegations of bid rigging, it is normal for such practices to be carried out in secrecy. The evidence that CCI is able to obtain in such cases may be purely circumstantial. It is therefore necessary to reconstitute certain details by deduction and the existence of an anti-competitive agreement must be inferred from a number of coincidences.

BRIEF FACTS

Information was filed before CCI by the People's All India Anti-Corruption and Crime Prevention Society (**"PAACCPA"**), which is a society registered under the Societies Registration Act, 1860. The informant alleged that three parties namely, M/s Klassy Computers (**"Klassy"**), M/s Nayan Agencies (**"Nayan"**), and M/s Jawahar Brothers (**"JB"**) were engaged in bid rigging with respect to a tender issued by the Pune Zila Parishad (**"ZP Pune"**), which is the local government body in charge of administering the rural areas of the Pune district of Maharashtra. Klassy is a sole-proprietorship firm and both Nayan and JB are partnership firms that operate as licensed dealers for Usha International Ltd. (**"UIL"**), a company engaged in the business of selling new age home appliances such as sewing machines, fans, power products, water coolers, water dispensers etc.

The information stated that ZP Pune had invited bids in e-tender No. 1/15-16 on 7th November, 2015, for procurement of Picofall-cum-Sewing Machine (**"Machine"**) with Indian Standard Institute (**"ISI"**) mark for distribution amongst the women, disabled persons, and people belonging to economically backward classes; under the Social Welfare Development Scheme (**"SWDS"**) of the

Maharashtra Government. Further, the information stated that the Maharashtra Government had passed a resolution on 2nd January ,1992, specifying that government departments should purchase products bearing ISI mark only through public procurement and in the event of non-availability of ISI mark products, the concerned department may opt for non-ISI mark products provided that the products to be purchased should be in conformity with the standards specified by ISI.

It was alleged that despite the Machine bearing ISI mark being available in the market; at the behest of UIL, ZP Pune obtained equivalent specifications from the Government Polytechnic Institute, Pune (**"Institute"**). The informant contended that such equivalent specifications were obtained for the sole purpose of ensuring that only UIL's products would match the specifications given by the institute and the terms of the tender were amended to reflect the same. Further, the informant contended that Klassy, Nayan, and JB submitted identical price bids in response to the tender, and Klassy's bid was accepted despite being almost double the 'Maximum Retail Price' (**"MRP"**) of the same machine when sold by UIL in the market. This, according to the informant, clearly demonstrated that ZP Pune had relied on extraneous considerations for awarding the tender to the distributors of UIL.

Finally, the informant also submitted that all three bids submitted by Klassy, Nayan and JB were submitted through the same IP Address and the earnest money deposit (**"EMD"**) was paid through the same bank, i.e. State Bank of India. Informant also alleged impropriety in the subsequent tender floated by ZP Pune for purchase of the same machine, wherein a supply order was placed on Klassy based on the previous tender process. This, the informant contended, was in contravention of an order passed by the ***Hon'ble Bombay High Court in Vijay Kumar Gupta vs. the State of Maharashtra and Ors., Writ Petition No. 1889 of 2009;*** wherein the Government of Maharashtra was directed to ensure that no extension of contracts is granted by its various departments and instrumentalities except in cases when found necessary in the wisdom of the competent authority, for valid reasons that must be recorded in writing after due consultation with the concerned Department.

OBSERVATIONS

Whether ZP Pune has acted in a manner that is in contravention of the Act?

Held: While directing the DG to investigate, CCI noted that conduct of ZP Pune in facilitating bid-rigging amongst UIL and its distributors would not fall within the domain of competition law and therefore, the informant must raise said grievance before the appropriate forum. CCI has the powers to investigate the representatives of the tenderer to understand and ascertain the tender design,

tendering mechanism including the eligibility of the bidders in terms of tender conditions by requisitioning the relevant records. This is, however, not to suggest that the procurer itself could be proceeded against in an inquiry for violation of the provisions of the Act in respect of the tenders floated by it, where bid rigging is alleged to have taken place. Any lack of due diligence or non-compliance with the procurement procedure has to be dealt with administratively in accordance with the relevant and extant mechanism by appropriate authorities.

Whether the DG has the power to requisition call records from telecom service operators?

Held: CCI dismissed the contention that the DG could not requisition call records of Klassy from telecom service operators and held that a bare reading of Section 36 of the Act, read with Section 41, reveals that for the purpose of discharging its function, the DG is vested with the power of a Civil Court under the Civil Procedure Code, 1908 (**"CPC"**), which enables it to call for records from telecom service operators which are essential in many cases to establish the collusive conduct between parties engaged in bid rigging.

Whether UIL and its distributors have engaged in bid rigging?

Held: To ascertain whether UIL and its distributors had engaged in bid rigging, in contravention of Section 3(3)(d) of the Act read with Section 3(1), CCI noted that the values of the bids submitted by Klassy, Nayan, and JB were very close to each other within a range of INR 30/-, which was highly unlikely in normal market conditions. In a highly competitive market, bidders quote their rates after taking into consideration input costs and prevailing market conditions, which includes overhead costs incurred by each bidder on account of having different geographical locations. However, neither Klassy, nor Nayan nor JB were able to provide justify their similar prices and overhead costs.

However, since price parallelism is not in itself sufficient to establish concerted action amongst the bidders, CCI examined whether there existed any agreement for coordinated bidding amongst the parties. Upon examination, the DG found that proprietors for the same enterprise, a M/s Steelfab Corporation, had paid the EMD on behalf of the bidders, thereby explaining why said EMD was paid using the same bank. CCI noted that a Mr. Nikhil Gandhi had paid the EMD for Klassy and Nayan, while his brother Mr. Nilesh Gandhi had paid the same on behalf of JB; this was done on the behest of Mr. Venkatesh Darak of Klassy on behalf of all three bidders. This entire chain of events clearly established that Klassy played a key role in the entire process of submission of bids by the three bidders. Therefore, CCI opined that the arrangement seemed to be a part of a broader understanding with each other to coordinate and cooperate in submitting bids for the tender.

Further, the DG also investigated the informant's claim that the bidders had submitted their respective bids from the same IP address, which revealed that the said IP address belonged to Klassy. Klassy contended that it also operates a cyber-café that offers tender filing services and the respective tenders of Nayan and JB were submitted by it as a part of said service. To corroborate its findings, the DG obtained call records of interactions between UIL and its dealers, which showed that key persons within Klassy, Nayan and JB were constantly in touch during the tender bidding process, which included multiple calls on the date of submission of the bids and other important dates during the tender process. Klassy again contended that it had to regularly keep in touch with Nayan and JB in order to file their bids as a part of their tender filing service. However, CCI rejected the contention put forth by Klassy and held that continuous contact between the bidders and financial dealings would be considered as a 'plus factor' in the instant case.

Further, upon investigating JB's role in the concerted bidding, CCI found that JB had not come before CCI with clean hands as it had sought to hide the fact that it maintains close business relations with Klassy and both parties have been colluding in multiple other tenders to harm the competitive process.

CONCLUSION

Therefore, CCI held that Klassy, Nayan, and JB were engaged in bid-rigging in the 2015 ZP Pune tender in contravention of the provisions of Section 3(1) of the Act read with Section 3(3)(d). Further, CCI also found that both the partners in JB, Mr. Jawahar Motilal Shah and Mr. Harshwardhan Motilal Shah could not escape liability for their conduct in terms of Section 48(1) of the Act. Since the three parties were sole proprietorships or partnership firms, CCI saw it fit to impose modest penalties of INR 10 lakhs on each of the party and a penalty of INR 10 Thousand upon each partner of JB. *(People's Anti-Corruption and Crime Prevention Society v. Usha International Ltd. & Ors., CCI Case No. 90 of 2016; Order dated 17th March 2021)*

11. CCI dismisses allegations of cartelisation against Corrugated Box Manufacturers' Associations

KEY POINTS

A no presumption of appreciable adverse effect on competition ("AAEC") cannot arise without first establishing the existence of an agreement in terms of the provisions Act.

BRIEF FACTS

An information was filed before CCI by the Gujarat Paper Mills Associations (**"GPMA / Informant"**), alleging that there existed a cartel in the corrugated box manufacturing industry. GPMA, which is the association of kraft paper mills within the state of Gujarat, alleged that the following regional and pan Indian associations of corrugators had cartelized and directed their members to not accept deliveries of kraft paper from GPMA members for certain days. Allegations were made against Indian Corrugated Case Manufacturers' Association (**"ICCMA / OP1"**), Federation of Corrugated Box Manufacturers' Association of India (**"FCBMA / OP2"**), the pan-Indian federation comprising the different regional associations of corrugated box manufacturers; Western India Corrugated Box Manufacturers' Association (**"WICBMA / OP3"**); Karnataka Corrugated Box Manufacturers' Association (**"KCBMA / OP4"**); and North India Corrugated Box Manufacturers' Association (**"NICBMA / OP5"**).

GPMA alleged that the intent behind the cartelisation was to push for low price of kraft paper (raw material for manufacturing corrugated boxes) and simultaneously increase the price of the finished goods i.e., corrugated boxes by creating a shortage of supply within the market. This was allegedly achieved by issuing resolutions for members of ICCMA, FCBM, WICBMA, KCBMA, and NICBMA (collectively referred to as **"OPs / Corrugators Associations"**) to shut their manufacturing units in a coordinated manner at preordained dates. GPMA also contended that ICCMA had passed a resolution, demanding that kraft paper manufacturers refrain from directly approaching the end users of corrugated boxes (**"Brand Owners"**). This was done so as to deny the brand owners from enjoying the benefits of a healthy competitive market, and to allow the corrugated box manufacturers to retain control over the pricing of corrugated boxes. GPMA argued that such actions taken by the OPs was a violation of the provisions of Section 3(3)(a) and Section 3(3)(b) of the Act.

At the outset, the CCI noted that GPMA itself was undergoing investigation for a cartel in the kraft paper industry wherein the allegation was that the kraft

paper mills and their industry associations were artificially increasing prices and engaging in periodic premeditated shut downs of the manufacturing units to create artificial scarcity of kraft paper in the market (**"2017 Investigation"**). Further, it was revealed that the allegations in the current information related to the same time period as the allegations in the 2017 Investigation, i.e. January 2017 – March 2017.

OBSERVATIONS

Whether the OPs have formed a cartel to prevent their members from purchasing kraft paper?

Held: In the information, GPMA alleged that the OPs had engaged in anti-competitive conduct by issuing several resolutions, circular, and notifications directing their members to refuse to accept deliveries on predetermined dates,

To assess whether such communication amounted to evidence of the existence of a 'buyers cartel' as contended by GPMA, CCI relied upon its past decisions in *Advertising Agencies Guild v. IBF & its members, CCI Case No. 35 of 2013 (**"IBF Case"**), XYZ v. Indian Oil Corporation & Anr., CCI Case No. 05 of 2018 ("**IOC Case"**), and International Air Transport Association v. Air Cargo Agents Association, CCI Case No. 29 of 2017 (**"IATA Case"**).*

In the IBF Case, CCI had established the contours of the legitimate functions that can be carried out by a trade association by holding that *"trade associations provide a forum for entities working together in the same industry to meet and discuss common issues. They carry out many valuable and lawful functions which provide a public benefit.....when these trade associations transgress their legal contours and facilitate collusive or collective decision making with the intention of limiting or controlling the production, distribution, sale or price of or trade in goods or provision of services as defined in Section 2(c) of the Act, it will amount to violation of the provisions of the Act."*

In the IOC case, CCI had examined a ' buyers cartel' and held that *"the creation of a buyer power through joint purchasing may rather lead to directed benefits for the consumers in the form of lower prices bargained by the buyer.....For assessment of such cases, it is imperative to first look at the potential theories of Arm and then the conditions necessary for of infliction of competitive harm need to be examined.".*

In the IATA case, CCI had held that there no presumption of 'Appreciable Adverse Effect on Competition' (**"AAEC"**) under Section 3(3) of the Act, would arise if the existence of an anti-competitive agreement is not established. Based on the aforementioned orders, CCI opined that all the resolutions,

circulars, and notifications were merely recommendatory in nature as they did not impose any adverse conditions on any of the members for not following the same. The OP's had issued such circulars only to create awareness regarding market conditions and impact of the actions of paper mills upon the corrugated box manufacturing industry. GPMA had contended that the OPs had issued circulars directing their members to close production and not accept any deliveries for 'kraft paper'. However, the OP's were able to establish that such closure of deliveries was not mandatory and many corrugated box manufacturers continued to operate as usual and accepted deliveries during the purported closure period. Moreover, GPMA failed to establish the existence of an agreement amongst the OPs and their members to engage in any anti-competitive activity and as such, the question of such resolutions, circulars, and notifications amounting to anti-competitive agreements was dismissed by CCI. Further, the CCI also noted that GPMA able to justify its inordinate delay in approaching CCI in 2020 with information pertaining to conduct that took place during a six-month period between 2016 and 2017.

CONCLUSION

In view of the above findings, the CCI was of the prima facie view that no case could be made out against the OPs for contravention of Section 3(3) of the Act. Accordingly, the information was dismissed in terms of the provisions of Section 26(2) of the Act. *(Gujarat Paper Mills Association v. Indian Corrugated Case Manufacturers Association & Ors., CCI Case No. 28 of 2020; Order dated 19.03.2021)*

Note: *In the interest of full disclosure, L&S represented the five corrugated box manufacturer's associations before the CCI in this case.*

12. CCI exercises Suo Motu powers to initiate investigation into the new WhatsApp privacy policy and user agreement

KEY POINTS

CCI is empowered to initiate investigate into any conduct which may contravene the provisions of the Act if the CCI knows that such conduct is about to be committed. The CCI is obligated to prevent practices having an adverse effect on competition.

BRIEF FACTS

CCI initiated an investigation into the new privacy policy introduced by WhatsApp Inc. (**"WhatsApp"**) for its popular social media messaging application (**"App"**) 'WhatsApp Messenger'. The investigation was initiated by CCI in exercise of its *suo motu* powers pursuant to multiple media reports concerning a notification sent by WhatsApp to its users; whereby the users were informed that they needed to mandatorily accept the new privacy policy in order to retain their account information after 8th February, 2021.

All previous policy updates gave users the option to 'opt out' of sharing their respective data with WhatsApp's parent company, Facebook Inc (**"Facebook"**). This fact was noted by the CCI in a previous case, *Vinod Kumar Gupta v. WhatsApp Inc., CCI Case No. 99 of 2016* (**"Vinod Kumar Gupta Case"**). However, under the new policy no such option is provided to users and Whatsapp going forward will mandatorily share user data with Facebook. Accordingly, CCI arrayed both WhatsApp and Facebook as 'Opposite Parties' for the purpose of the proceedings.

OBSERVATIONS

Whether Facebook should be arrayed as a party to the present proceedings?

In its preliminary response, Facebook submitted that Facebook and WhatsApp are separate and distinct legal entities and the WhatsApp App is operated solely by WhatsApp.

CCI rejected the contention of Facebook and termed it as 'evasive', given that Facebook is the parent company of Whatsapp and in this case, a direct beneficiary of the new privacy policy. In such circumstances, Facebook would be a proper party for the purposes of the investigation.

Whether the issues presented by the new privacy policy fall within the jurisdiction of CCI or within the purview of the information technology law framework?

WhatsApp relied upon the decision of the Hon'ble Supreme Court in *Competition Commission of India v. Bharti Airtel Ltd. & Ors., (2019) 2 SCC 521* (**"Bharti Airtel Case"**) and contended that the issues presented by the new privacy policy were *sub-judice* before various courts and other fora in India and therefore, CCI could not look into the same.

CCI rejected the contention and held that the *Bharati Airtel Case* had no relevance to the issues at hand since the said decision aimed at maintaining a 'comity' between sectoral regulators and CCI. WhatsApp had failed to update CCI about any proceedings before a sectoral regulator. Further, CCI was examining the issues through the lens of Section 4 of the Act since, in a data driven economy, CCI needs to examine whether the excessive data collection and subsequent usage of such data results in any anti-competitive implications.

Additionally, WhatsApp had relied on the *Vinod Kumar Gupta Case* to contend that a breach of the Information Technology Act, 2000 would not fall within the purview of CCI. This argument was also rejected by CCI on the grounds that in a data driven economy, excessive and / or unreasonable data collection and sharing may grant a competitive advantage to dominant players, which is within CCI's jurisdiction to examine.

Whether CCI's exercise of *suo motu* jurisdiction was premature?

WhatsApp contended that the new privacy policy had not been put into effect and therefore CCI could not initiate a suo motu investigation into the same in terms of a previous order of CCI in *Harshita Chawla v. WhatsApp Inc., CCI Case No. 15 of 2020*, (**"Harshita Chawla Case"**) wherein CCI itself had held that abuse of dominance is a post-facto analysis.

CCI rejected the contention and held that the deadline for users to accept the new privacy policy was 15th May, 2021, following which users would not be able to access the full functionality of the WhatsApp App without acceptance of such terms. Therefore, the clock had already started for users to accept and the same could be examined by CCI under the lens of Section 4 of the Act. Further, even Section 33 of the Act empowers CCI to investigate any potential contravention of the provisions of Sections 3, 4 and 6 of the Act if such an act is about to be committed.

Whether the new privacy policy amounts to a violation of Section 4 of the Act?

CCI noted that in the Harshita Chawla Case, it had noted that WhatsApp was a

dominant entity in the market for Over-the-Top (**"OTT"**) messaging apps through smartphones. Further, CCI noted that after reports of the new privacy policy, other OTT apps such as 'Signal' and 'Telegram' witnessed a surge in downloads but since WhatsApp operates on 'network effects', its user base has not been affected.

CCI found that the new privacy policy mandates that user data will be shared with Facebook, while also unduly expanding the variety of data collection from the app. This *inter alia*, includes transactions and payments data, data related to location, mobile operator data, device operation data etc.

CONCLUSION

Therefore, CCI was of the prima facie opinion that the mandatory and expansive stipulations under the new privacy policy merit a detailed investigation. *(In re: Updated Terms of Service and Privacy Policy for WhatsApp Users, Suo Motu Case No. 01 of 2021; Dated 24th March 2021)*

MERGER CONTROL

1. Acquisition of Orix Wind SPVs by Greenko Energy Holdings

Greenko Energy Holdings (**"GEH / Party No. 1"**) is a company limited by shares incorporated in Mauritius, engaged principally in the business activity of investment holding. It is the holding company of the Greenko Group of Companies (**"Greenko"**). GEH has an Indian subsidiary which is primarily engaged in the business of owning, developing, constructing and maintaining power generation projects.

Orix is a limited liability company incorporated in Japan. It is the holding company of the Orix Group of Companies (**"Orix / Party No. 2"**), which is engaged in the business of offering services like corporate financial services, maintenance leasing, real estate, private equity investments, life insurance, banking and credit, asset management, environment and energy services. Orix is present in India in the power generation sector, directly or indirectly, through (a) Orix Wind SPVs (**"OWS / Party No. 3"**), which are engaged in power generation through wind energy and (b) Sun Renewables WH Private Limited (**"SRWPL"**) which is engaged in power generation through solar energy.

The proposed combination concerns GEH, Orix, and OWS which are collectively referred to as the **"Parties"**. Pursuant to a a framework agreement dated 11th September 2020, executed between GEH and Orix, the proposed combination will be carried out by way of two inter-connected steps:

i. GEH will acquire 100% equity stake in OWS from Orix; and

ii. Orix will acquire not more than 24% equity stake in GEH.

With respect to horizontal overlaps, CCI observed that there exists an overlap between the Parties in the power generation segment in India. The Parties submitted that the relevant market for the horizontal overlaps may be defined: (i) at the broad level - as the market for power generation in India ("Broad Relevant Market"); (ii) at the narrower level – as the market for power generation through renewable energy sources in India (**"Narrow Relevant Market"**); and at the narrowest level (iii)(a) as the market for power generation through wind source in India (**"Narrowest Relevant Market A"**), and (iii) (b) the market for power generation through solar source in India (**"Narrowest Relevant Market B"**).

Upon examination of the relevant markets as defined by the parties, CCI found

that the combined market share of parties in the Broad Relevant Market was less than 5%, and in the Narrow Relevant Market, Narrowest Relevant Market A, and the Narrowest Relevant Market B, the market share of the parties lay between 10 to 20%. Accordingly, CCI was of the opinion that the proposed combination was not likely to cause any competition concern.

With respect to vertical overlaps, CCI observed that there was a potential for vertical overlaps as OWS and SRWPL were engaged in power generation in India (**"Upstream Market"**) and Teestavalley Power Transmission Limited (**"TPTL"**), an indirect investee company of GEH was engaged in power transmission within India (**"Downstream Market"**).

However, CCI noted that TPTL was one of many transmission licensees operating in India and had a miniscule presence in the sector for transmission of electricity, with a market share of less than 1% in terms of circuit kilometres and the market was dominated by other notable players.

Accordingly, the proposed combination was approved under Section 31(1) of the Act.

2. Manipal Health Enterprises Private Ltd. acquires Columbia Asia Hospitals Private Ltd.

Manipal Health Enterprises Private Ltd. (**"MHEPL / Acquirer"**) is part of the Manipal Educational and Medical Group which operates a network of hospitals providing multi-speciality care. Manipal Group has 15 hospitals spread across 7 cities in India under the brand name 'Manipal Hospitals'. Outside India, MHEPL only carries out business activities in Malaysia.

Columbia Asia Hospitals Private Ltd. (**"CAHPL / Target"**) is a private healthcare company that provides high-quality, affordable and accessible healthcare. CAHPL is a part of the International Columbia US LLC, an international healthcare group, which operates a chain of modern hospitals across India, China and Africa.
The Proposed Combination contemplates acquisition of 100% shareholding of CAHPL by MHEPL, which are collectively referred to as the **"Parties"**.

CCI observed that the activities of the Parties exhibit a vertical overlap in the segments of retail diagnostics market and tele-radiology service. MHEPL has been offering retail diagnostics services since 2015 through its subsidiary and has a marginal presence through multiple subsidiaries in the public healthcare space. CAHPL on the other hand, offers tele-radiology services, which could be classified as downstream to the hospital services offered by MHEPL. However, the revenue generated by CAHPL from such service constitutes an insignificant portion of its overall revenue. Therefore, CCI opined that the activities of the Parties were not significant and thus, the said vertical overlap did not appear to raise any competition concern.

CCI also noted that the services offered by the parties overlapped in Bengaluru and the National Capital Region, both regions have multiple large tertiary hospitals. However, the combined market position of the Parties was not significant either in terms of beds or any speciality / procedure offered by the Parties. The incremental market share due to the Proposed Combination was also not significant. Further, the regions also feature the presence of other prominent players such as Apollo Hospitals, Narayana Health, Fortis, Medanta, Max Hospitals etc. Accordingly, CCI was of the opinion that the proposed combination was not likely to raise any competition concern.

Accordingly, the proposed combination was approved under Section 31(1) of the Act.

3. Acquisition of minority shareholding in Aditya Birla Fashion and Retail Ltd. by Flipkart Investments Private Ltd.

Aditya Birla Fashion and Retail Ltd. (**"ABFRL / Target"**) is a public limited company incorporated under the Companies Act, 1956. ABFRL is engaged in the business of manufacturing and retailing branded apparels, footwear and accessories, through its retail stores, multi-brand outlets, departmental stores, online retail platforms and e-commerce marketplaces, across India.

Flipkart Investments Private Ltd. (**"FIPL / Acquirer"**) is a newly incorporated company which is not currently engaged in any business activities within India or anywhere else. FIPL a wholly-owned subsidiary of Flipkart Private Limited (**"FPL"**), which is a part of the Walmart Group. The Walmart Group (through its various subsidiaries) is engaged in various business activities in India, *inter alia* (i) Wholesale cash and carry of goods (B2B sales), (ii) Provision of marketplace-based e-commerce platforms to facilitate trade between customers and sellers in India, and (iii) UPI and prepaid payment instrument services:

The proposed combination relates to acquisition of 7.8% minority shareholding by FIPL in ABFRL, both of which are collectively referred to as the **"Parties"**.

While assessing the vertical / complementary relationship between the products/ services of the Parties, CCI noted that:

(i) The Walmart Group is a customer of ABFRL in the B2B sales segment,

(ii) ABFRL is engaged in both B2C and B2B sales and the Walmart Group is engaged in B2B sales in the apparels, footwear and accessories (**"AFA"**) category.

(iii) The Walmart Group is engaged in the provision of e-commerce marketplace services in India and ABFRL is a seller on the same e-commerce marketplace service. Therefore, there exists a potential vertical relationship between the B2B business of the Walmart Group (upstream) and ABFRL (downstream) whereby the Walmart Group can supply its AFA category products to ABFRL on a B2B basis, which ABFRL may then sell on to end-customers,

(iv) The Walmart Groups' UPI payment and mobile wallet application, PhonePe, is complementary to ABFRL's sales in India and ABFRL utilises it as one of the modes for undertaking its sales in India, and

(v) As an e-commerce marketplace services provider, the Walmart Group offers integrated logistics services to all the sellers that are listed on its marketplace, on the same terms i.e., there is no exclusivity or preferential

treatment towards any sellers, including ABFRL.

However, CCI decided to leave the exact delineation of the relevant market open as the material available on record did not suggest that the proposed combination was likely to cause an appreciable adverse effect on competition in India. Moreover, the presence of both the Acquirer and Target in upstream or downstream segments as discussed above was not significant to raise any competition foreclosure concerns in India.

In addition to above, CCI noted that the Acquirer had stated in the notice that FPL's Indian subsidiary, Flipkart India Private Limited (**"FK India"**) and ABFRL had agreed to enter into a strategic commercial arrangement relating to distribution of certain identified branded products of ABFRL through the e-commerce platforms of Walmart Group, to the exclusion of certain other platforms. Hence, CCI decided to issue an advisory to the Acquirer that it should refrain from indulging in any such conduct which would amount to leveraging their control over the platform in favour of the identified ABFRL brands to the disadvantage of other sellers/service providers on the platform.

Accordingly, the proposed combination was approved under Section 31(1) of the Act.

NEWS NUGGETS

1. CCI initiates investigations into abusive conduct of Google Pay

CCI has initiated an investigation to determine whether Google is abusing a dominant position in the market for digital payments through its online payments application 'Google Pay'. In order to determine whether there is any substance in the allegations, CCI is conducting face-to-face interviews with rival online payment entities PhonePe and Paytm Payments Banks among others. Among other things, CCI is investigating whether Google has leveraged its dominant position in the Android App store market by utilising user data to gain an unfair advantage for its payments platform.

2. Chennai becomes home to a New Bench of the National Company Law Appellate Tribunal and a new CCI regional office

The Union Minister for Finance and Corporate Affairs, Nirmala Sitharaman, inaugurated the Chennai bench of the National Company Law Appellate Tribunal (**"NCLAT"**) on 25th January. The inauguration was carried out through virtual mode and two members of NCLAT Delhi Hon'ble Shri. Balvinder Singh, Member (Technical) and Hon'ble. Shri. Justice Venugopal M. have taken charge of the newly constituted Chennai Bench.

A month later, on 26th February, the Regional Office (South) of CCI was inaugurated in Chennai. While the adjudicatory functions of CCI will continue to be carried out from New Delhi, the regional office will cater to the five states in the south region i.e., Andhra Pradesh, Karnataka, Kerala, Tami Nadu, Telangana and two Union Territories i.e. Puducherry and Lakshadweep for the following functions: (i) accepting filing and receiving cases, (ii) facilitating investigations, (iii) following up on court cases in the High Courts in the South region, and (iv) enabling in online deposition of persons in coordination with New Delhi office.

REGULATORY UPDATE

CCI inserts new provision for Coram of meetings in the Competition Commission of India (Meeting for Transaction of Business) Regulations, 2009

On 2nd March 2021, CCI amended the Competition Commission of India (Meeting for Transaction of Business) Regulations, 2009 to insert Regulation 3A. The new provision specifies that once CCI sets a case down for final hearing after the completion of pleading, the Coram for the hearing *"would remain constant and such Coram alone would continue to hear and participate in all subsequent proceedings on all hearing dates and would write the final orders."*

Further, the new provision also specifies that in case of any change to the Coram mid-hearing, the matter would be heard afresh with a new Coram. The insertion of the new provision codifies the holding of the Hon'ble Delhi High Court in *Mahindra Electric Mobility Ltd. & Anr. v. Competition Commission of India & Anr., Writ Petition (Civil) No. 11467 of 2018,* wherein the Hon'ble Court had held that all hearings before the CCI must follow the principle of *'who hears must decide'.* In the same order, the following guidelines were laid down to assist CCI at the time of final hearing: (i) When all evidence has been heard, CCI must set down the case for final hearing, (ii) Once final hearing commences, the same members should hear and write the final order, (iii) Once the proceedings are underway, no member should take an individual break from the proceedings and then join the proceedings later.

TEAM PROFILE

L BADRI NARAYANAN

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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

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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

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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.

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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

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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.

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