



Information Exchange in India – Shifting Legal Standards?

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Information Exchange in India – Shifting Legal Standards?

Introduction

The Competition Commission of India ('CCI') has by far adopted a mix of 'effects-based' and 'objects-based' approaches for cartel regulation in India. To establish a cartel contravention, it typically examines whether competitors have entered into an 'agreement' for the exchange of information that resulted in a collusive outcome in the market. And because cartels are often hard to detect, it often infers their existence from several 'coincidences' and 'indicia'. CCI's practice, however, varies in considering the *implementation* of a cartel as a necessary element for establishing a contravention. In this edition, we examine CCI's practice on this aspect.

Competition Act, 2002 on Information Exchange

The Competition Act, 2002 ('Act') assumes 'agreements' among competitors that result in: (a) price-fixing; (b) limiting supply; (c) market allocation; and (d) bid-rigging as anti-competitive. This presumption may be rebutted by the cartel participants by offering evidence to the contrary, e.g., establishing that the pro-competitive benefits of an arrangement are likely to outweigh the potential harm.

The Act, therefore, prescribes a three-step approach for establishing a cartel contravention. First, CCI must find that an anti-competitive agreement among competitors existed. Second, it must find that such exchange was acted upon by the companies and resulted in price determination or market limitation. Third, it should consider whether the parties have provided sufficient evidence to rebut the statutory presumption to show that the net market effects of the agreement were not, in fact, anti-competitive. That being said, the Act does not answer whether CCI must prove—or can it assume—that the information exchanged by firms was acted upon by the firms and affected the respective firms' conduct in the market¹.

CCI's Practice on the Relevance of 'Implementation' for Establishing a Contravention

CCI has had the opportunity to deal with the exchange of information between competitors that did not result in the fixation of price or market allocation *etc.*, in a range of decisions. It has often declined to find cartel violations where parties exchange competitively sensitive information but the information exchanged did not lead to the fixation of price *etc.*

In a 2016 decision (*Ruchi Soya*)², CCI found certain competitors to have entered into an agreement to increase prices, accumulate stock, and create artificial scarcity in trading of some commodities in commodity exchanges in India. It did not find a contravention because (among other reasons), there was no resultant determination of prices of the commodity or a limitation in supply.

Similarly, in a 2018 decision (*Flashlights*)³, CCI found certain manufacturers of flashlights to have exchanged monthly information on prices, production, and sales, intending to increase prices of flashlights. CCI did not consider such an exchange to be a contravention of the Act because there was no evidence of its implementation or a resultant increase in the price of flashlights in the market.

A decision of CCI issued in June 2020 (*Bearings*)⁴, however, adopts a different approach. CCI found that five bearings manufacturers met to decide prices that were to be quoted to original equipment manufacturers in the automotive bearings market. The fact that parties met to decide the price revisions was considered sufficient by CCI to establish a cartel violation. CCI found that the information exchange compromised the parties' independence to quote rates which they would have quoted absent their coordination. While CCI acknowledged that it was possible for the cartel to not have led to a collusive outcome in the market, it did not consider 'implementation' of the arrangement to be necessary for establishing a cartel violation. Instead, the decision implies that the mere establishment of an anti-competitive agreement (without implementation) would be sufficient to find the parties to have contravened the cartel provisions of the Act. In effect, CCI presumed (and conflated) *both* implementation and AAEC. This is a deviation from the previous standard established in *Flashlights* and *Ruchi Soya*

1 This is different from the presumption of appreciable adverse affect on competition ('AAEC') that the Act prescribes for horizontal arrangements. AAEC is presumed once Section 3(3) of the Act is satisfied. Section 3(3) itself requires that a horizontal agreement between competitors should determine a purchase or sale price, limit market, result in bid rigging etc.

2 Case no. 76 of 2012

3 *Suo Motu* Case No. 01 of 2017

4 *Suo Motu* Case No. 05 of 2017

Implications of Assuming Implementation of Information Exchange

CCI's varied approaches in these decisions bring out some important questions that it must address at a policy level. Once the exchange of anti-competitive information among competitors is established, (i) is there a requirement to show that the agreement was acted upon by the parties?; and (ii) if so, can CCI assume 'implementation' and find parties to have contravened the Act, basis the information exchange alone?

On the one hand, such an assumption would reduce the regulatory burden of CCI having to prove the implementation of cartels. This burden may especially be challenging in situations where proving price fixation, limiting supply, *etc.*, is difficult to gauge due to factors such as the complex nature of the markets involved or the historic nature of the cartel.

On the other hand, such an assumption could create a stricter standard that sanctions all exchanges of competitively sensitive information among competitors unless demonstrably pro-competitive. A *per-se* standard may also require firms to take a closer look at their intelligence-gathering exercises which are often adopted to benchmark their performance against their competitors. For example, firms may need to ensure that any information exchanged with a competitor serves a documented legitimate business purpose; and consider hiring independent third-party aggregators to gather information in an aggregated form that could mask the competitively sensitive information completely. Such a standard *may* also increase the number of leniency applicants that may come forward to report conduct with their competitors to CCI. This may occupy wider regulatory resources of CCI for examining claims of cartel conduct that may not have resulted in a collusive outcome in the market.

Interestingly, the European Commission ('EC') prohibits agreements with either the object or effect of restricting competition⁵. Restrictions 'by object' by their very nature have the potential to restrict competition. When analysing an information exchange as a concerted practice, the EC considers it sufficient for one party to disclose commercially sensitive information to a competitor and for the latter not to reject the information. Once concerted information exchange is established, there is a rebuttable presumption that the firms took the information into account when determining their conduct on the market.

In sum, CCI must adopt a consistent approach on whether the implementation of an agreement/acting on information exchanges is necessary to prove cartel contravention and on whom the burden of proving or disproving such a contravention would lie. This would aid firms in having legal certainty and ensure greater compliance with the antitrust laws in India.

Combination Orders

CCI Approves Acquisition of Shareholding by Canary Investment Limited and Link Investment Trust II in Intas Pharmaceutical Limited with Modifications⁶

On April 30, 2020, CCI approved the acquisition of approximately 3% of the shareholding in Intas Pharmaceutical Limited ('Intas') by Canary Investment Limited ('Canary') and Link Investment Trust II ('Link') (affiliates of ChrysCapital).⁷ Through the transaction, the shareholding of ChrysCapital (through its affiliates) would have increased from 3% to approximately 6% in Intas. The transaction also granted ChrysCapital and its affiliates the right to receive information regarding the affairs of Intas, right to appoint a director on the board, and the right to veto certain corporate actions including amendment to charter documents, commencement of new businesses and change in capital structure.

ChrysCapital, Canary, and Link (together, 'Acquirers') argued that the acquisition of less than 10% with minority investment protection rights was exempt because it does not qualify as a strategic acquisition. CCI disagreed. It noted that an acquisition that involves rights that allow active participation or the ability to materially influence the day-to-day affairs or the strategic corporate actions of a target enterprise cannot be regarded as being 'solely as an investment'.

ChrysCapital had minority shareholdings in other companies in the pharmaceutical sector apart from its shareholding in Intas. It held less than (i) 10% shareholding in Mankind Pharma Limited ('Mankind') and Eris Lifescience Limited; (ii) 20% shareholding in GVK Biosciences Private Limited ('GVK') and Curatio Healthcare Private Limited ('Curatio').

In its assessment, CCI was concerned with the Acquirers' common shareholding in its controlled portfolio entities (*i.e.*, GVK, Curatio, and Mankind) and Intas in the same business. CCI



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⁵ See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements

⁶ This summary is based on a copy of the decision published by CCI on July 10, 2020. The decision got subsequently removed from CCI's website.

⁷ Combination Registration No. C-2020/04/741.



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considered that such shareholding in competing businesses is likely to allow the Acquirers the ability to pursue anticompetitive goals such as allocation of product or geographic market or customers, streamlining innovation efforts, price arrangements, or bid-rigging in concentrated markets. It also noted that the combined market share of Intas and the Acquirers' controlled portfolio entities was greater than 30% in more than 20 pharmaceutical products.

To address CCI's concerns, the Acquirers offered certain voluntary modifications. They undertook to (i) remove their director on the board of Mankind; (ii) restrict the use of information concerning Intas, Curatio, and Mankind; and (iii) not exercise their veto rights in Mankind regarding change in capital structure, mergers and acquisitions, amendment to charter documents, and commencement of new businesses, except some limited exemptions to protect the value of their investment. CCI accepted these commitments and approved the transaction.

CCI Approves Tiger Midco LLC's Acquisition of Tech Data Corporation

On April 30, 2020, CCI approved the acquisition of 100% of the shareholding in Tech Data Corporation ("**Tech Data**") by Tiger Midco LLC ("**Tiger Midco**").⁸ Tiger Midco was a special purpose vehicle set up and managed by investment funds affiliated to Apollo Management, L.P. ("**Apollo**").

The Apollo group is present in India in application services, provision of cloud solutions, and professional services. Tech Data's offerings in India include hardware products, software products, distribution of cloud solutions, security and analytical solutions, and educational offerings.

CCI noted that cloud solution providers and cloud solution distributors compete in the market for the provision of cloud solutions and also overlapped vertically since cloud solution providers engage distributors. However, it decided to not define a relevant market because of the insignificant market share of the parties in these markets and the presence of significant competitors such as Microsoft, Google, Ingram India, Crayon India. CCI approved the transaction because it did not anticipate any foreclosure effects on competition in India.

CCI Approves the Merger of Mylan N.v. with Upjohn Inc.

On March 23, 2020, CCI approved a transaction notified by Mylan N.v. ("**Mylan**") and Upjohn Inc. ("**Upjohn**").⁹ The transaction involved (i) separation of a portion of Pfizer Inc.'s business and its transfer to Pfizer Inc.'s wholly owned subsidiary, Upjohn; and (ii) transfer of all of Mylan's assets and liabilities to Upjohn through a merger or asset sale. The combined business would be wholly owned by Upjohn and renamed as "Viatris".

Both parties are active in the business of supplying active pharmaceutical ingredients ("**APIs**") and finished dosage products ("**FDPs**") (primarily prescription drugs) in India. Upjohn is present in two therapeutic categories in which Mylan intends to launch a product. CCI did not find any competition concerns on this overlap because of the presence of other competitors.

Mylan also sells certain APIs (upstream market) which could be used by Upjohn to manufacture its FDPs (downstream market) such as Amlogard, Viagra, and Daxid. Mylan's market share in the upstream market in India was between 0-10% and it faces competition from significant players including Dr. Reddy's Laboratories, Hetero Drugs Limited, Cadila Healthcare Limited, Aurobindo Pharma, and Teva Pharmaceuticals. Upjohn's market share in the downstream market for Amlogard, Viagra, and Daxid ranged between 0-10% at ATC3 and ATC4 levels.¹⁰ Further, the market share for Daxid was between 20-25% and 30-35% at a molecular level. However, because of the presence of large competitors in the market, such as Mankind Pharma, Zydus Cadila, Dr. Reddy's Laboratories, and Ranbaxy, CCI decided to approve the transaction.

CCI Approves JSW Energy Limited's acquisition of GMR Kamalanga Energy Limited

On April 7, 2020, CCI approved an acquisition of 100% shareholding in GMR Kamalanga Energy Limited ("**GMRK**") by JSW Energy Limited ("**JEL**").¹¹

Both parties are active in the power generation market in India (and at a narrow level, the thermal power generation segment in India). The combined and incremental market share of the parties in these common segments was between 0-5%. There were also some potential vertical overlaps between JEL's subsidiaries and GMRK, where the parties' market shares are miniscule. Given the lack of market share and the presence of several significant competitors in each segment/sub-segment, CCI found that the transaction is not likely to cause an AAEC in India.

⁸ Combination Registration No. C-2020/03/737.

⁹ Combination Registration No. C-2020/01/720.

¹⁰ Anatomical Therapeutic Chemical or 'ATC' is a form of classification of medicinal/pharmaceutical products based on the particular medicine's indications, therapeutic use, composition and mode of actions, maintained by the European Pharmaceutical Marketing Research Association and IQVIA (formerly Intercontinental Medical Statistics).

¹¹ Combination Registration No. C-2020/03/731.

CCI Approves an Investment by Amazon NV Investment Holdings LLC in Future Coupons Private Limited

On November 28, 2019, CCI approved an acquisition of 49% shareholding in Future Coupons Private Limited ('FCL') by Amazon.com NV Investment Holdings LLC ('Amazon NV').¹² The transaction also involved certain intra-promoter group transactions between FCL, Future Corporate Resources Private Limited ('FCRPL') and Future Retail Limited ('FRL').

The Amazon group and the FCL group are both engaged in B2B and B2C retail in India. CCI assessed the competition dynamics (including market shares) at the retail market level, separately for the organized segment, and its narrower segments, and found no competition concerns.

It also analyzed vertical overlaps between the parties in B2B sales, digital payments, online marketplaces, and the sale of Amazon-branded devices, where the Amazon group was active. However, because of the parties' marginal presence in these markets and the lack of any direct or exclusive commercial arrangement between them, CCI found that the vertical relationships did not raise any competition concerns. It accordingly found that the transaction is unlikely to cause an AAEC in India.

CCI Approves the Acquisition of Emami Cement Limited by Nuvoco Vistas Corporation Limited

On May 5, 2020, CCI approved an acquisition of 100% shareholding in Emami Cement Limited ('ECL') by Nuvoco Vistas Corporation Limited ('NVCL').¹³ The parties are involved in the manufacture and sale of cement (specifically, grey cement) in India. ECL was also engaged in the sale of clinkers to other cement manufacturers. NVCL manufactured clinkers for captive consumption only. CCI delineated the relevant market as the market for manufacture and sale of grey cement (through trade and non-trade mode) in Chhattisgarh and West Bengal ('Relevant Market').¹⁴

CCI found the combined market shares of the parties to be around 15-20% in terms of installed capacity and sales volume in the Relevant Market. The Relevant Market also had significant competitors such as Shree Cement, Holcim, Ultratech, and Dalmia and the Herfindahl Hirschman Index ('HHI')¹⁵ and Delta-HHI values assessed by CCI in terms of the considered metrics were less than 2000 and 250. On this basis, CCI found that this overlap was not likely to cause an AAEC. It also did not find any competition concern in its analysis of the vertical overlaps between the parties. This is because the sale of grey cement and clinkers to third parties by ECL constituted an insignificant portion of its revenue to cause any foreclosure concerns.

Behavioural Orders

CCI Dismisses Allegations of Abuse of Dominance against National Highways Authority of India

On July 7, 2020, CCI dismissed allegations of abuse of dominance against National Highways Authority of India ('NHAI').¹⁶ NHAI was alleged to have abused its dominant position by modifying the experience-related eligibility criteria for engaging consultants prescribed by in its tender documents. The allegation was that this experience requirement was not compliant with the standard tender document of the Ministry of Road Transport and Highways (parent ministry of NHAI).

While CCI did not find NHAI to be dominant, it proceeded to analyse the alleged conduct claiming that NHAI was a "key player" in the market. It observed that prescription of tender conditions such as including eligibility criteria is the prerogative of the procurer, which must not be interfered with, unless the terms and conditions are demonstrably unfair or discriminatory. CCI dismissed the case given the lack of evidence of abuse.



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¹² Combination Registration No. C-2019/09/688.

¹³ Combination Registration No. C-2020/03/734.

¹⁴ This area comprises the states of Chhattisgarh, West Bengal, Bihar, Jharkhand, and Odisha as per CCI's decision in Combination Registration No. C-2014/07/190 – Lafarge/Holcim.

¹⁵ HHI is one of the indices used to assess the level of market concentration and the changes in the concentration due to a combination.

¹⁶ *In Re: Sandeep Mishra v. National Highways Authority of India*, Case No. 13 of 2020, Order dated July 7, 2020.



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CCI Dismisses Allegations of Abuse of Dominance against sps Steels Rolling Mills Limited and Shakambhari Ispat & Power Limited

On July 8, 2020, CCI dismissed allegations of abuse of dominance against sps Steels Rolling Mills Limited ('sps') and Shakambhari Ispat & Power Limited ('SIPL').¹⁷ SIPL, as a successful resolution applicant under the corporate insolvency resolution process, controls sps's management under the orders of the National Company Law Tribunal, Kolkata ('NCLT').

Before the insolvency proceedings, sps and Prashant Properties Private Limited ('Informant') entered into a 'Permitted User Agreement' to allow the Informant to use sps's trademark 'Elegant'. While the NCLT acknowledged the validity of the Informant's contract with sps, it did not grant any relief to it (to use the trademark) because its jurisdiction had ceased after the approval of SIPL's resolution plan to revive sps. A plea to grant a permanent injunction before a civil court was also dismissed.

The Informant alleged before CCI that SIPL (through sps) abused its dominant position by issuing a public notice that threatened civil and criminal prosecution against any entity using the trademark 'Elegant' or associated trademarks in any business activities. CCI found that there was no evidence demonstrating the existence of a legal right inherent in the Informant concerning the trademark. The Informant also failed to show any anti-competitive behaviour or consumer harm. CCI also found that the public notice was just a reflection of the existence of sps's and SIPL's rights to safeguard against the misuse of their trademarks, which they validly possess. Given the above, CCI decided to close the matter.

CCI Refrains from Imposing a Penalty in a Cartel Involving Composite Brake Block Manufacturers

On July 13, 2020, CCI concluded that several composite brake block ('CBB') manufacturers cartelized to fix prices, limit supply, allocate market, and rig bids of CBB tenders.¹⁸ CCI had initiated an investigation after receiving complaints from various Indian railway zones ('Informants') against ten CBB manufacturers claiming that the CBB manufacturers had cartelized by offering identical bids and reductions in price in response to the tenders floated by the railway zones. The investigative arm of CCI, the Director-General ('DG') found that the CBB manufacturers had contravened the cartel provisions of the Act.

CCI's Findings

Evidence: CCI found incriminating emails, WhatsApp communications, text messages, and call data records against each CBB manufacturer. These documents showed that the CBB manufacturers discussed bid prices and payment of compensation if any of the manufacturers lost the tender. The documents also showed that the CBB manufacturers allocated specific quantities for each tender. DG also found instances of CBB manufacturers having quoted the same prices across tenders. CCI found this evidence to establish the existence of a cartel between the CBB manufacturers.

AAEC: CCI rejected the CBB manufacturers' argument that they had no control over the final prices and quantities, which were negotiated and determined by the Indian Railways. It held that the Act prohibits any conduct which can potentially cause an AAEC, for example, an agreement to fix prices even when the final price is different from the 'fixed' price. It also found that once a cartel is established, it is presumed to cause an AAEC in India and none of the CBB manufacturers were successful in rebutting this presumption.

CCI finally found the CBB manufacturers and their officials to have contravened the Act. While CCI issued a cease and desist direction, it did not impose a monetary penalty on the CBB manufacturers and their officials because of:

- the continued cooperation of the CBB manufacturers during the investigation;
- the admission of cartelization by the CBB manufacturers which led to an expedited inquiry; and
- the low turnover of most of the CBB manufacturers; and
- the economic impact of COVID-19 on the credit needs and liquidity of micro, small and medium enterprises.

¹⁷ *In Re: Prashant Properties Private Limited v. sps Steels Rolling Mills Limited and Ors.*, Case No. 17 of 2020, Order dated July 8, 2020.

¹⁸ *In Re: Chief Materials Manager, South Eastern Railway v. Hindustan Composites Limited and Ors.*, Ref. Case Nos. 3 of 2016, 5 of 2016, 1 of 2018, 4 of 2018 and 8 of 2018, Order dated July 13, 2020.

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