



Penalties on Individuals Under the Competition Act, 2002

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Penalties on Individuals Under the Competition Act, 2002

Introduction

The Competition Commission of India ('CCI') can impose significant monetary penalties on individuals for contravention of the provisions of the Competition Act, 2002 ('Act') under Section 48 of the Act¹. CCI presumes responsibility and penalises any person in charge of and responsible for the conduct of the company at the time of the contravention². This presumption of responsibility is particularly difficult to dispel where the individual in question, who is charged with the contravention, is a director, manager, secretary or any other officer of a company. In such cases, the concerned individuals need to clearly establish that the contravention has taken place without their consent, connivance, or negligence³. The penalty for contraventions by individuals found to be responsible may go up to 10% of the average income of the concerned individuals, for the last three preceding financial years. The penalty imposed on such individuals is in addition to that imposed on the enterprise in question, and failure to pay the penalty amount could result in such individuals being imprisoned for up to three years, under Section 42(3) of the Act. Clearly, the Act empowers CCI to impose significant penalties on individuals found to be responsible for anti-competitive conduct, and is increasingly choosing to do so.

CCI's Increasing Focus on Individual Penalties

CCI's initial 'light touch' approach to penalties in its early years of enforcement meant that it chose not to impose significant penalties on individuals. However, penalising the individuals of an enterprise, responsible for contravention of provision of the Act appears to have become an enforcement priority recently. This emphasis on affixing individual responsibility for anti-competitive conduct could be attributed to three key factors: (i) an increased awareness of the Act and its provisions, amongst senior management in companies as a result of CCI's extensive advocacy efforts in its initial years; (ii) an overall reduction in the quantum of penalty (and consequently the deterrent effect) that could be imposed upon an enterprise as a result of the decision in **Excel Crop Care Limited v. CCI and ors.**⁴, which limits maximum penalty to the 'relevant turnover' of an enterprise; and (iii) a perceptible inability to deter repeated anti-competitive cartel behavior amongst trade associations, through penalties, since such associations have low 'turnovers'. CCI after a number of cartel decisions, particularly in the film exhibition and pharmaceutical distribution sectors, probably realised that merely levying a nominal penalty on the negligible turnover of an industry association was not deterring its significantly more wealthy individual members from engaging in anti-competitive behavior. To remedy this situation, CCI has been increasingly imposing penalties on individual office bearers involved in contraventions, with the first penalty on an individual being levied by CCI, only in 2014⁵.

When Can an Individual be Investigated?

The imposition of penalties on individual officers of an enterprise has not gone unchallenged. To start with, individual officers have questioned CCI's imposition of personal penalties without conducting a separate investigation into their respective roles in the contravention. The Company Law Appellate Tribunal in its early orders⁶, found favour in this contention and held that a separate proceeding for examining the liability of individual company officers was required after CCI had first established a contravention against the company. The rationale for this was that Section 48(1) of the Act pre-supposes guilt against every person and the use of the word 'committed' in the two sub-sections, i.e., Section 48(1) and 48(2), makes the finding of contravention against the company, a necessary pre-condition to establishing individual responsibility. However, the Delhi High Court ('DHC') has since held in at least two of its judgements (See, **Cadila Healthcare Limited v. CCI**⁷ and **Mahyco Monsanto Biotech (India) Private Limited v. CCI and ors.**⁸) that an investigation into the liability of the company and the individuals can be carried out contemporaneously. The DHC's view, does however protect an individual director's right of defense by way of its numerous decisions, holding that: (i) an investigation into the behavior of a company and its officers does not preclude such officers from demonstrating that they had not committed anti-competitive acts, or that they had exercised requisite due diligence; (ii) CCI must have some basis to investigate the role of individual officers and is required to form a pri-

1 The Act is available at https://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf

2 Section 48(1) of the Act

3 Section 48(2) of the Act

4 **Excel Crop Care Limited v. CCI and ors.**, 2017(6) SCALE 241.

5 *Suo Moto Case No. 2 of 2012*, available at https://www.cci.gov.in/sites/default/files/o22012_o.pdf

6 *Appeal No. 5 of 2016*, order dated May 10, 2016, *Appeal No. 9 of 2016*, order dated May 10, 2016.

7 **Cadila Healthcare Limited v. CCI**, LPA No. 690 of 2018.

8 **Mahyco Monsanto Biotech (India) Private Limited v. CCI and ors.**, LPA No. 637 of 2018.

ma facie opinion of contravention of the Act by the company and individuals before ordering an investigation against them under Section 26(1) by the DHC⁹; and finally (iii) CCI must have adequate evidence to conclude that such officers were indeed in-charge and/or responsible for the conduct of the business of the concerned company to impose a penalty on them¹⁰.

Conclusion

CCI's approach to maintaining significant deterrence by penalising individuals responsible and involved in the contravening acts on behalf of the concerned company is in keeping with international best practices. The courts have however balanced the need for individual penalties to be effective deterrents, with requisite protections to their rights of defense. This is evident from the proposed amendments in Competition (Amendment) Bill, 2020¹¹, which removes any ambiguity on how individual penalties will be computed. The proposal stipulates that the quantum of penalty that can be levied on individuals will be limited: (i) to a maximum cap of 10% of an individual's average 'income' for the last three preceding financial years; and (ii) specifically in cases of cartel, up to 10% of the individual's average income for each year of the continuance of the anti-competitive agreement.

Companies would do well to take note of the increased focus on penalising individuals responsible for anti-competitive conduct and consider conducting regular compliance trainings and spreading awareness about the Act, and its requirements. Such compliance exercises will go a long way in mitigating penalties for the company and limiting liability for its senior officers. It is also worth noting that individual officers can also avail penalty reductions available under The Competition Commission of India (Lesser Penalty) Regulations, 2009 (as amended) ('**Leniency Regulations**'), and that companies should consider including their individuals as applicants at the time of applying for leniency¹².

Behavioral Decisions

CCI Dismisses Complaint against PayU Alleging Abuse of Dominance

On January 29, 2020, CCI dismissed an allegation of abuse of dominant position under Section 4 of the Act, against PayU Payments Private Limited ('PayU') and Enstage Software Private Limited ('Wibmo')¹³.

PayU is a financial technology company providing technology solutions to online merchants and holds a Non-Banking Financial Company ('NBFC') license in India. Wibmo is a leading technology and service provider for the financial services industry that provides a host of services like mobile payments, fraud and risk management, and prepaid solutions. The informant, Mr. Satyen Narendra Bajaj ('**Mr. Bajaj**'), alleged that PayU is dominant in the relevant market for 'e-payments gateway in India' and Wibmo is dominant in the downstream market of 'risk-based authentication and payment security services in the e-payments gateway in India' and that after the acquisition of Wibmo by PayU in April 2019, PayU's market power would enhance in the market of e-payment processing gateway services in India for completion of e-payments.

It was further alleged that high market power is likely to result in unfair and discriminatory conditions in availing payment gateway services for both consumers and the competitors of PayU and Wibmo. Further, PayU had foreclosed competition and created barriers to entry for new players by not allowing competitors, access to Wibmo, which restricts them from using an authentication and payment security services by Wibmo for an e-payment transaction. Mr. Bajaj also alleged that as a result of Wibmo's acquisition, PayU has details of accounts of buyer and sellers along with commission charged by other payment gateways that used Wibmo's services. This ready access to customer database could be used by PayU to onboard any merchant by offering lower commission.

CCI observed that Mr. Bajaj's allegations were premised only upon the fact that the combined entity has become dominant in the market leading to both exclusionary as well as exploitative effects in the relevant market. CCI held that, unlike the Monopolies and Restrictive Trade Practices ('MRTP') Act, mere existence of a dominant position, without *prima facie* evidence of



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⁹ National Engineering Industries Limited v. CCI, W.P. (C) No. 1714 of 2020.

¹⁰ Mahyco Monsanto Biotech (India) Private Limited v. CCI and ors., LPA No. 637 of 2018.

¹¹ Available at <http://feedapp.mca.gov.in/pdf/Draft-Competition-Amendment-Bill-2020.pdf>

¹² Amendments to the Leniency Regulations were notified on 22 August 2017. Pre-amendment, the benefit of a lesser penalty under the Leniency Regulations was only available to 'enterprises'. CCI in various orders in last few years and most recently in the Electric Power Steering Case, Suo Moto Case No. 07(01) of 2014, available at <https://www.cci.gov.in/sites/default/files/Suo-Moto-07-01-2014.pdf>, has granted equal reductions in penalty to the individuals, and their enterprise which filed for leniency.

¹³ Case No. 23 of 2019, order delivered on February 5, 2020.



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its abuse, is not recognised as an anticompetitive conduct under the Act. The Act provides for a departure from its predecessor and CCI reiterated the settled position that the existence of *prima facie* abusive conduct under Section 4(2) of the Act is a pre requisite to order an investigation. CCI dismissed the complaint because Mr. Bajaj had not furnished any evidence in relation to the abuse of dominant position by PayU.

CCI Dismisses Allegation of Bid Rigging in Railway Track Maintenance Market

On February 5, 2020, CCI dismissed a complaint by Plasser India Private Limited ('Plasser') against Harbour Sales Private Limited ('OP-1'), Alpha National Trading Co. ('OP-2') ('OP-1 and OP-2 are collectively referred to as 'Indian companies'), CRCC High-Tech Equipment Corporation Limited ('OP-3'), Hubei Srida, Heavy-Duty Engineering Machinery Co. Limited ('OP-4'), Ministry of Railways, Union of India ('OP-5') and Oriental Hengtai (Taian) Machinery and Electronic Technology Co. Limited ('OP-6') (OP-3, OP-4 and OP-6 are collectively referred to as 'the Chinese companies'), alleging *inter alia* contravention of the provisions of Section 3(3) of the Act¹⁴.

Plasser is engaged in the manufacture of high performance and highly sophisticated machines for track maintenance, track-laying and track renewal. The Indian companies and the Chinese companies are engaged in developing track maintenance machinery market.

The Ministry of Railways invited bids for the supply of Dynamic Track Stabilizing Machine through a tender that specified that an agent could represent or quote on behalf of only one firm. Plasser claimed that tender conditions were violated since the Indian companies acted as agents for the Chinese companies. Moreover, there are common linkages between the Indian companies because of common directorship and partnership between members of one family.

It was alleged that the Indian companies and the Chinese companies entered into an anticompetitive agreement, since the Chinese companies should have been more diligent in appointing their agents. It was further alleged that they tacitly agreed to engage in anticompetitive conduct by appointing agents having common linkages, which gave rise to a potential risk of exchange of sensitive commercial information.

CCI dismissed the information, observing that the violation of the conditions in the tender did not amount to a violation of the provisions of the Act, and relied on **In Re: Reprographics India v. Hitachi Systems Micro Clinic Pvt. Ltd.**¹⁵, to observe that in the absence of evidence, a mere possibility of collusion on the basis of common ownership of agents is not sufficient to order further inquiry.

CCI Dismisses Allegations of Abuse of Dominant Position by Assam Petrochemicals Limited

On February 6, 2020, CCI dismissed the complaint of the Assam Plywood Manufacturers' Association ('APMA') alleging abuse of dominant position under Section 4 of the Act by Assam Petrochemicals Limited ('APL')¹⁶. The APMA is an association of plywood manufacturers in the state of Assam, and APL is a public sector undertaking by the Government of Assam established for the manufacture of ethanol and formalin.

Formalin is used by the plywood units for the manufacture of resin, which, in turn, is used as a binding agent in the manufacture of plywood. The APMA alleged that APL, being the sole producer of formalin in Assam and the North-East states, indulged in discriminatory pricing by charging a higher price for formalin from plywood manufacturers in Assam, and a lower price from those in other states.

APL responded that it receives most of its revenue from outside the states of Assam, Nagaland and Arunachal Pradesh. APL submitted that the prices charged by it in other states are based on the prices charged by its competitors in those markets, i.e., APL is compelled to sell below the cost price because of the low prices charged by other sellers of formalin in those markets. Moreover, APL stated that even in the states of Assam, Nagaland and Arunachal Pradesh, its prices for formalin are below the price charged by its competitors.

CCI observed that there are multiple sellers in the market and the buyers can switch from one seller to another without incurring significant costs. The choice for buyers continues to exist irrespective of whether the relevant geographic market is defined narrowly i.e., it is limited to the states of Assam, Nagaland and Arunachal Pradesh, or broadly to include West Bengal as well. The presence of other players indicates that APL cannot operate independent of the competitive forces in the market or affect consumers in its favour, and therefore APL does not enjoy a dominant position. Accordingly, CCI dismissed the complaint.

¹⁴ Case No.45 of 2019 (order delivered on February 5, 2020).

¹⁵ Case No. 41 of 2018.

¹⁶ Case No. 34 of 2019.

CCI Dismisses Complaint against usv Private Limited

On February 7, 2020, CCI dismissed a complaint by Mr. Makarand Anant Mhaskar ('Mr. Mhaskar') alleging that usv Private Limited ('usv') and its C&F agent, Kundan Pharmacon ('Kundan') have abused their dominant position under Section 4 of the Act¹⁷. Mr. Mhaskar is a wholesaler who had placed an order for purchase of drugs from usv/Kundan and confirmed the receipt of the order along with a demand draft and other documents.

Mr. Mhaskar alleged that usv imposed a number of unfair conditions upon him such as: (i) compelling him to collect the goods from the Pune carrying and forwarding (C&F) agent (Kundan); (ii) compelling him to pay the amount in advance; and (iii) precluding him from returning the goods for any reason whatsoever or from purchasing the goods from another C&F agent.

CCI observed that Kundan is merely a C&F agent and therefore for the analysis under Section 4 of the Act, usv is the relevant entity. CCI observed that while Mr. Mhaskar has claimed that usv is dominant in the relevant market, he has not substantiated the claim with evidence. CCI conducted its own analysis and concluded that usv did not enjoy a dominant position because: (i) Mr. Mhaskar did not claim that the drugs are sold only by usv and no substitutes are available; and (ii) the market data collected by CCI suggested that a number of pharmaceutical companies have higher sales than usv. Accordingly, CCI dismissed the information.

CCI Dismisses Allegation of Price-Fixing by Indian Telecom Operators

On February 10, 2020, CCI dismissed an allegation by Mr. Ajinder Singh, on behalf of Teleclub Alberta Limited ('Informant') claiming that Vodafone Idea Limited ('Vodafone'), Reliance Jio Infocomm Limited ('Reliance'), Airtel Limited ('Airtel') and Sify Technologies ('Sify') acted in violation of Sections 3 and 4 of the Act. Vodafone, Reliance, Airtel and Sify are together referred to as 'Telcos'¹⁸.

The Informant had filed the information on behalf of Teleclub (Alberta Limited) in his capacity as its CEO. Teleclub is an international telecom carrier in Canada. Vodafone is an Indian subsidiary of Britain based Vodafone Group PLC, which started Indian operations in 2007 with the acquisition of controlling interest in Hutch Essar. In 2018, Vodafone acquired Idea Cellular and became the largest telecom service provider in India. Likewise, Reliance and Airtel are also major telecom service providers operating in India. Further, as per publicly available information, Sify is the largest Information and Communications Technology ('ICT') service provider, systems integrator and all-in-one network solutions company operating in India, which has partnered with major network operators to deliver global network solutions.

The Informant entered into an agreement with Idea Cellular (now acquired by Vodafone) to provide inbound calls to India at the rate of ₹ 0.37 per minute through Idea Cellular's network for which a Master Agreement was signed and executed between the Informant and Idea Cellular in November 2017. Subsequently, an amendment to the Master Agreement was executed between the Informant and Idea Cellular (now acquired by Vodafone) in April 2018.

The Informant alleged that during the course of business, the Telcos held a conference in Hawaii, United States and decided to charge standard rate of US\$ 0.0053 for inbound calls terminating on their network in India, instead of the rates fixed by Telecom Regulatory Authority of India's ('TRAI') notifications i.e., ₹ 0.30 per minute. The Informant had no option but to agree to these terms, as all telecom operators provided the same rate. The telecom operators further increased the rate of inbound calls to US\$ 0.0115 per minute after another meeting in February 2018, and the same was telephonically communicated to the Informant. The Informant alleges that the telecom operators also harassed the Informant by choking its ports used for sending traffic.

CCI observed that the allegation related to charging rates above those fixed by the TRAI, and fell within TRAI's jurisdiction. Accordingly, CCI sought TRAI's opinion on two issues: (i) whether the service providers (Telcos) can be said to have contravened the provisions of IUC Regulations, 2018 by charging higher termination charges for inbound international calls, terminating into India?; and (ii) whether any complaint has been filed with TRAI in this regard?

In its response, TRAI explained that the Interconnection Usage Charges (IUC) Regulations, 2018 prescribe the International Termination Charges ('ITC') for international incoming calls to wireline and wireless networks at ₹ 0.30 per minute. The International Settlement Charge ('ISC') has not been regulated under the IUC Regulations, 2018 and is supposed to be decided by mutual negotiations between the Indian Long Distance Operators ('ILDOS') and foreign service providers. No Indian Long Distance ('ILD') license was issued by the Department of Telecom ('DoT') in the name of the Informant. According to TRAI, the Informant is in the business of providing services in the capacity of a foreign service provider and, thus, has to negotiate with the ILDOS for deciding ISC for inbound international calls terminating in India. TRAI further clarified that the Telcos in the present case had not contravened the IUC Regulations, 2018. Re-



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¹⁷ Case No. 42 of 2019.

¹⁸ Case No. 32 of 2019



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sponding to the second question posed by CCI, TRAI stated no complaint was filed with TRAI in this regard till that date.

In light of the categorical opinion received from the sectoral regulator, CCI dismissed the information and observed that the parties are well within their legal rights to negotiate the terms and conditions for doing business *inter-se*, while not violating the principles of competition law.

CCI Dismisses Allegation against Central Medical Services Society

On February 10, 2020, CCI dismissed a complaint by Mr. Ambalal V. Patel (**‘Mr. Patel’**) alleging abuse of dominant position by Central Medical Services Society (**‘CMSS’**), Anti TB department (**‘ATBD’**) and RITES India Limited (**‘RITES’**)¹⁹. Mr. Patel alleged that CMSS and RITES inserted unfair conditions in tenders for the purchase of anti-TB drugs and HIV drugs respectively with a view to establishing a monopoly in these markets.

CMSS published a tender to procure Anti-TB drugs for supply to various government dispensaries and asked for suppliers to have Geneva WHO-prequalified certificate (mentioned in labelling only). As a result, only two companies that meet this criterion are allowed to participate in the tender. Mr. Patel claimed that there are other companies with WHO certifications, which are better than WHO-prequalified certification, but CMSS designed tender conditions in a way to give an unfair advantage to the two companies.

CMSS has been established as a Central Procurement Agency to streamline drug procurement and distribution system of Department of Health & Family Welfare, Ministry of Health and Family Welfare, Government of India. RITES, is a Government of India enterprise and is a multi-disciplinary consultancy organisation in the fields of transport, infrastructure and related technologies. It also offers consultancy services for comprehensive procurement & logistics management and auditing, covering all phases of procurement cycle. According to the definition of ‘enterprise’ under Section 2(h) of the Act, CCI held that CMSS and RITES are engaged in procurement of health sector goods and offering consultancy services respectively, which are economic activities. Relying on its past decisions²⁰, CCI observed that since these entities are not performing any sovereign functions, they are ‘enterprises’ for the purposes of the Act.

In its previous decisions involving allegations of abuse of buyer’s power²¹, CCI delineated the relevant market by applying the concept of ‘demand side substitutability’ inversely. Accordingly, the relevant product market may be delineated as ‘market for procurement of Anti-TB drugs’ in case of CMSS, and ‘market for procurement of HIV drugs’ in case of RITES. Since suppliers of health sector goods/drugs can participate in the tenders from all across India, CCI defined the relevant geographic market as ‘the territory of India.’

CCI observed that there is not adequate information in the submission of Mr. Patel or in the public domain to assess whether the opposite parties in this case are dominant in the relevant market delineated above.

CCI also observed that: (i) WHO-prequalified certification is a globally accepted standard of quality, safety and efficacy and the same could be incorporated in the tender to improve the quality standards of the drug and public safety; (ii) CCI’s past jurisprudence²² suggests that it would not intervene in the buyer’s prerogative to decide the tender conditions/technical specifications unless they appear to be demonstrably unfair/discriminatory, which did not appear to be the case; and (iii) allegations regarding violations of Drugs and Cosmetics Act, 1940 or Public Procurement (Preference to Make in India) Order, 2017 are out of the purview of the Act. Accordingly, CCI held that such a condition for supplying drugs for treating the critical diseases, *prima facie*, cannot be termed as arbitrary or anti-competitive unless the same is wholly irrelevant or illusory.

CCI Dismisses Allegations of Abuse of Dominant Position by the Railways

On February 3, 2020, CCI dismissed a complaint by Mr. Meet Shah and Mr. Anand Ranpara (**‘Mr. Ranpara’**) alleging that the Ministry of Railways (**‘Railways’**) and the Indian Railways Catering and Tourism Corporation (**‘IRCTC’**) have abused their dominant position through excessive pricing of railway tickets sold online²³. Railways and IRCTC are together referred to as ‘Indian Railways’.

Mr. Ranpara alleged that the Indian Railways were abusing their dominant position in the market by rounding off the actual base fare of a railway ticket to the next higher multiple of ₹ 5. CCI held that there existed a *prima facie* case of abuse of dominance by the Indian Railways and

¹⁹ Case No. 02 of 2020

²⁰ Cupid Limited v. Ministry of Health & Family Welfare and Central Medical Services Society, Case No. 45 of 2018.

²¹ Shri Rajat Verma v. Public Works (B&R) Department Government of Haryana & others, Case No. 70 of 2014; Adcept Technologies Pvt. Ltd. v. Bharat Coking Coal Limited, Case No. 16 of 2013; Cupid Limited v. Ministry of Health & Family Welfare and Central Medical Services Society, Case no. 45 of 2018; Case No. 80 of 2015, V.E. Commercial Vehicles Limited v. UPSRTC;

²² Suntec Energy Systems/National Dairy Development Board/Amul Dairy, Case No. 69 of 2016; Pandrol Rahee v. DMRC, Case no. 03 of 2010; etc

²³ Case No. 30 of 2018.

directed the Director General ('DG') to cause an investigation in the matter.

CCI defined the relevant market as the 'market for sale of tickets by railways in India' and relying on the DG report, regulatory and statutory framework of the relevant market and precedents²⁴, held that the Indian Railways were dominant in the relevant market.

CCI closed the investigation and dismissed the information, since: (i) the practice of rounding off the fares had *bona fide* justifications, being a policy decision taken by the Railways in accordance with the statute, and was approved by the Indian Parliament with a view to help the Railways recoup its losses and; (ii) while re-couping losses is not a *bona fide* justification in every case, the information indicated that the practice of rounding off yielded efficiencies in terms of time and convenience both to the consumers as well as to the Railways, and as such cannot be held to be a threat to competition in India; (iii) post examination of the rounding off policy, CCI observed that it is non-discriminatory and treats each passenger uniformly without any discrimination; and (iv) purchasing tickets from counters is a traditional method and a lot of people in India do so from PRS (Passenger Reservation System) counters directly.

CCI Dismisses Complaint against ABB India Limited

On January 31, 2020, CCI dismissed a complaint filed by InPhase Power Technologies Private Limited ('InPhase') against ABB India Limited ('ABB') for allegedly abusing their dominant position in the market²⁵.

InPhase relied on a report of Ken Research (2015) to allege that ABB was dominant in the relevant market of 'manufacture and sale of Power Quality Compensators ('PQC') with Insulated Gate Bipolar Transistor ('IGBT') technology for low voltage i.e., below 1000V in India'. ABB abused its dominant position by instituting criminal and civil litigation with *mala fide* intention in order to stop InPhase from doing business. Further, ABB informed its customers/suppliers that InPhase is an illegal and sham company against which legal proceedings had been initiated. Further, since ABB's customers were dependent on it, they were compelled to purchase ABB's power quality products and stop dealing with InPhase. Accordingly, InPhase alleged that ABB abused its dominant position by acting in contravention of: (i) Section 4(2)(b)(i) (limiting or restricting the production of goods or services); (ii) Section 4(2)(b)(ii) (limiting or restricting technical or scientific development); (iii) Section 4(2)(c) (denial of market access); and (iv) Section 4(2)(e) (leveraging dominance in one market to enter or protect another market).

After submission of the DG report, InPhase argued that the relevant market had been defined incorrectly. CCI allowed InPhase and ABB to cross examine witnesses whose statements had been relied on by the DG. In the supplementary DG report, the DG concluded that the cross-examinations did not reveal anything new that required revisiting the original findings in the DG's report on delineation of the relevant market, assessment of dominance or its abuse.

CCI defined the relevant market as 'Market for manufacture and sale of IGBT based Power Quality Solutions ('PQS') for less than 1kV usage in India', on the basis of the differences between cost, technology, intended use, performance etc., of IGBT and non-IGBT based PQS. The DG and CCI held that ABB was not dominant in the defined relevant market because: (i) at least three competitors had higher market shares in the relevant market during the relevant period; (ii) there are enough competitive constraints which prevent a player from acting independently of market forces; (iii) there was no information to demonstrate customer dependence; (iv) there were no entry barriers in the relevant market as could be seen from the entry of InPhase and other players; and (v) including traction in the relevant market, as contended by InPhase, would result in expanding the market size, resulting in reduction of ABB's market shares.

CCI concluded that since ABB was not dominant in the relevant market, no case arises for an examination under Section 4 of the Act.

AZB & Partners represented ABB in these proceedings before CCI.

Karnataka High Court Stays CCI's Order for a Detailed Investigation into Abuse of Dominance by Flipkart and Amazon

On February 14, 2020, a single bench of the High Court of Karnataka ('KHC') ordered a stay of the *prima facie* order of CCI dated January 13, 2020²⁶, ('CCI Order') directing the DG to conduct a detailed investigation against Flipkart Internet Services Private Limited ('Flipkart') and Amazon Seller Services Private Limited ('Amazon'), and their affiliated entities (collectively, the 'Opposite Parties')²⁷.

The Delhi Vyapar Mahasangh ('DVM') had alleged that the Opposite Parties had entered

²⁴ Shri Sharad Kumar Jhunjunwala and others v. Union of India and others, Case Nos: 100 of 2013; Shri Ismail Zabiulla v. Union of India and others, Case No. 49 of 2014; and Shri Yaseen Bala v. Union of India and others, Case No. 89 of 2014.

²⁵ Case No. 12 of 2016

²⁶ Case No. 40 of 2019, available at <https://www.cci.gov.in/sites/default/files/40-of-2019.pdf>

²⁷ Amazon Seller Services Private Limited v. CCI, W.P. 3363 of 2020, Karnataka High Court.



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into various exclusive vertical anti-competitive agreements with certain 'preferred' sellers on their marketplaces for the sale of various products, across sectors, including the smartphone market, where the Opposite Parties were the platform for the exclusive launch of several smartphone models. CCI ordered an investigation²⁸ to ascertain whether the alleged exclusive arrangements, deep-discounting and preferential listing by the Opposite Parties were used as an exclusionary tactic to foreclose competition in violation of the provisions of the Act.

Amazon approached the KHC in a writ challenging CCI Order and after hearing Amazon's submissions, KHC ordered a stay on CCI Order on the following grounds: (i) CCI had invited Amazon for an oral hearing to understand the nuances of e-commerce platforms and businesses in India in an earlier complaint filed by All India Online Vendors Association ('AIOVA') against Flipkart. After hearing Amazon and Flipkart, CCI closed the case. However, in the present complaint with similar allegations, CCI did not call Amazon and Flipkart for an oral hearing to understand the allegations, before passing an investigation order; (ii) Amazon is currently being investigated for violation of the Foreign Direct Investment ('FDI') norms, which allegedly enable it to provide deep discounts. Therefore, CCI could not have initiated an investigation, in light of the Supreme Court's ('SC') judgment in **CCI v. Bharti Airtel Limited and ors.**²⁹, that held that the jurisdiction of CCI is barred till the time a specialised regulator conducts an investigation and arrives at a finding of contravention of that law; (iii) Amazon could demonstrate that the Confederation of All India Traders had filed multiple cases before the DHC, Rajasthan High Court against Flipkart and Amazon on similar allegations and had paid the fee for filing the complaint before CCI which shows malice behind filing of the complaint; and (iv) CCI failed to define the 'agreement' in question before directing an investigation against an anti-competitive agreement as laid down by the Bombay High Court in its order in **Star India Private Limited v. CCI and ors.**³⁰. CCI had not identified or perused the exclusive agreement between Amazon and 'preferred sellers' against which the investigation was directed. The matter is currently pending final adjudication.

Combinations

CCI Approves Laptev's Acquisition of Welspun's Plates and Coils Mill Division

On November 18, 2019, CCI approved the acquisition, of the Plates and Coils Mill Division, as a going concern on a slump sale basis ('**Target business**') of Welspun Corp Limited ('**Welspun group**') by Laptev Finance Private Limited ('Laptev') of the JSW group³¹.

JSW Steel Limited is engaged in the manufacture and sale of a wide variety of iron and steel products, while the Target business produces hot rolled coils, sheets and plates. CCI observed that the technical characteristics, intended use, price levels etc., of various steel products may be different and each of the product segments form a separate relevant product market. Based on this, CCI held that the activities of the parties overlap with respect to the following steel products: (i) Hot rolled coils and sheets ('HR-CS'); (ii) Hot rolled Plates ('HR-P'); (iii) in the sub-segmentation (on the basis of thickness) of HR-P i.e., 0-5 mm, 5-25 mm and above 25mm.

CCI approved the combination and observed that horizontally: (i) the combined market share of the parties in each of the segments is less than 35% and the incremental market share is 0-5% in terms of gross product and domestic sales; and (ii) the combined entity will continue to be constrained by other players in the market such as, Tata Steel Limited, Steel Authority of India Limited and Essar Steel. Further, CCI observed that the combination is unlikely to foreclose the market at vertical levels since the Target business has limited presence in India and incremental market shares are low.

CCI Approves Nippon's Acquisition of a Minority Stake in Future Supply Chain Solutions Limited

On December 10, 2019, CCI approved the acquisition of approximately 22% of the shareholding in Future Supply Chain Solutions Limited ('FSCSL') by Nippon Express (South Asia and Oceania) Pte. Limited ('**Nippon Express**')³². Nippon Express proposed to purchase around 14.63% of the share capital of FSCSL from Griffin Partners Limited ('GPL'), and subscribed to 8.64% equity

²⁸ Summary of the CCI Order available at <https://www.azbpartners.com/bank/ci-orders-detailed-investigation-on-flipkart-and-amazon/>

²⁹ CCI v. Bharti Airtel Limited and ors., Civil Appeal No.11843 of 2018.

³⁰ Star India Private Limited v. CCI, W. P. No. 9175 of 2018.

³¹ Combination Registration No. C-2019/09/684.

³² Combination Registration No. C-2019/10/695.

share capital of FSCSL, on a fully diluted basis.

Nippon Express is a wholly owned subsidiary of Nippon Express Co. Limited., which provides one-stop logistics services at a global level including transport services through ground, air and ocean solutions, industry-specific transport services, specialised transport services such as moving and relocation, heavy haulage and construction, and warehouse and distribution services. FSCSL is a subsidiary of Ritvika Trading Private Limited, which in turn is a wholly owned subsidiary of Future Enterprises. Like Nippon Express, FSCSL is also a third-party supply chain and logistics service provider, which offers automated and IT-enabled warehousing, distribution and other logistics solutions. The parties to the combination do not provide warehousing and distribution services on a standalone basis, but may provide these services in exceptional situations.

CCI observed that parties to the combinations' businesses overlapped horizontally in the provision of four services: (i) contract logistics; (ii) road transport services; (iii) cross border freight services by air; and (iv) cross border freight services by water.

CCI did not delineate the relevant market as the combination would not lead to adverse appreciable effect on competition in any of the alternative relevant markets because: (i) the combined market share of the parties to the combination, in terms of value, is in the range of (0-5%) in each of the segments, and (ii) 90% of the logistics sector is unorganised with both organised and unorganised players imposing significant competitive constraints on each other. CCI observed that while there could be potential vertical overlaps in the activities of Nippon Express or the group it belonged to, in the cross-border freight forwarding by water and air (Upstream Markets), and the activities of FSCSL, in provision of contract logistics (Downstream Market) and vice versa, these relationships are not likely to raise anticompetitive concerns as parties to the combination don't have the ability or the incentive to foreclose competition in these markets.

CCI Approves Napean's Acquisition of a Minority Stake in SBI General Insurance

On December 13, 2019, CCI approved the acquisition of a 16.01% of the paid up share capital of SBI General Life Insurance ('SBI-IAG') by Napean Opportunities LLP ('Napean'), through the purchase of shares from IAG International Pty. Limited ('IAG')³³.

Napean is a newly incorporated entity, which belongs to the PI Opportunities Fund – I ('PIOF-I'), and Azim Premji Trust ('APT'). PIOF-I is a Category II alternative investment fund, registered under Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012 while APT is a private trust incorporated under the Indian Trusts Act, 1882. Hereinafter, PIOF-I and APT are collectively referred to as 'Acquirer Group'.

SBI-IAG, a joint venture between SBI and IAG, is engaged in the business of providing general insurance products in India. These products range from motor, health, personal accident, travel and home insurances in the retail space and aviation, fire, marine, package, construction and engineering and liability insurance in the commercial space. Napean/Acquirer Group (including certain of their portfolio companies), are not engaged in any business activities relating to similar or identical or substitutable products or services with SBI-IAG's business.

Therefore, CCI approved the combination, given that there were no direct/indirect horizontal overlaps between the parties to the combination. While one of the portfolio companies of the Acquirer Group is engaged in the market for distribution of general insurance products and is therefore vertically related to the SBI-IAG's business activity: (i) the distribution of general insurance products is highly fragmented (because of the presence of a large number of players); and (ii) this vertical relationship may not cause any competition concerns, as parties to the combination don't have the ability or incentive to foreclose competition in these markets.

CCI Approves Increase in CDPQ's Stake in Piramal

On December 10, 2019, CCI approved an increase in the stake held by Caisse de dépôt et placement du Québec ('CDPQ') in Piramal Enterprises Limited ('PEL') through the subscription of compulsorily convertible debentures ('CCDs'), issued and allotted by preferential issue (once converted, equity shareholding of CDPQ will increase from 3.68% to 8.99%)³⁴.

CDPQ, a part of the CDPQ Group, is an institutional fund, which manages and serves depositors comprising public and private pension and insurance funds in Quebec, Canada. In India, CDPQ is present through a number of entities such as CDPQ India Private Limited ('CDPQ India'), Ivanhoe Cambridge Investment Advisory (India) Private Limited ('Ivanhoe Cambridge India'), Edelweiss Assets Reconstruction Company ('EARC'), etc.

PEL belongs to the Piramal group and operates in financial services, pharmaceuticals and healthcare insights and analytics. PEL is present in the financial services sectors through the following entities, i.e., India Resurgence Fund ('Indiarf'), India Resurgence ARC Private Limited ('IRARC'), Shriram Capital Limited ('SCL'), etc.

³³ Combination Registration No. C-2019/11/702.

³⁴ Combination Registration No. C-2019/10/704.



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There are horizontal overlaps between the parties to the combination in the broader business segments of loans/lending services and asset reconstruction services. CCI observed that: (i) CDPQ's presence (through EARC) in asset reconstruction services segment may exhibit a potential vertical with PEL's loan/lending services; and (ii) a potential vertical relation also exists between PEL's presence (through IRARC) in asset reconstruction services segment with CDPQ's loans/lending services. However, CCI approved the combination since these horizontal and vertical overlaps are unlikely to cause an appreciable adverse effect on competition in India.

CCI Approves Transfer of 50% of the Shareholding of My Home Industries³⁵

On December 27, 2019, CCI approved the purchase of 50% of the shareholding of My Home Industries Private Limited ('**MHIPL**') by My Home Constructions Private Limited ('**MHCPL**'), Jupally Real Estate Developers Private Limited ('**JREDPL**') and Dr. Rameswar Rao Jupally (collectively referred to as '**My Home Companies**'), from CRH India Investments B.V. ('**CRH/Seller**'), through the execution of share purchase agreements.

My Home Companies are part of the My Home group ('**My Home Group**'), which is active in a wide variety of sectors including construction and real estate development, manufacturing and supply of grey cement, power consultancy, power generation, power trading, media and broadcasting, pharmaceutical and education. After the proposed combination, the My Home Group would have sole control over MHIPL.

MHCPL is engaged in the business of construction of residential and commercial projects and real estate development, transportation and logistics sector and caters to the demand of MHIPL in transporting cement and raw materials. JREDPL is also a part of My Home Group, which is not currently engaged in any business activity in India.

MHIPL is also a part of My Home Group, and is an equally held joint venture between the Seller and the My Home Group, primarily engaged in the manufacturing and supply of grey cement. MHIPL is also engaged in power generation activities from waste heat and solar power sources for captive consumption.

CRH, registered in Amsterdam, is engaged in the manufacture and supply of a range of building materials and products used in construction and maintenance of infrastructure, housing and commercial projects, present in India through its 50% shareholding in MHIPL.

CCI approved the combination, since: (i) My Home Companies and their group is engaged in the logistics, construction and generation of power and related consultancy services, which are substantially for captive consumption within the My Home Group; and (ii) as far as the cement manufacturing and construction activities of the My Home Group are concerned, the projects are largely confined to the state of Telangana where they face significant competitive constraints from other players and do not pose any threat to competition in India.

CCI Approved the following Transactions under the Green Channel Mechanism

i. Acquisition of shares of TVS SCS by Mahogany: This notification relates to the acquisition of less than 25% of the shareholding on a fully diluted basis of TVS Supply Chain Solutions Limited ('**TVS SCS**') by Mahogany Singapore Company Pte. Limited ('**Mahogany**')³⁶. Mahogany is a Singapore-based special purpose vehicle that operates as an investment holding company and has no business operations of its own. TVS SCS provides supply chain management services including contract logistics, warehousing, transportation, freight forwarding, packaging design and solutions, in-plant and aftermarket solutions, material handling, material management, free trade warehousing, infrastructure solutions and technology logistics to clients in over fifty countries across the globe.

ii. Transfer of family shareholdings in various companies to BabaSaheb Kalyani Family Trust: This notification relates to an internal restructuring of family shareholding in Hibiscus Investment and Finance Private Limited, Peach Blossom Investment Private Limited, Rosario Investment Private Limited and Yokoha Investment Private Limited (collectively, '**Companies**')³⁷. The combination is aimed at transferring the existing family shareholding in the Companies to the Babasaheb Kalyani Family Trust ('**Family Trust**'). The Companies are private limited companies that have been set up as investment holding companies engaged in the business of holding shares, debentures, advances and other securities of Babasaheb N. Kalyani ('**BNK**') group companies while the Family Trust does not operate any business in India.

³⁵ Combination Registration No. 2019/12/711.

³⁶ Combination Registration No. C-2020/2/721.

³⁷ Combination Registration No. C-2020/1/719.



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❖
Ranked No.1

RSG Top 50 Indian Law Firms Ranking, 2019 | RSG Top 40 Indian Law Firms Ranking, 2017

❖
Highly Recommended Law Firm for Competition & Antitrust
Asialaw Profiles, 2020

❖
Tier 1 in Competition / Antitrust
Benchmark Litigation Asia-Pacific, 2019

❖
Competition & Antitrust Law Firm of the Year
Global Leading Lawyers, 2017

❖
Competition & Antitrust Law Firm of the Year
Lawyers Worldwide Awards, 2019

❖
Competition Law Firm of the Year
Corporate INTL, 2016

❖
Corporate Law Firm of the Year
Chambers Forum India Awards, 2019

❖
Law Firm of the Year
VC Circle, 2018, 2017, 2016 & 2015

❖
Law Firm of the Year | Best Overall Law Firm of the Year
India Business Law Journal, 2019

❖
Best Law Firm of the Year – India
Corporate USA Today – Law Awards, 2018

❖
India Deal Firm of the Year
ALB SE Asia Law Awards, 2018

❖
Tier 1 in India M&A Rankings
Asian Legal Business, 2018

❖
Ranked No.1
by Deal Value and Deal Count in the India
M&A Announced and Completed Deals League Tables
Thomson Reuters' Emerging Markets M&A–Legal rankings, 2019

❖
Ranked No. 1
by Deal Volume and Deal Count in the India
M&A Announced Deals League Table
Bloomberg's Global M&A–Legal rankings, 2019

❖
Ranked No. 2
by Deal Count in the League Table
Mergermarket's Global and Regional M&A–League Tables of Legal Advisors, 2019

❖
Ranked No. 1
for PE and M&A Rankings by Deal Count and Deal Value
Venture Intelligence League Tables of Legal Advisors, Jan – Jul, 2019

❖
Client Service Law Firm of the Year
Chambers Asia-Pacific Awards, 2017

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