



Treatment of Trade Associations under Competition Law

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Treatment of Trade Associations under Competition Law

Introduction

The treatment of trade associations and their activities has been a topic of keen interest for antitrust practitioners and regulators. Trade associations face a difficult challenge of balancing their legitimate goals of addressing industry issues on the one hand and ensuring there is no anti-competitive information exchange between its members on the other. There have been a plethora of cases from competition authorities including the Competition Commission of India ('CCI') investigating trade associations' role in cartel cases, including price fixing, allocation of customers or territories and bid-rigging. However, there are not many cases where trade associations have been investigated for abusing their dominant position. The CCI in its recent order in *Air Cargo Agents Association of India ('IATA') v. International Air Transport Association ('IATA Case')*¹ has considered the applicability of abuse of dominant position provisions under the Competition Act, 2002 ('Act') to trade associations². In the IATA Case, the CCI analysed the activities of IATA and since some of the services provided by IATA and IATA India were based on payment of fees, IATA was held to be an 'enterprise' and therefore open to an examination for abuse of dominance. In this article, we analyse the CCI's cases on trade associations and assess whether its approach of assessing trade associations for abuse of dominance is merited. We conclude with the key takeaways from the CCI's decisions for trade associations.

Enterprises and Economic Activity

Under the Act, only an 'enterprise' can abuse its dominant position³ and an enterprise is defined⁴ as any firm or person engaged in activities relating to production, storage, supply, distribution, and acquisition *etc.*, of goods or provision of services⁵. Therefore, the starting point of assessing whether trade association can be held liable for abuse of dominance is to determine if it can be characterized as an enterprise.

The CCI has observed⁶ that for any entity to be an enterprise, it is necessary to be engaged in an activity which is clearly 'economic' and 'commercial' in nature. Further, the CCI⁷ and the Supreme Court⁸ have clarified that in order to constitute an economic activity, the entity has to be engaged in offering products in some market where there are some buyers and sellers regardless of whether the activities are intended to earn a profit or not.

Functional Approach of Assessing the Economic Activities

The CCI has held that the analysis of the economic activities of a trade association should be done based on the functional aspects and not the institutional aspects. This is because the same legal entity may be acting as an enterprise when it is carrying one activity and not when carrying any other. The European Union ('EU') also follows a 'functional approach' in determining whether an entity's activity can be regarded as the one performed by an undertaking under the competition rules. The Court of Justice in *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*⁹ observed that 'The classification as an activity falling within the exercise of public powers or as an economic activity must be carried out separately for each activity exercised by a given entity'. The CCI has held that if the role of the trade association is limited to being a platform for its members to discuss common issues and it does not undertake any commercial activities on its own then it will not be termed as an enterprise.¹⁰ However, this functional approach has resulted in different outcomes in similar circumstances for the CCI.

In *Santuka Associates Pvt. Ltd. v. All India Organization of Chemists and Druggists*¹¹, the informant alleged that All India Organization of Chemist and Druggist ('AIOCD') was limit-

1 Please refer below for further details on the IATA Case.

2 Case No. 79 of 2012

3 Section 4 of the Act.

4 Section 2(h) of the Act.

5 The term 'services' is defined under Section 2(u) of the Act and includes sectors such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, conveyancing of news or information and advertising, *etc.*

6 *Shubham Srivastava v DIPP*, Case no 39 of 2013 (Minority Order).

7 *Surinder Singh Barmi v. BCCI*, Case no 61 of 2010.

8 *Competition Commission of India v. Coordination committee of artists and technicians of W.B. Film and Television*, Civil Appeal No. 6691/2014

9 Case C-49/07 [2008] ECR I-4863

10 *Reliance Big Entertainment Limited and Others v. Karnataka Film Chamber of Commerce*, Cases 25, 41, 45, 47, 48, 50, 58 and 69 of 2010

11 Case 20 of 2011

ing/denying market access to stockists and distributors of pharmaceutical products and also abusing its dominant position. While assessing the allegation of abuse, the CCI held that the constituent members of the trade association may be enterprises but since AIOCD didn't have any independent business activities, it was not an enterprise and was consequently only liable for the cartel conduct.

On the other hand, in *Shivam Enterprises v. Kiratpur Truck Operators*¹² ('**Kiratpur Case**') the CCI agreed with the informant's submission that Kiratpur Sahib Co-operative Transport Society ('**Transport Society**') was an 'enterprise' by examining the 'functional aspects' of the Transport Society. It observed that the Transport Society was engaged in activities relating to provision of services of freight transport by trucks because (i) the Transport Society got the contracts and executed them through its members; and (ii) the contracts were handled through internal procedures and the customers had limited ability to change them¹³. Further, since only the Transport Society was providing transport services in the Kiratpur area, the CCI held that it was dominant in the market for 'provision of services of goods transportation by trucks in and around Kiratpur area in Punjab'. The CCI also held that it was abusing its dominant position in this market. Additionally, the CCI also penalized the Transport Society for collusive conduct.

In the IATA Case, the informant alleged that IATA was involved in collusive conduct as well as for abuse of dominance. The CCI and the Director General analysed and exonerated IATA from the allegation of cartelization but did not assess the informant's allegation of abuse of dominance. However, when the Appellate Tribunal directed the CCI to analyse the allegation of abuse of dominance, the CCI assessed IATA's activities¹⁴ and observed that IATA India had been established for rendering advisory and other services in relation to the aviation industry in general and to act as a representative of IATA in India. Further, some of IATA's activities, particularly provision of account settlement services were based on payment of fee.¹⁵ IATA reported its income under three heads (i) sales of products and services; (ii) interest income and; (iii) share of profit in a joint venture. Accordingly, the CCI found IATA as an 'enterprise' operating in the market 'for account settlement services in respect of air cargo segment in India'. However, the CCI did not find IATA to be dominant in the relevant market.

Conclusion

The CCI's approach in the IATA and Kiratpur cases raise questions over the treatment of the trade associations for antitrust analysis. Our view is that the CCI's functional approach to determine if a trade association is an enterprise is formalistic and may result in false positives. In the Kiratpur Case, the Transport Society was executing a contract in its own name and was receiving payments from customers which was then passed on to its members after retaining some commission. However, in the IATA Case, the economic activity that led to its characterization as an enterprise was provision of account settlement services for the cargo agents. The CCI rejected IATA's submission that its account settlement service was merely a platform to simplify the billing and settling of accounts between airlines and freight forwarders/cargo agents. Providing a common platform that simplifies and makes the processes efficient for the industry is a classic function of a trade association and it is debatable whether such function could be construed as an economic activity for the trade association's own benefit. If a trade association is engaged in price fixing or creates barriers to a new entrant, it can be held liable under the anti-cartel provisions under the Act since its members will be presumed to be colluding through the trade association.

By the same token, holding trade associations potentially liable for abuse of dominance would, by extension, amount to finding members liable for abuse collectively since the trade association acts at the behest of its members for their benefit. The CCI has held in several cases that the concept of collective dominance is not available under the Act. However, investigating against trade associations under abuse of dominance provisions may be viewed as recognizing the concept of collective dominance under the Act. This may also place a difficult burden on the CCI to segregate each activity of a trade association as an economic or non-economic activity.

In any event, the IATA Case indicates that there may be enhanced scrutiny of trade association activities since they may now be scrutinized under cartel and abuse of dominance provisions. To avoid a potential abuse of dominance issue, trade associations may have to review their activities closely to ensure that they are not used as a platform and be seen as themselves providing economic activities like payment of any fees for accessing any service or negotiating and executing contracts on behalf its members, charging administrative fees for organizing any



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¹² Case No 43 of 2013

¹³ The customer makes payment for the services to the Transport Society and it in turn passes the payment to the concerned members of the transport society after retaining its commission/administrative charges.

¹⁴ Services like, intelligence and statistics, financial services, consulting, advertising, advocacy, liaisoning with aviation industry among other things.

¹⁵ The Director General found that IATA's main source of income was from sale of products and services and contribution of member airlines for billing and settlement plan operations which facilitates remittances from cargo agents to various airlines.



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industry-wide function such as maintaining industry data, operating platforms for commercial transactions, etc. It may also be useful for trade associations to seek guidance on whether they are likely to be regarded as dominant in any commercial activity they are currently involved in.

Behavioural Cases

CCI Penalizes M/s Klassy Computers, M/s Nayan Agencies and M/s Jawahar Brothers for Engaging in Bid-Rigging¹⁶

On March 17, 2021, CCI issued its decision on allegations of bid-rigging and cartel conduct against Usha International Ltd. ('OP-1'), M/s Klassy Computers ('OP-2'), M/s Nayan Agencies ('OP-3'), M/s Jawahar Brothers ('OP-4'), in relation to bids invited by Pune Zilla Parishad ('OP-5') ('OPs').

The informant had alleged that the tender invited by OP-5 for procurement of pico-fall-cum-sewing machine, as part of a social welfare scheme of the Government of Maharashtra, was manipulated in favour of OP-1, and that the bids submitted by OP-2 to OP-4 were identical.

The CCI found that M/s Klassy Computers, M/s Nayan Agencies, and M/s Jawahar Brothers had quoted similar bid prices based on the evidence collected by the Director General ('DG'). It arrived at this finding with additional evidence such as IP addresses, call data records, and close coordination in other tenders, to conclude that the bidding process was rigged. CCI exonerated Usha International for the lack of sufficient evidence and stated that lack of proper due diligence and verification by a manufacturer before issuing authorization letters in relation to their bids, cannot, in itself, be a ground to hold a party in contravention.

CCI imposed a penalty on the three entities M/s Klassy Computers, M/s Nayan Agencies, and M/s Jawahar Brothers of ₹10,00,000 respectively and issued cease and desist directions. It noted that collusion in public procurements not only defeats the tendering process but also has an adverse impact on the exchequer. It also imposed a penalty on the individuals of M/s Jawahar Brothers identified by the DG as being responsible for the conduct in terms of the provisions of Section 48 of the Act.

Erratum

The special edition of our *Inter Alia* issue on April 29, 2021 carried a version of a case summary titled 'CCI Penalizes Usha International Ltd. and Others for Engaging in Bid-Rigging and Cartel Conduct'. The case summary inadvertently suggested that CCI penalized Usha International Ltd., which it did not. The error is regretted, and the update has been duly revised.

CCI Initiates an Investigation against Whatsapp LLC and Facebook Inc.¹⁷

On March 24, 2021, CCI initiated a suo-moto investigation against Whatsapp LLC ('Whatsapp') and Facebook Inc. ('Facebook') concerning abuse of dominance.

Based on a review of media reports, CCI observed that Whatsapp updated its privacy policy and terms of service for its users making it mandatory for the users to accept the terms and conditions to retain their WhatsApp account information. The new policy provides the manner in which Whatsapp will share personalised user information with Facebook and its subsidiaries. CCI noted that the Whatsapp notification in relation to its updated privacy policy indicated that unlike Whatsapp's prior privacy policy where users had an option to choose whether they wanted to share their WhatsApp data with Facebook, under the new privacy policy every user has to mandatorily agree to such data sharing with Facebook.

On Whatsapp's preliminary objection against CCI's jurisdiction to take cognizance of the case since the same issues are sub-judice before other courts, CCI observed that such policy updates have to be examined from a competition lens. Further, in digital markets, unreasonable data collection and sharing may grant competitive advantage to the dominant players and may result in exploitative as well as exclusionary effects.

In its assessment of the relevant market and Whatsapp's dominance, CCI relied on its prior decision i.e., *Harshita Chawla v. WhatsApp Inc.*¹⁸, to conclude that WhatsApp is dominant in the relevant market for 'OTT messaging apps through smartphones in India'.

On abuse, CCI noted that the new policy does not provide Whatsapp's existing users an option to choose not to have their WhatsApp account information shared with Facebook, implying that consent to sharing and integration of user data with other Facebook companies has been made a precondition for availing WhatsApp service. CCI further noted that the new poli-

¹⁶ Case No. 90 of 2016, Order dated March 17, 2021

¹⁷ Suo Moto Case No. 01 of 2021, Order dated March 24, 2021

¹⁸ Case No. 15 of 2020

cy facilitates data collection which is expansive and disproportionate since it seeks to capture, amongst others, transactions and payments data; data related to battery level, signal strength, app version, mobile operator, ISP, language and time zone, device operation information, service related information and identifiers etc. Further, given that Whatsapp and Facebook are the two largest players in terms of market share in the relevant market of instant messaging, their conduct required scrutiny. Lastly, CCI noted that the wordings of the new policy were opaque, vague, open-ended and lacked complete disclosures, thereby hiding the actual data cost that a user incurs for availing WhatsApp services.

Based on the above, CCI formed a *prima facie* view that the conduct of Whatsapp and Facebook is unfair to users. Accordingly, CCI directed the Director General ('DG') to initiate an investigation against Whatsapp and Facebook.

Subsequently, writ petitions were filed by Whatsapp and Facebook before the Delhi High Court ('DHC') challenging the CCI order on grounds of lack of jurisdiction since a judicial challenge against the updated privacy policy and terms of service is pending adjudication before the Supreme Court of India ('SC') and DHC.

DHC dismissed the writ petitions concluding that pendency of the issues before the SC and before itself would not bar the CCI from exercising its jurisdiction. However, DHC clarified that any finding made by the CCI during its investigation would be subject to, and bound by, the findings of the SC and those of its own. DHC further noted that the scope of CCI's investigation is broader than the issues pending adjudication before the SC and itself.

CCI Penalizes Uttarakhand Agricultural Produce Marketing Board for Abusing its Dominance¹⁹

On March 30, 2021, CCI accepted the allegations of abuse of dominant position against Uttarakhand Agricultural Produce Marketing Board ('UPMB').

The informant, a representative body of certain international spirits and wines companies operating in India, alleged that UPMB, the exclusive wholesale licensee for alcoholic beverages including Indian Made Foreign Liquor ('IMFL') in the state of Uttarakhand, along with the exclusive sub-wholesalers Garhwal Mandal Vikas Nigam Ltd. ('GMVN') and Kumaun Mandal Vikas Nigam Ltd. ('KMVN'), placed orders for supply of IMFL brands in an arbitrary manner contrary to certain clauses of the Liquor Wholesale Order issued by the Chief Secretary, state of Uttarakhand. The allegations pertained to: (i) placing of orders in an arbitrary and discriminatory manner with no relation to the consumer demand for certain brands of beverages; (ii) not procuring alcoholic beverages of certain brands such as USL and Pernod leading to a significant decline in their market shares; (iii) not maintaining minimum stock levels and were not supplying IMFL brands in accordance with the retailers' demand; and (iv) entering into an agreement with IMFL manufacturers which contained unfair and onerous conditions.

Based on the DG's findings, CCI delineated the relevant market as (a) market for wholesale procurement of branded alcoholic beverages in the State of Uttarakhand; (b) market for distribution of branded alcoholic beverages in the licensed area of GMVN in the State of Uttarakhand; and (c) market for distribution of branded alcoholic beverages in the licensed area of KMVN in the State of Uttarakhand, and found the opposite parties to be dominant in the respective markets.

CCI observed that the sales volume of USL and Pernod significantly declined as compared to before the implementation of the Liquor Wholesale Order while the sales volume of other suppliers witnessed significant growth. However, upon revocation of the Liquor Wholesale Order, the sales volume of USL and Pernod significantly increased in conformity with the consumer demand while the sales volume of other suppliers declined. This was substantiated by submissions of GMVN that UPMB did not supply different brands of IMFL as per the demand/indents raised by it along with complaints/grievances in respect of non-availability of brands as indented by retailers who were in actual interaction with end-consumers. On the issue of maintenance of minimum stock, CCI noted that UPMB did not make any attempts to communicate to the Excise Department about being unable to comply with the requirement of maintenance of minimum stocks in violation of its obligation under the Liquor Wholesale Order. Lastly, CCI found clauses of UPMB's agreement with IMFL manufacturers to be unfair.

Based on the above, CCI concluded that UPMB abused its dominant position in violation of Section 4(2)(c) and 4(2)(b)(i), 4(2)(a)(i) of the Act and decided to impose a penalty of ₹10 million after keeping certain mitigating factors in mind. However, CCI did not hold GMVN and KMVN liable under the provisions of the Act since they (i) fulfilled their obligations of raising indents about the liquor in demand to UPMB; and (ii) were entirely dependent on UPMB for obtaining supplies and they could not directly procure from the IMFL manufacturers.



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¹⁹ Case No. 2 of 2016, Order dated March 30, 2021



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CCI Dismisses Allegations of Cartelization and Abuse of Dominance against International Air Transport Association and International Air Transport Association (India) Pvt. Ltd.²⁰

On March 31, 2021, CCI dismissed allegations of cartelization and abuse of dominance against the IATA and International Air Transport Association (India) Pvt. Ltd. ('IATA India').

The informant, the national association of air cargo agents in India, alleged that IATA India unilaterally assumed to itself the regulatory power for registering, accrediting and regulating the engagement of cargo agents by the airlines in India and thereby, ran the licensing system for the IATA registered cargo agents by enforcing many financial terms and conditions on cargo agents in India who are members of the Informant. The informant further alleged that upon an increase in price of aviation fuel, IATA deliberately mandated the cargo agents to collect the increased or extra prices under the head of 'surcharge' from the consumers causing losses of commission to the cargo agents. Additionally, the unilateral introduction of Cargo Accounts Settlement System ('CASS') (a billing and settlement system of accounts between airlines and cargo agents) by IATA and IATA India facilitating payment for freight and other dues to all airlines in India led to violation of two orders issued by the Ministry of Civil Aviation and Air India respectively prescribing a different system and rate of commission to be paid to the cargo agents. Lastly, the informant pleaded a scrutiny of the alleged conduct under provisions governing cartels under the Act.

Earlier, in this case, after the DG's investigation, CCI passed an order dated 4 June 2015 where neither IATA nor IATA India were found to have formed a cartel. Subsequently, the case was appealed before the Competition Appellate Tribunal, which remanded the matter on procedural grounds and directed the DG to re-investigate whether IATA and IATA India's conduct had also amounted to an abuse of dominant position.

On the preliminary objection of IATA and IATA India that they should not be considered an 'enterprise' under the Act, CCI noted that IATA reports income under three heads- (i) sales of products and services, (ii) interest income and (iii) share of profit in a joint venture. It also derived income from its member airlines under the Billing and Settlement Plan. Further, IATA India's revenue comprised reimbursement of expenses on activities performed on behalf of IATA and interest accrued on the surplus funds invested by IATA. Accordingly, CCI held IATA and IATA India to be enterprises because (i) some of the services provided by them were based on payment of fees; and (ii) they perform economic activities.

While delineating the appropriate relevant market, CCI noted that relevant market should comprise all services available to air cargo agents for settling their bills or invoices by the airlines for air cargo and accordingly, delineated the relevant market as '*the market for account settlement services in respect of air cargo segment in India*'.

In its assessment of IATA's dominance, CCI noted that during the relevant period of investigation i.e., 2009-2010 to 2013-2014, no airline used CASS. Therefore, IATA's market share was nil. After CASS was adopted in 2013-2014, only 7 out of 76 airlines used CASS. Out of those 7 airlines, some continued to use their account settlement services. Even during subsequent years, the share of airlines using CASS was less than 22%. Further, CASS was not mandatory but an option for air cargo agents. Accordingly, IATA and IATA India were not found to be dominant in the relevant market. In the absence of IATA's dominance, CCI did not examine any abuse of dominance by IATA.

With respect to the Informant's allegations on reinvestigating a cartel infringement under Section 3, CCI dismissed the same noting that (i) the Competition Appellate Tribunal had set aside the earlier CCI order in this case on the ground that a Section 4 violation of abuse of dominance was not dealt with by the DG; (ii) no fresh evidence was put forward by the Informant and the DG was correct in adopting its first investigation report of 2014 (which had held that IATA did not violate Section 3 of the Act).

Accordingly, CCI closed the case under Section 26(6) of the Act.

CCI Dismisses Allegations of Cartelization and Abuse of Dominance against Urbanclap Technologies India Pvt. Ltd.²¹

On March 31, 2021, CCI dismissed allegations of cartelization and abuse of dominance against Urbanclap Technologies India Pvt. Ltd. ('Urban Clap').

The Informant who was Urban Clap's user, alleged that Urban Clap, an online platform providing beauty and housekeeping services, forces the professionals listed on its platform to purchase the products/material used by them, only from Urban Clap. Further, Urban Clap arbitrarily decides the products it provides from selected brands, and in case the professional fails to procure the desired quantity, Urban Clap deducts amount from the account of the professional and dis-

²⁰ Case No. 79 of 2020, Order dated March 31, 2021

²¹ Case No. 30 of 2020, Order dated March 24, 2021

patches the product arbitrarily. As per the informant, Urban Clap's conduct amounted to imposition of unfair conditions, denial of market access, exclusive supply agreement and refusal to deal.

CCI in its assessment observed that the professionals listed on Urban Clap's platform are allowed to purchase their products from third parties. Noting that the salon services market is quality-driven where brand image and goodwill are paramount, CCI found merit in Urban Clap's justification that the products it selectively provides for professionals to use are based on: (i) consumer demand; (ii) genuineness and assured quality; and (iii) feedback of the professionals.

Based on the above, CCI closed the case under Section 26(2) of the Act.

CCI Dismisses Allegations of Cartelization and Abuse of Dominance against Asian Paints Limited and Others²²

On April 12, 2021, CCI dismissed allegations of imposition of abuse of dominance and cartelization against Asian Paints Limited ('Asian Paints') and two individuals namely Mr. K.B.S. Anand and Mr. K. Sundaram.

The informant, a small scale business engaged in manufacturing of primers and paints under the brand-name 'Arcus', had alleged that Asian Paints filed a false criminal case against it in the court of the Learned District Munsif-cum Judicial Magistrate, Arcot, alleging that the informant sold damaged products falsely claiming itself to be Asian Paints. It was alleged that this was a frivolous allegation raised by Asian Paints in abuse of its dominant position to drive competition out of the market by creating barriers to entry and deny market access to competitors.

CCI observed that the Informant failed to show any facts or evidence on record which indicate violation of the provisions governing anti-competitive agreements since no horizontal or vertical relationship between Asian Paints and the informant existed. Further, CCI agreed with Asian Paints' contention that the informant failed to show how the competition was affected as a result of Asian Paints exercising its legitimate rights to protect its intellectual property rights.

Based on the above, CCI dismissed the case under Section 26(2) of the Act.

CCI Dismisses Allegations of Abuse of Dominance by Chettinad International Coal Terminal Pvt. Ltd.²³

On April 9, 2021, CCI dismissed allegations of imposition of unfair conditions and requirement of accepting supplemental obligations against Chettinad International Coal Terminal Pvt. Ltd. ('Chettinad Coal') and Kamarajar Port Limited ('Kamarajar').

The Informant, an independent financial service advisor focused on infrastructure sectors such as power, ports, roads, etc., alleged that Chettinad, a terminal operator at Kamarajar Port providing coal terminal services, forced users to pay a part of the coal terminal charges in the name of 'charges for coordination and liasoning services' to third party service providers. The Coordination and Liasoning Charges ('C&L Charges') were required for availing the services of Chettinad despite these charges not being a part of the 'Published Tariff' of Kamarajar Port.

Before defining the relevant market, CCI noted that the informant did not file any specific allegation against Kamarajar. Accordingly, CCI allowed Kamarajar's request of being exonerated from the proceedings.

On relevant market, relying on the fact that dedicated/captive coal terminal services are not open for third parties/common users, CCI concluded the relevant product market to be 'the market for provision of common user coal terminal services at sea-ports'. Further, CCI held that Krishnapatnam Port did exercise some competitive price constraints on Chettinad. Thus, the relevant market was held to be 'provision of common user coal terminal services at sea-ports in and around Kamarajar Port which includes CICTPL and common user coal terminals at Krishnapatnam Port'.

CCI did not find Chettinad dominant in the relevant market because of the competitive constraints that Krishnapatnam Port posed. Based on the DG's investigation, CCI concluded that there was a significant percentage of common users and while the quantity of coal imported at Chettinad and Krishnapatnam increased, the overall share of Chettinad decreased since 2013-14. As such, in terms of total coal handling capacity, Krishnapatnam was far larger than Chettinad.

CCI also referred to the DG's finding that Krishnapatnam enjoyed a higher degree of size and resources and held considerable assets. In fact, while the assets of Chettinad declined from 2011-12 to 2015-16, the assets of Krishnapatnam Port increased during the same period. The DG also found that in terms of revenue, net income/ profit, return on assets etc., Krishnapatnam was ahead of Chettinad.

Based on the above, CCI found that Chettinad was not dominant in the relevant market, and therefore, dismissed the case.

²² Case No. 53 of 2020, Order dated April 12, 2021

²³ Case No. 73 of 2015



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CCI Finds no Abuse of Dominance and Cartelization by Flora and Fauna Housing and Land Developments Pvt. Ltd. and Others.²⁴

On April 15, 2021, CCI dismissed allegations of imposition of unfair conditions, denial of market access and cartelization against Flora and Fauna Housing & Land Developments Private Limited ('OP-1'), Patiala Kings Liquor Pvt. Ltd. ('OP-2'), Royal Beverages Pvt. Ltd. ('OP-3'), Kiwi Wines And Beverages Pvt. Ltd. ('OP-4'), Chadha Holdings Pvt. Ltd. ('OP-5') and the Government of Uttar Pradesh ('OP-6').

The Informant, a public limited company whose founders are engaged in the business of manufacturing and trading liquor in North India, contended that OP-5 is the holding company for the entire 'Group' that owns or controls the exclusive licensees for wholesale trade in country liquor within the State of Uttar Pradesh i.e., OP-1 to OP-4. It was alleged that since manufacturers/ distilleries of liquor cannot sell liquor directly to retailers or end consumers, the exclusive procurement of liquor by OP-1 to OP-4 from OP-5 led to denial of market access to the other distilleries. It was further alleged that OP-1 to OP-4 were operating under a mutual agreement to source their purchases of country liquor only from certain manufacturers to the exclusion of others, thereby limiting or controlling the market of country liquor in violation of the provisions of Section 3(1) read with Section 3(3)(b) of the Act.

CCI rejected a jurisdictional plea raised by OP-1, OP-4 and OP-5 that since the present case deals with country liquor it is outside the purview of CCI as the Supreme Court has held that there is no right to trade with respect to potable liquor. CCI rejected this plea on the ground that the appointment of wholesalers/ distributors is indisputably a 'service' within the meaning of the Act and hence within the purview of CCI. This conclusion was fortified by the wide amplitude of the terms 'trade' and 'goods' under the Competition Act, as identified by CCI.

CCI delineated the relevant product market as the 'market for procurement of country liquor from licensed manufacturers', on the basis of various factors such as the ingredients, alcoholic content, manufacturing process and the regulatory framework. The relevant geographic market was held to be the State of Uttar Pradesh in light of the DG's conclusion that the conditions of competition were homogeneous in the State of Uttar Pradesh for purchase of a license for country liquor.

The DG in its investigation divided the relevant period into two different parts i.e., from May 20, 2009 to March 31, 2011 (first relevant period) and from April 1, 2011 to March 31, 2018 (second relevant period). This is because during the first relevant period only, OP-1 operated in the relevant market as being the sole wholesaler for the country liquor in the entire State of Uttar Pradesh. Subsequently, from April 1, 2011 to March 31, 2018 (second relevant period), there were at least four different licence holders in the State of Uttar Pradesh, who were assigned different excise zones.

CCI found that OP-1 was dominant during the first relevant period since they were the sole wholesaler of country liquor, and hence, had a market share of 100%. CCI found that there were no unfair conditions imposed and no denial of market access by OP-1 or OP-5 as the Informant was unable to provide any evidence that they requested OP-1/OP-5 to purchase its liquor, and that OP-1/OP-5's unfair and discriminatory conditions led to the closure of 11 distilleries. In fact, it was shown that OP-1/OP-5 had been purchasing liquor from nearly all possible entities that were regularly operating in the market.

CCI also rejected the argument that OP-1/OP-5 leveraged their position to enter the 'market for manufacture and supply of country liquor in the State of Uttar Pradesh' for the same reasons.

With respect to the second relevant period, OP-1 to OP-4 were each, license holders. CCI noted that there was no evidence of preferential treatment being given by OP-1 to OP-4 to their own distilleries. The informant had not shown any evidence to indicate that they had made efforts towards securing orders or supplying their liquor to the ops.

Finally, CCI observed that they could not examine the claim against OP-6 since policy formulation is in the realm of sovereign activities and is not subject to the purview of CCI under the Act. Lastly, in the absence of any evidence, CCI rejected the allegations pertaining to collusion and bid rigging by the ops.

Thus, CCI found no contravention under the Act and dismissed the case.



CCI Approves Additional Acquisition of 11.82 to 17.25% of Outstanding Shares of Technip Energies B.V. by Bpifrance Participations S.A.²⁵

On February 24, 2021, CCI approved the additional acquisition of minimum 11.82% and a maximum 17.25% of the outstanding shares of Technip Energies B.V. (**‘Technip’**) by Bpifrance Participations S.A. (**‘Bpifrance’**). The proposed transaction would increase Bpifrance’s stake in Technip to 14.07 to 20%.

Bpifrance is a limited liability company that invests, directly and indirectly, in various companies, using either its own funds or third parties’ funds to stimulate and consolidate the national economic base. It does not directly have any presence or undertakes any business in India.

Technip is a private limited liability company belonging to the TechnipFMC plc group. Technip is an engineering and technology company for the energy transition that provides design and project development services.

CCI did not find any horizontal or vertical overlaps between the business activities of Bpifrance and Technip. Further, none of the products or services of either of two are key products/essential services for each other’s business. Based on this, CCI approved the combination.

CCI Approves Additional Acquisition of 3% Shareholding of Intas Pharmaceuticals Ltd. by ChrysCapital.²⁶

On April 30, 2020, CCI approved the additional acquisition of 3% of the shareholding of Intas Pharmaceuticals Ltd. (**‘Intas’**) by ChrysCapital and its affiliates (**‘ChrysCapital’**), Canary Investments Ltd. (**‘Canary’**) and Link Investment Trust II (**‘Link’**).

ChrysCapital is engaged in the business of making investments in different sectors including consumer goods and services, financial services, healthcare and pharmaceuticals. Canary is an investment company owned by ChrysCapital VII LLC, which has been set up by ChrysCapital. Link is a private trust registered in India, which is also in the business of making investments.

Intas is in the business of development, manufacturing and marketing of pharmaceutical formulations. It is the ultimate parent company of various Intas subsidiaries.

CCI observed that ChrysCapital would obtain the right to receive information regarding the affairs of Intas, right to appoint a director on the board of Intas and right to veto certain corporate actions including amendment to charter documents, commencement of new line of business and change in capital structure. CCI further observed that there is a horizontal overlap between the activities of Intas and other pharmaceutical companies in which ChrysCapital has shareholding and contractual rights to participate in some of their strategic corporate actions.

ChrysCapital owns less than or equal to 10% of the share capital in each of Mankind Pharma Limited (**‘Mankind’**) and Eris Lifesciences Limited (**‘Eris’**) and less than 20% of the share capital in each of GVK Biosciences Private Limited (**‘GVK’**) and Curatio Healthcare Private Limited (**‘Curatio’**).

ChrysCapital’s interest in Eris is limited to its shareholding. Therefore, CCI did not consider it important for identification of overlaps. However, ChrysCapital’s interest in GVK, Curatio and Mankind (**‘Portfolio Entities’**) included board representation, right to seek information as well as the right to veto certain corporate actions including the change in capital structure, mergers and acquisitions, commencing new line of business and amendment to charter documents. Based on this, CCI observed that ChrysCapital enjoys the ability to influence the strategic focus and operations of GVK, Mankind and Curatio.

Based on ChrysCapital’s power to veto certain strategic corporate actions, CCI observed that ChrysCapital had the ability to materially influence the strategic affairs of these entities and a similar position would be gained in Intas through its investment in Intas.

In its assessment of the relevant market, CCI referred to its earlier decisions and held that with regard to prescription drugs CCI has looked at the molecular details (**‘ATC 4 Level Classification’**). With regard to OTC products, the classification had been made on the basis of formulation level and therapeutic indication (**‘ATC 3 Level Classification’**).

CCI noted that the combined market share of Intas and the Portfolio Entities was greater than 30% in more than 20 pharmaceutical products treating ailments in (a) alimentary tract and metabolism; (b) cardiovascular system; (c) dermatologicals; (d) genito-urinary system and sex hormones; (e) musculo-skeletal system; (f) nervous system; (g) respiratory system; and (h) various others. The horizontal overlap of the activities of Intas and Curatio were limited to one

²⁵ Combination Registration No.C-2021/01/809

²⁶ Combination Registration No. C-2020/04/741



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product i.e., Biotin and they only had a market share of 7% and 4% respectively. Mankind and Intas were found to be significant competitors at the ATC 4 Level Classification, with their market shares remaining similar for more than three years. CCI observed that the common shareholding in Mankind and Intas would enable ChrysCapital to engage in various kinds of anti-competitive coordination and actions.

In order to address possible anti-competitive concerns, ChrysCapital offered the following voluntary modifications:

- i. remove their director from the Mankind's board;
- ii. restrict use of information relating to Intas, Curatio and Mankind; and
- iii. an undertaking not to exercise veto rights in Mankind in relation to change in capital structure, merger and acquisition, amendment to memorandum and articles of association and commencement of new business, with certain limited exemption to protect the extent of their shareholding/ investment.

In light of these voluntary modifications, CCI held that these modifications will address any potential competition concerns and therefore, approved the combination.

CCI Approves Acquisition of 8% equity shareholding of API Holdings Private Limited by TPG Growth V SF Markets Pte. Limited.²⁷

On December 30, 2020, CCI approved the acquisition of 8% equity shareholding (on a fully diluted basis) of API Holdings Private Limited ('API') by TPG Growth V SF Markets Pte. Limited ('TPG') by way of primary and secondary acquisitions. TPG would be funded by TPG Global, LLC and its affiliates ('TPG Global') and Korea Investment Corporation ('KIC'). KIC would acquire certain shareholding in TPG Growth V Accord II, Limited Partnership, which would be funding TPG.

TPG and KIC do not have any investments in India, but TPG Global has investments in the pharmaceutical and healthcare sector in India.

API is the ultimate parent entity of the API group and is incorporated in India. API is directly and indirectly engaged in various business activities in the pharmaceutical and healthcare sector.

API (including subsidiaries and Medlife) do not have any retail business segment due to the restrictions under the FDI Policy. API has licensed the operations of PharmEasy (an online medical supply store and pharmacy website supplying medicines) to an unrelated and independent third party and has no control over the products offered on the PharmEasy platform. Similarly, Medlife will cease to operate in the B2C business segment and will license this business to an independent third party prior to the implementation of the combination.

CCI did not find any horizontal overlaps in the business activities of API and TPG Global. However, there were existing and potential vertical overlaps, between the portfolio companies of TPG Global and API.

The market share of each portfolio company of TPG Global and API was in the range of 0-5% in each segment/ sub-segment in India. There were also several players present. Accordingly, CCI held that there was no ability or incentive to foreclose competition and the combination was approved.

CCI Approves Acquisition of up to 51% of the equity share capital of Mukand Sumi Special Steel Limited by Jamnalal Sons Private Limited.²⁸

On December 30, 2020, CCI approved the acquisition of up to 51% of equity share capital of Mukand Sumi Special Steel Limited ('MSSSL') by Jamnalal Sons Private Limited ('JSPL').

MSSSL is a Joint Venture ('JV') entered into between Mukand Limited ('Mukand') and Sumitomo Corporation Japan ('Sumitomo'). Post the combination, Mukand will leave MSSSL and will be replaced by JSPL.

JSPL belongs to the Bajaj Group of Companies and its ultimate control lies with Bajaj Sevashram Private Limited ('BSPL'). Its principal business is of investing in shares and securities of the Bajaj Group companies, mutual fund units and lending to group companies in the Bajaj Group.

Mukand is the holding company of MSSSL and is a part of the Bajaj Group of Companies. It operates in the steel sector. It is engaged in the business of manufacturing carbon, alloy and stainless-steel bars, rods, etc. and has a machine building division as well. Mukand through its subsidiary Mukand Sumi Metal Processing Limited, manufactures bright bars and wires.

MSSSL is engaged in the business of manufacturing, marketing, selling, distribution, etc., of special and alloy steel long products such as hot rolled bars and hot rolled wire rods and is a part of the same group as JSPL and Mukand.

CCI found the combined market share of JSPL through Mukand and MSSSL was found to

²⁷ Combination Registration No. C-2020/11/788

²⁸ Combination Registration No. C-2020/11/784

be insignificant in the market for long steel products in India with presence of other players. Therefore, CCI approved the combination.

CCI Approves Additional Acquisition of 0.83% shareholding in Oravel Stays Private Limited by svf India Holdings (Cayman) Limited.²⁹

On September 6, 2019, CCI approved the additional acquisition of 0.83% shareholding in Oravel Stays Private Limited ('OYO') by svf India Holdings (Cayman) Limited ('svf'). In addition to this transaction, RA Hospitality Holdings (Cayman) ('RA Co') would acquire equity shares in OYO.

Prior to the combination, svf had the ability to appoint two out of nine directors on OYO's board. Post the combination, since the board is expanding svf will be entitled to appoint one more director i.e. three out of eleven directors on the board of OYO.

Other investors were also acquiring a minority shareholding in OYO, but the exact details were unavailable due to confidentiality.

RA Co is company incorporated in the Cayman Islands and does not have any commercial operations in India. 100% of RA Co is indirectly owned by Mr. Ritesh Agarwal, the founder and promoter of OYO. Mr. Ritesh Agarwal currently owns 12.28% equity in OYO.

svf is an entity incorporated in the Cayman Islands and is a holding company to hold the investments on behalf of Softbank Vision Fund L.P. It is also a part of the Softbank Group ('SBG'). svf itself does not have any physical presence in India and is not engaged in the provision of services. However, certain direct/ indirect subsidiaries of SBG and portfolio companies, in which SBG has non-controlling investments (with certain veto rights) are present in India.

OYO is a technology start-up incorporated in India and is primarily active in the hospitality and hotels business in India.

RA Co does not have any operations in India. Additionally, Mr. Ritesh Agarwal does not have any other investments in the hotel and hospitality space, apart from OYO.

CCI didn't identify any horizontal or vertical overlaps in the business activities of the other investors with OYO. CCI held that since svf already has a shareholding of 49.16% in OYO and will increase it by 0.83% to 49.99% by virtue of the combination, the proposed change in shareholding is unlikely to affect the competition dynamics in any of the segments in which OYO is present.

In view of this, CCI approved the combination.

CCI Approves Acquisition of 100% of the Shares of Common Stock of Varian Medical Systems Inc. by Siemens Healthineers Holding I GmbH.³⁰

On February 10, 2021, CCI approved the acquisition of 100% and sole control of Varian Medical Systems Inc. ('Varian') by Siemens Healthineers Holding I GmbH ('SHS').

SHS is a wholly-owned subsidiary of Siemens Healthineers AG ('Siemens'). It is not engaged in any business activity.

Siemens is a public company incorporated under the laws of Germany and is a global provider of healthcare solutions and services. Its business is divided into three broad categories: (i) imaging; (ii) laboratory diagnostics; and (iii) advanced therapies. In India, Siemens is present through its subsidiaries.

Varian is a public company listed on the New York Stock Exchange and is a global provider of medical devices and software solutions for treating cancer with radiation therapy and other advanced treatments. Its business is broadly divided into three segments: (i) oncology; (ii) proton solutions; and (iii) interventional solutions.

CCI observed that there are no horizontal overlaps in the business activities of SHS, Siemens and Varian. However, the medical imaging and laboratory diagnostics business of Siemens and the interventional oncology solutions, radiation therapy equipment, oncology software and treatment, pathology/laboratory services and general acute care hospital of Varian, could be considered to exhibit vertical or complementary overlaps.

CCI observed that the upstream market of diagnostic imaging equipment is fragmented with the presence of known players. Similarly, the upstream market of laboratory diagnostic equipment is fragmented with the presence of several known players. The downstream market is also characterised by the presence of several players in each of these segments with significant market share compared to Varian. Given the presence of several parties at this level, CCI did not find any ability to foreclose competition.

Further, Varian operates a hospital and fourteen oncology centres across 12 cities in India. Thus, a vertical relationship exists with Siemens, who supplies imaging equipment. The market share of Varian in the overall segment for oncology treatment is less than 1% and this segment is characterised by the presence of well-known hospitals and standalone oncology centres.



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²⁹ Combination Registration No. C-2019/07/672

³⁰ Combination Registration No C-2020/12/798



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Inter alia...

Thus, there was no potential for competition concerns arising out of the combination and hence was approved by CCI.

CCI Approves Acquisition of 26.12% Shareholding in Tata Communications Limited by Panatone Finvest Limited.³¹

On February 22, 2021, CCI approved the acquisition of 26.12% shareholding in Tata Communications Limited ('TCL') by Panatone Finvest Limited ('PFL'). Both PFL and TCL are a part of the Tata Group, which is ultimately owned by Tata Sons Pvt. Ltd. ('Tata Sons').

The combination consists of two steps: (i) the Government of India ('GoI') proposed to sell up to 16.12% equity shareholding of TCL; and (ii) immediately after the first step, the GoI will sell to PFL a portion of or the entire balance shareholding held by the GoI in TCL i.e., up to 26.12% shareholding.

PFL is a Systematically Important Non-Deposit Taking Core Investment Company (CIC-ND-SI) registered with Reserve Bank of India. It is a subsidiary of Tata Sons and engaged in telecommunication services through its subsidiaries, Tata Teleservices Limited and Tata Teleservices (Maharashtra) Limited.

TCL is a facilities-based service provider of a broad range of integrated communications services. It generates revenue from three business segments—wholesale voice, enterprise and carrier data and others.

CCI identified overlaps in the following segments: (i) provision of international long-distance services ('ILD')-voice; (ii) provision of national long-distance services ('NLD') – voice; (iii) provision of internet service provider services ('ISP'); (iv) provision of enterprise services; (v) undersea cable systems on a worldwide basis; and (vi) provision of ATM machine services on a pan-India basis.

CCI observed that the TCL's market share for the provisions of ILD, NLD and ISP services is in the range of 5-10% and the incremental market share will only be 2% which is insignificant to cause any competitive harm. These segments are also characterised by the presence of several players with significant market shares.

In the market for ATM services and in the market for undersea cables, there are several big players present who will continue to provide significant competitive constraints to TCL and PFL.

Since there were no competition concerns arising out of the combination, the same was approved by CCI.

³¹ Combination Registration No. C-2021/02/814



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❖
Tier 1 Firm for Competition & Antitrust
Legal 500, 2021

❖
Firm of the Year – Antitrust and Competition
In-House Community Awards, 2021

❖
Band 1 Firm for Competition & Antitrust
Chambers & Partners Global, 2021

❖
Band 1 Firm for Competition & Antitrust
Chambers & Partners Asia-Pacific, 2021

❖
Outstanding Law Firm for Competition & Antitrust
Asialaw Profiles, 2021

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

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

❖
Law Firm of the Year | Best Overall Law Firm of the Year
India Business Law Journal, 2021

❖
India National Law Firm of the Year
Chambers Asia-Pacific Awards, 2021

❖
Law Firm of the Year
VC Circle, 2020, 2018, 2017, 2016 & 2015

❖
Ranked No.1
RSG Top 50 Indian Law Firms Ranking, 2019

❖
Ranked No.1
by Deal Count in the India League Table
MergerMarket Global & Regional M&A Report – Legal Advisors Q1 2021

❖
Ranked No.2
by Deal Value in any Indian Involvement Announced & Completed League Tables
Refinitiv Global & Emerging Markets M&A Legal Ranking Q1 2021

❖
Ranked No. 1
by Deal Count in India Announced Deals League Table
Bloomberg's Global M&A Market Review Q1 2021

❖
Ranked No. 1
by Deal Count in Top Advisors M&A League Table
Venture Intelligence Legal Advisors Rankings Q1 2021

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