



## Conflicting Views on 'Locus Standi' under the Competition Act, 2002?

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## Conflicting Views on ‘Locus Standi’ under the Competition Act, 2002?

### Introduction

To proscribe anti-competitive conduct and ensure a competitive market place, the Competition Act, 2002 (‘Act’) empowers the Competition Commission of India (‘CCI’) to investigate, prohibit and penalise any entity for engaging in conduct that results in an appreciable adverse effect on competition in India. Indeed, the Act’s preamble identifies CCI’s mandate to *inter alia* ‘eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants.’

Notably, investigations undertaken by CCI are stated to be inquisitorial, and not adversarial, in nature.<sup>1</sup> In line with CCI’s mandate, this means, inquiries undertaken by CCI address anti-competitive conduct that affects, or is likely to affect, the market in general (*in rem*). CCI is not concerned with addressing disputes that concern individual grievances (*in personam*). In fact, the inquisitorial scheme of powers granted to CCI allows it to direct investigations not only against accused parties, but also expand the investigation to other unspecified parties.<sup>2</sup>

Given CCI’s ability to address concerns *in rem*, we examine in this article, the extent to which the identity of the informant is relevant in proceedings before CCI? More specifically, we explore whether ‘any person’ has the *locus standi* to file a case before CCI, in light of CCI’s broader mandate to correct market distortions and existing decisions of CCI and the appellate tribunal.

### Who can Inform CCI of Anti-Competitive Conduct?

CCI is empowered to inquire into anti-competitive conduct either on its own volition or upon a reference made by the Government or any statutory authority. The Act specifically empowers ‘any person, consumer or trade association’ to file ‘information’ with CCI apprising it of anti-competitive conduct. The word ‘complaint’ was replaced with the word ‘information’ for notifying CCI of anti-competitive conduct.<sup>3</sup> Similarly, the words ‘complainant or defendant’ were replaced with ‘person or an enterprise’, thus reducing the importance given to the identity of the person notifying CCI of alleged anti-competitive conduct. Notably, unlike for filing ‘information’ before CCI, the Act introduces a qualification for filing appeals against appealable decisions of CCI, by only allowing ‘aggrieved persons’ to file such appeals.<sup>4</sup>

### The Present Debate

In 2018, an independent law practitioner, Samir Agarwal, filed information before CCI against Uber and Ola, alleging the existence of a cartel between the respective cab aggregators and their drivers.<sup>5</sup> CCI dismissed this case citing the lack of evidence to establish an anti-competitive agreement.

In the appeal filed by Agarwal, Uber and Ola challenged the *locus* of the informant as an ‘aggrieved party’ to file the appeal, as he hadn’t presented any credible evidence of legal injury arising from the alleged conduct. The National Company Law Appellate Tribunal (‘NCLAT’) recognized that the concept of *locus standi* had been carefully diluted for public interest litigations, class actions suits and whistle blower complaints but, in doing so, was supported by an appropriate legal framework that safeguarded against unscrupulous complaints. In the context of the Act, however, the NCLAT reasoned that allowing ‘any person’ to be an informant before CCI may be misused to target certain enterprises with allegations of anti-competitive conduct. To the extent the Act empowers CCI to take cognizance of anti-competitive conduct through other means, NCLAT held that the term ‘any person’ should necessarily be construed as a person who has suffered an invasion of legal rights as a consumer or beneficiary of healthy competitive practices. On this basis, NCLAT held that Agarwal failed to prove any legal injury caused to him either as a consumer or as part of any consumer or trade association. Although not so categorically, the erstwhile Competition Appellate Tribunal (‘COMPAT’) has in at least one case in 2015, alluded to the need for CCI to examine more closely the informant’s *locus* at the time of initiating an investigation in, at least, one other case.<sup>6</sup>

This recent approach of the NCLAT, is in sharp contrast to that adopted by CCI and, indeed,

1 CCI v. Steel Authority of India Ltd., (2010) 10 SCC 744.

2 Delhi High Court’s decision in Mahindra Electric Mobility Ltd. v. CCI & other related cases, 2019 SCCOnline Del 8032.

3 The Competition (Amendment) Act, 2007.

4 Section 53B of the Act; Jitender Bhargava v. CCI & Ors., Appeal No. 44 of 2013.

5 Case No. 37 of 2018.

6 Dr. LH Hiranandani Hospital v. CCI, Appeal No. 19 of 2014.

earlier decisions of the appellate tribunal. CCI has consistently maintained that the Act requires it to inquire into any anti-competitive conduct brought to its attention, regardless of whether the informant has personally suffered from such legal injury.<sup>7</sup> The COMPAT too appeared to have in its earlier decisions supported this view by observing that Parliament had ‘neither prescribed any qualification for the person who wants to file an information under Section 19(1)(a) nor prescribed any condition which must be fulfilled before an information can be filed under that section’.<sup>8</sup>

Following NCLAT’s decision in the *Agarwal* case, CCI appears to have sought to clarify its stance on *locus*, in a closure order examining allegations of abuse of dominance against WhatsApp Inc. (**‘WhatsApp’**).<sup>9</sup> Relying on NCLAT’s observation in *Samir Agarwal*, WhatsApp challenged the Informant, Harshita Chawla’s (a lawyer claimed to be closely associated with a petitioner who has approached the Apex Court in a case against WhatsApp and Facebook recently) locus to lodge a complaint before CCI, absent any invasion of legal rights as a consumer. CCI dismissed this challenge on the following grounds: (a) CCI is duty-bound to address instances of market distortion regardless of whether the remedy is sought by the informant in *rem* or in *personam* and follows an inquisitorial system as upheld by the Supreme Court of India;<sup>10</sup> and (b) the substance of the information carries greater significance than the identity of the informant.<sup>11</sup> CCI further noted that this was supported by the amendments to the Act that widened the scope from a ‘complaint’ to ‘information’.<sup>12</sup> Disagreeing with the decision of the appellate tribunal, CCI held that an informant need not necessarily be an ‘aggrieved party’ by the alleged conduct to bring it to CCI’s notice.

### Position in Other Jurisdictions

The qualifications for a locus vary across antitrust jurisdictions. Similar to India, South Africa initiates investigations further to information filed by ‘any person’. In the European Union, citizens are encouraged to inform the European Commission (‘EC’) about suspected infringements of competition laws. Although there is a mechanism for complainants to lodge a formal complaint if they have been affected by allegedly anti-competitive conduct, the EC also provides for ‘any person’ to inform the EC of suspected anti-competitive practice by way of an e-mail, regardless of whether they meet the specific requirements to lodge a complaint. Given that the EC also has the power to initiate investigations, such e-mails act as a starting point to detect market problems. On the other hand, jurisdictions such as Germany, Brazil, Japan and US require complaints to be filed by persons with ‘proximate cause’ or who have been affected by the infringement of competition laws as a result of the alleged anti-competitive conduct. The difference in approach to *locus standi*, is likely on account of the distinctions in their judicial systems. While competition regulators in the EU and South Africa are inquisitorial bodies, antitrust claims in Germany, Brazil, Japan and the US are adversarial in nature.

### Conclusion

Although, CCI seems to have had the last word on locus, it’s difficult to lose sight of the fact that the appellate tribunal appears to take a contrary view. CCI’s position re *locus standi* of an informant appears to be grounded in a strict reading of the Act and subsequent amendments. Although the NCLAT’s views seem to emanate from legitimate policy considerations of entertaining complaints by persons with no tangible interest in the outcome of the case and the likely increase in frivolous complaints, the Act does appear to have certain checks and balances to, at least limit, if not preclude altogether, this possibility. For example, filing information with CCI requires remittance of filing fees, ranging from INR 5,000 to INR 50,000 (approx. USD 70 to USD 700) depending on the nature of the informant’s identity.<sup>13</sup> Furthermore, an informant can be penalized with a substantial penalty, if found to have altered, omitted material information or provided incorrect information to CCI.<sup>14</sup>

In the meantime, and given the prevailing inconsistency in legal position, enterprises would be well advised not to build their litigation strategy solely on challenging an informant’s locus, although it would arguably qualify as an important part of their legal strategy.

7 Shri Saurabh Tripathy v. Great Eastern Energy Corporation Ltd., Case No. 63 of 2014.

8 Shri Surendra Prasad v. CCI & Ors., Appeal No. 43 of 2014.

9 Harshita Chawla v. WhatsApp Inc. & Facebook Inc., Case No. 15 of 2020.

10 CCI v. Steel Authority of India Ltd., (2010) 10 SCC 744.

11 Reliance Agency and Chemists and Druggists Association of Baroda & Others, Case No. 97 of 2013.

12 The Competition (Amendment) Act, 2007.

13 The charges are Rs. 5,000 (approx. USD 70) in case of individual, Hindu undivided family, non-governmental organization, consumer association or cooperative society and INR 20,000 (approx. USD 270) in case of company/firm having turnover less than INR 1,00,00,000 (approx. USD 136,000) in the preceding year. In other cases the filing fees is INR 50,000 (approx. USD 700).

14 Section 45 of the Act.



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## Behavioural Cases

### CCI Dismisses Allegations of Abuse of Dominance against WhatsApp Inc.<sup>15</sup>

On August 18, 2020, CCI passed an order dismissing the information filed by Harshita Chawla against WhatsApp and its holding company, Facebook Inc. ('Facebook') alleging a contravention of Section 4 of the Act.

The informant alleged that WhatsApp has a dominant position in the market of internet based messaging application and was abusing its dominance by bundling its messaging application with the payment option i.e. WhatsApp Pay ('WA Pay') thereby using such dominance to penetrate the United Payment Interface (UPI) enabled Digital Payments Application Market.

The informant submitted that WhatsApp is dominant in the following relevant product markets: (a) market for internet-based messaging applications through smartphones in India ('Internet Messaging'); and (b) market for UPI enabled digital payment applications in India ('UPI Enabled Digital Payments'). The informant submitted that the UPI Enabled Digital Payment applications were a distinct market segment as these are not substitutable with other modes of payment such as debit cards, credit cards, mobile wallets, net banking, and other forms of electronic payment facilities.

The informant relied on WhatsApp's high market share, economies of scale enjoyed by it, and the absence of significant competitors to establish WhatsApp's dominance in the market of Internet Messaging market. The informant alleged that WhatsApp used this dominant position to: (a) mandate pre-installation of WA Pay into its messaging application which amounts to the imposition of an unfair condition; (b) bundle digital payment services with its instant messaging services, each being different services with separate consumer demand. The informant further alleged that such mandatory pre-installation of WA Pay indicated that WhatsApp was leveraging its dominant position in the Internet Messaging market to enter/protect its market position in the UPI Enabled Digital Payments market in violation of Section 4(2)(e) of the Act.

WhatsApp and Facebook contested the informant's locus for filing the information based on the National Competition Appellate Law Tribunal's decision in *Samir Agarwal v. Competition Commission of India*,<sup>16</sup> ('Samir Agarwal'). WhatsApp submitted that the informant had not suffered any legal injury as a result of the alleged anti-competitive conduct and thus had no locus to file the information. CCI rejected this contention stating that under the scheme of the Act the informant need not necessarily be an aggrieved party to file a case before CCI.

Regarding the allegation of installing WA Pay with the messaging service, WhatsApp submitted that to activate WA Pay, users are required to sign up for various terms and conditions including the mandatory linking of the user's bank account to enable payments. Accordingly, there was no abuse in the market of UPI Enabled Digital Payments since the users have complete freedom in deciding to use WA Pay.

CCI observed that while many digital applications offer a host of services, it is important to identify the primary or most dominant features of such apps to delineate the relevant market and assess the substitutability of such features. In this context, CCI noted that WhatsApp primarily offered instant messaging services to its users which are distinct and not substitutable by the services offered by other digital applications. Accordingly, CCI defined the Relevant Market as 'Market for Over-The-Top messaging apps through smartphones in India' ('OTT Messaging'). Regarding digital payments, CCI agreed with the informant and defined the relevant market as the 'Market for UPI enabled Digital Payment Apps in India'.

CCI relied on WhatsApp's popularity, its wide usage, its relative strength vis-à-vis its competitors, and the network effects enjoyed by it to hold it a dominant player in the market of OTT Messaging. CCI noted that the existence of an app or a pre-installed feature does not necessarily translate into actual usage. CCI acknowledged WhatsApp's submission that to enable WA Pay, users were required to follow certain registration steps and provide certain additional information. As such, no transaction can be completed without the user taking these necessary voluntary steps. CCI also noted that incorporating a payment feature does not influence consumer choice, as there is a strong likelihood of a *status quo* bias that operates in favour of the existing competitors in the UPI Enabled Digital Payments market. Accordingly, CCI held that the integration of WA Pay into WhatsApp's application did not amount to the imposition of an anti-competitive unfair condition.

CCI also dismissed allegations of anti-competitive bundling, since there was no compulsion on users to use WA Pay for making instant interbank transfers. Moreover, the presence of various established players such as Google Pay, PayTM, Phone Pe, Amazon Pay, etc., in the UPI

<sup>15</sup> Case No. 15 of 2020, Order dated August 18, 2020.

<sup>16</sup> Competition Appeal No. 11 of 2019, Judgement dated May 29, 2020.

Enabled Digital Payments market indicated a competitive market. CCI observed that it would be incorrect to assume that wa Pay will automatically gain a considerable market share, merely based on its pre-installation. CCI also dismissed the allegation of leveraging because of the vigorous competition in the UPI Enabled Digital Payments market. Further, CCI observed that since WhatsApp's ecosystem does not involve paid services for normal users, the consumer traffic would not automatically be diverted to wa Pay. Accordingly, CCI dismissed all the allegations and passed a closure order under Section 26(2) of the Act.

### **CCI Dismisses Allegations of Abuse of Dominance and Anti-Competitive Vertical Agreements against Amazon<sup>17</sup>**

On September 11, 2020, CCI passed an order dismissing the information filed by Lifestyle Equities C.V ('Lifestyle') against Amazon Seller Services Private Limited ('Amazon') and Cloutail India Private Limited ('Cloutail') alleging contravention of provisions of Section 3(4) and Section 4 of the Act.

Lifestyle, which owns the clothing brand Beverly Hills Polo Club ('BHPC') had filed the information alleging abuse of dominance and entering into anti-competitive exclusive agreements by Amazon. Lifestyle alleged that Amazon was dominant in the market for 'online fashion retail in India' and abused its dominant position by selling counterfeit/unauthorized products of the BHPC brand on its marketplace at extremely low prices, resulting in predatory pricing. Notably, Lifestyle by itself did not sell any of its products on Amazon's website. The effect of such low pricing has resulted in consumers shifting their purchase of BHPC products from Lifestyle's website to Amazon's website, where BHPC's products (allegedly counterfeit) are available at extremely low prices. Lifestyle alleged that such practices of Amazon have resulted in an appreciable reduction in its brand appeal.

Lifestyle also alleged that Amazon had appointed Cloutail as a preferred seller on its marketplace. It was alleged that Cloutail sells products at highly discounted prices, which created high entry barriers in the online retail space. Further, instead of acting as a neutral marketplace, Amazon favoured its preferred sellers/labels by giving them higher search ranking and positive customer reviews which disadvantaged the other sellers. As a result, Lifestyle (or any such apparel manufacturer) that intends to sell products through Amazon's website is constrained to sell through Amazon's preferred sellers (such as Cloutail).

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

Regarding the alleged anti-competitive exclusive agreements between Amazon and fashion brands such as Allen Solly, us Polo Association, and Adidas, CCI noted that: (a) none of their contracts was exclusive; and (b) there were plenty of online intermediation channels available for such brands to reach consumers. CCI also rejected the informant's reliance on another case involving similar issues of vertical agreements concerning preferential listing, discounts, etc., in the online smartphone market<sup>18</sup>. CCI held that the market dynamics of smartphones and fashion products in India are different, with fashion being more diverse and dispersed. Further, unlike the case concerning the smartphones, there was no allegation of platform-specific exclusive launch of fashion products by brands, accordingly, there was no concern of the consumer's choice being affected and inter-platform competition. CCI concluded that since Amazon was not dominant in the market for service provided by online platforms for selling fashion merchandise in India, no case was made out under Section 3(4) of the Act.

Regarding the allegation of online sale of counterfeit products on Amazon, CCI noted that since Amazon was not dominant in this market the issue of online sale of counterfeit products would not attract antitrust scrutiny. However, Lifestyle could raise the issue of counterfeit products through other regulatory instruments due to the adverse implications that it otherwise has on sellers and buyers.

Accordingly, in the absence of any appreciable adverse effect on competition that could have been caused by Amazon's conduct, CCI passed a closure order under Section 26(2) of the Act.

<sup>17</sup> Case No. 09 of 2020, Order dated September 11, 2020.

<sup>18</sup> Case No. 40 of 2019, Order dated January 13, 2020.





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### **CCI Dismisses Allegations of Abuse of Dominance against Ashiana Housing Limited<sup>19</sup>**

On August 26, 2020, CCI passed an order dismissing the information filed by Mr. Devinder Sharma (a resident of a retirement home build by Ashiana Housing) against Ashiana Housing Limited ('Ashiana Housing') and Ashiana Maintenance Service LLP ('Ashiana Maintenance') alleging a contravention of provisions of Section 4 of the Act.

The informant alleged that Ashiana Housing is the only retirement homes complex in Lavasa, Pune and is, therefore, a dominant player in the '*market for the provision of services for development and sale of retirement homes including residential units and apartments in Lavasa*'. The informant further alleged that Ashiana Housing abused its dominant position by (a) imposing unfair terms and conditions in the sub-lease agreement by indulging in unauthorized use of the common area; (b) having a discretionary right to make alterations/carry out additional construction in all places of Ashiana Utsav (i.e. retirement housing complex of Ashiana Housing); (c) unauthorized use of the common area for housing construction employees which creates unhygienic conditions and adversely affect the privacy of the senior citizens, apart from being a health concern given the COVID 19 pandemic; (e) not forming a residential association in breach of the sub-lease agreements; and (f) charging high maintenance fee to the residents. The informant relied on CCI's previous decisions in **Belaire Owner Association v. DLF Limited and others<sup>20</sup>**, **Naveen Kataria v. Jaiprakash Associates Limited<sup>21</sup>** to establish jurisdiction for these allegations.

While defining the relevant market, CCI noted that retirement homes form a separate category of residential units as they are equipped with distinguishing features designed for senior citizens such as (a) unique doorknobs; (b) handrails in bathrooms; and (c) infrastructure with wheelchair access etc. CCI further noted that a consumer intending to buy a retirement home in Pune would not consider any other retirement homes in any other area outside Pune. Accordingly, CCI delineated the relevant market as the '*market for provision of services of development and sale of retirement homes in the form of residential flats in Pune district*'.

CCI noted that various players including Paranjpe Schemes Limited, Vascon Engineers Private Limited, Manisha Constructions, and Gagan Properties operated in this market. Accordingly, CCI concluded that Ashiana Housing is not dominant in the relevant market and therefore, the question of abuse does not arise.

CCI accordingly dismissing all the allegations and passed a closure order under Section 26(2) of the Act.

### **CCI Dismisses Allegations of Abuse of Dominance against Delhi Metro Rail Corporation<sup>22</sup>**

On August 26, 2020, CCI passed an order dismissing the information filed by M/s Dhiraj Gupta against the Delhi Metro Rail Corporation ('DMRC') alleging a contravention of provisions of Section 4 of the Act.

The informant is a sole proprietorship firm that had secured the license for parking rights at certain stations of the metro services operated by the DMRC. It was alleged that the DMRC was abusing its dominant position by violating the terms and conditions of the licensing rights by (a) providing parking lots in slightly damaged conditions leading to the reduced usage of parking lots; (b) postponing its obligations under the contract while accepting the monthly license fee; (c) imposing a lock-in period clause that prevented the informant from exiting the contract; (d) forcing to follow obligations under the contract with the threat of blacklisting from future tenders and forfeiture of the security deposit; and (e) fixing predatory prices for parking, all of which has resulted in the informant having to incur significant losses.

CCI clarified that DMRC was providing a mass rapid transport system in the National Capital Region and is engaged in the development and management of the modern metro system for urban transportation. These activities of DMRC were economic activities and would not constitute a sovereign function and are accordingly covered within the definition of 'enterprise' under the Act.

CCI noted that in urban agglomerations, it is common for such parking facilities to be outsourced to third parties and the informant was one such procurer. Accordingly, the relevant product market was defined as the '*market for procurement of services for provision of parking lot management*'. The relevant geographical market was delineated as 'Delhi' because (a) the informant's three parking lots were located in Delhi; and (b) the homogeneity of conditions of competition for the provision of parking lot services in Delhi was the same. Accordingly, the

<sup>19</sup> Case No. 22 of 2020, Order dated August 26, 2020.

<sup>20</sup> Case No. 19 of 2010, Order dated January 3, 2013.

<sup>21</sup> Case No. 99 of 2014, Order dated August 9, 2019.

<sup>22</sup> Case No. 24 of 2020, Order dated August 26, 2020.

relevant market was delineated as the ‘market for procurement of services for provision of parking lot management in Delhi’.

CCI noted that DMRC owned only 84 parking lots out of the 451 parking lots available under all the municipal corporations in Delhi. Apart from these, various parking lots were also operated at Railway Stations, Courts, Hospitals, Shopping Malls etc. Accordingly, DMRC was not a dominant procurer of parking lot management services in Delhi. Therefore, in the absence of a finding of dominance, CCI did not make any findings on abuse.

CCI accordingly passed a closure order under Section 26(2) of the Act dismissing all the allegations.



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### **CCI Dismisses Allegations of Abuse of Dominance against Yamaha<sup>23</sup>**

On September 7, 2020, CCI passed an order dismissing the information filed by Mr. Vijay Chaudhary against India Yamaha Motor Private Limited (**‘Yamaha’**) alleging a contravention of provisions of Section 4 of the Act.

The informant, an authorized dealer for Yamaha, was aggrieved by the unilateral termination of its dealership. The informant alleged that Yamaha had abused its dominant position by (a) failing to provide a copy of the executed dealership agreements to the informant; (b) terminating the dealership of 45 years without any justifications or plausible reasons; and (c) appointing another dealer as its replacement, all of which resulted in significant monetary losses to the informant.

CCI noted that given the differing characteristics and consumer preferences the scooters and motorcycles manufactured by Yamaha were not substitutable with each other. Accordingly, CCI delineated two relevant markets, i.e. the market for ‘*manufacture and sale of scooters in India*’ and ‘*manufacture and sale of motorcycles in India*’. CCI noted that Yamaha had a market share of less than 10% in both these markets and these markets were dominated by various established players such as Hero MotoCorp Limited, Honda Motorcycles & Scooters India Private Limited, TVS Motor Company, and Royal Enfield. CCI further noted that its assessment would not change, even if the geographical market was restricted to the State of Rajasthan (where the informant’s dealership was located). In the absence of a finding of dominance against Yamaha, CCI passed a closure order under Section 26(2) of the Act dismissing all allegations.

### **CCI Dismisses Allegations of Abuse of Dominance against Bajaj Auto Limited and Anti-Competitive Agreements against Bajaj Auto Limited and M/s SK Automobiles<sup>24</sup>**

On August 8, 2020, CCI passed an order dismissing the information filed by Mr. Mainejer Prasad Gupta against Bajaj Auto Limited (**‘Bajaj’**) and M/s SK Automobiles (**‘SK’**), which alleged a contravention of provisions of Section 3(4) and Section 4 of the Act.

The informant had applied for a dealership in Hojai, Assam, in response to an advertisement issued by Bajaj. However, Bajaj did not consider its application and instead allotted a dealership in another town called Nilbangan (which was located 8 km away from Hojai) to SK, which was Bajaj’s existing dealer in Nagaon and Tezpur, in Assam. The informant submitted that Bajaj’s conduct in (a) allowing for setting up a showroom in Nilbangan, instead of Hojai; and (b) granting SK the dealership despite it not fulfilling the requirements of the dealership agreement, i.e. by SK not keeping the stock in proximity of the showroom, resulted in limiting and controlling the market in violation of Section 3(3) of the Act. This conduct was also alleged to be an anti-competitive exclusive distribution agreement under Section 3(4) of the Act.

The informant further alleged that since SK is Bajaj’s existing dealer in Nagaon and Tezpur, it abused its dominance by colluding with Bajaj and securing the dealership in Nilbangan. The informant identified two relevant geographic markets in this case, i.e. Tezpur and Hojai. It was alleged that SK had used its dominant position in Tezpur to enter into Hojai.

CCI noted that the alleged conduct cannot be examined as collusion under Section 3(3) of the Act as dealers and manufacturers are not horizontally placed. CCI also dismissed allegations of exclusive distribution agreements given that Bajaj only had a market share of 12% in the overall market of two-wheelers in India. Further, SK was not considered as having any market power by its dealership in Tezpur, particularly given there are other dealers of other brands in and around Hojai, even if the geographic market were to be defined very narrowly.

Therefore, in the absence of any market power held by Bajaj and SK, CCI also dismissed allegations of abuse of dominance. CCI also noted that the informant’s mere willingness to commence a dealership agreement that failed to materialize would not raise any competition concerns that would warrant intervention.

CCI accordingly passed a closure order under Section 26(2) of the Act dismissing all the allegations.

<sup>23</sup> Case No. 27 of 2020, Order dated September 7, 2020.

<sup>24</sup> Case No. 23 of 2020, Order Dated August 6, 2020.



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## **CCI Dismisses Allegations of Abuse of Dominance and Anti-Competitive Agreements against Hexagon Geosystems India Private Limited<sup>25</sup>**

On August 26, 2020, CCI passed an order dismissing the information filed by Sowil Limited ('Sowil') against Hexagon India Geosystems India Private Limited ('Hexagon') for contravention of provisions of Sections 3 and 4 of the Act.

Sowil is a small scale company empaneled by the Ministry of Road, Transport and Highways for providing engineering consultancy services for the development of infrastructure projects. Sowil submitted that the Ministry of Railways, Research Designs and Standards Organization ('RDSO') had invited tenders for carrying out certain construction and repair work for Indian Railways. The potential bidder was required to distribute Safe Rail System services, which is a ground-penetrating radar ('GPR') system considered to be a fast and non-destructive way to inspect rail ballast, i.e., the stone foundation on which railways tracks are built. The tender issued required potential bidders to fulfil certain terms and conditions for participation. Sowil submitted that the 'Safe Rail System' marketed by Hexagon of Ingegneria Dei Sistemi ('IGN') was the only GPR system in the world that fulfilled the technical eligibility criteria required by the RDSO. Further, the prices quoted by Hexagon for providing the GPR services were exorbitant. Sowil relied upon an e-mail inadvertently shared by Hexagon with it where there was an internal discussion on adding an 80% mark-up over its purchase price. Such excessive pricing by Hexagon, the only technically eligible bidder, amounted to an abuse of its dominant position. Sowil further alleged that Hexagon contravened Section 3 of the Act by coordinating and requesting its international competitors to not partner with Indian companies to participate in the tender.

CCI noted that Hexagon was not the only bidder and the other bidders included (a) consortium of ZETICA Limited and Vandhana International Limited; (b) consortium of Hexagon Geosystems India Private Limited with Intergraph sg& I India Private Limited; and (c) consortium of Sowil with SIC Infraconsult GMBH. CCI also noted that there are at least 4 major global players in this market which included (a) Zetica Limited; (b) Ground Control Geophysik & Consulting GMBH; (c) SIC Infraconsult GMBH; and (d) M/s Loram. Given this market construct, Hexagon did not appear to hold any market power and CCI accordingly dismissed allegations of abuse of dominance.

CCI further observed that Sowil did not submit any evidence to indicate any collusive conduct by Hexagon. Accordingly, no case of contravention of Section 3 of the Act was made out. CCI accordingly passed a closure order under Section 26(2) of the Act dismissing all the allegations.

<sup>25</sup> Case No. 14 of 2020, Order dated August 26, 2020.



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