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## Balancing Confidentiality Claims With Due Process Requirements

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**MUMBAI:** AZB House Peninsula Corporate Park Ganpatrao Kadam Marg Lower Parel Mumbai 400013 India TEL +91 22 66396880 FAX +91 22 66396888 E-MAIL [mumbai@azbpartners.com](mailto:mumbai@azbpartners.com)

**MUMBAI:** Sakhar Bhavan 4th Floor Nariman Point Mumbai 400021 India TEL +91 22 66396880 FAX +91 22 49100699 E-MAIL [disputeresolution.mumbai@azbpartners.com](mailto:disputeresolution.mumbai@azbpartners.com)

**DELHI:** AZB House Plot No. A8 Sector 4 Noida 201301 National Capital Region Delhi India TEL +91 120 4179999 FAX +91 120 4179900 E-MAIL [delhi@azbpartners.com](mailto:delhi@azbpartners.com)

**GURGAON:** Unitech Cyber Park 602 Tower-B 6th floor Sector 39 Gurgaon 122001 National Capital Region Delhi India TEL +91 124 4200296 FAX +91 124 4038310 E-MAIL [gurgaon@azbpartners.com](mailto:gurgaon@azbpartners.com)

**BANGALORE:** Embassy Icon 7th Floor Infantry Road Bangalore 560 001 India TEL +91 80 42400500 FAX +91 80 22213947 E-MAIL [bangalore@azbpartners.com](mailto:bangalore@azbpartners.com)

**PUNE:** Onyx Towers 1101-B 11th floor North Main Road Koregaon Park Pune 411001 India TEL +91 20 67256666 FAX +91 20 67256600 E-MAIL [pune@azbpartners.com](mailto:pune@azbpartners.com)



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## Balancing Confidentiality Claims With Due Process Requirements

### Introduction

The protection of confidential information plays a pivotal role in any investigation undertaken by a government agency. Competition authorities have extensive access to competitively sensitive information of the enterprises being investigated and this makes it necessary for any confidential information obtained by the authorities during an investigation be accorded due protection. However, certain information might also need to be published or accessed by parties in pursuing their respective right of defence during proceedings. Therefore, one of the key challenges faced by investigating agencies is balancing the need to protect confidential information of the parties *vis-à-vis* the need to have a transparent and fair investigation.

### Treatment of Confidentiality Claims in India

Confidentiality rules and its framework are enshrined in the following provisions: (i) Section 57 of the (Indian) Competition Act, 2002 ('Act'); (ii) Regulation 35 of the Competition Commission of India (General) Regulations, 2009 ('**General Regulations**'); and (iii) Regulations 6 and 6A of the Competition Commission of India (Lesser Penalty) Regulations, 2009 ('**Leniency Regulations**').

Section 57 of the Act provides that no information relating to any enterprise, which has been sought by the Competition Commission of India ('CCI') or the Competition Appellate Tribunal can be disclosed without the prior written permission of the parties, other than in compliance with or for the purposes of the Act, or any other law for the time being in force.

Regulation 35 of the General Regulations provides the mechanism to claim confidentiality over any information provided during the course of an investigation. A request to claim document(s) as confidential can be made in writing to the Director General or CCI. This request can be made only if making the document(s) or part of them public will result in disclosure of trade secrets, destruction/appreciable diminution of the commercial value of any information or can be reasonably expected to cause serious injury. To ascertain whether information is confidential, the Director General or CCI also consider the following factors: (i) extent to which the information is known to outside public; (ii) extent to which the information is known to the employees, suppliers, distributors, and others involved in the enterprise's business; (iii) the measures taken by the enterprise to guard the secrecy of the information; and (iii) the ease or difficulty with which the information could be acquired or duplicated by others.

CCI, under its leniency regime, also has powers to impose lesser penalties on parties in case they disclose the existence of a cartel<sup>1</sup>. However, the confidentiality rules differ under the leniency regime as compared to the General Regulations. As per Regulation 6 of the Leniency Regulations, CCI or the Director General shall treat as confidential: (i) the identity of the leniency applicant; and (ii) the information, documents and evidence furnished by the leniency applicant as part of its leniency application. The only exceptions are where: (i) a disclosure is required by law; (ii) the applicant has agreed to such disclosure in writing; or (iii) there has been a public disclosure by the applicant.

### Treatment of Confidentiality Claims in other Jurisdictions

In the European Union ('EU'), the European Commission ('EC') treats access to information during an investigation as a fundamental procedural requirement in antitrust cases<sup>2</sup>. EC regularly publishes guidance documents on confidentiality claims, including guidance on the kind of information that may be classified as business secrets and other confidential information<sup>3</sup> and provides practical information for an enterprise claiming confidentiality in EU antitrust proceedings.<sup>4</sup> EC has also issued guidance and templates for the use of voluntary 'confidentiality rings' for access to file. A confidentiality ring under EU laws is a negotiated disclosure procedure through which a restricted circle of individuals are given access to confidential information contained in EC's file.<sup>5</sup>

In the United States of America ('US'), the Antitrust Division of the Department of Justice and the Federal Trade Commission ('Agencies') depend on access to sensitive, non-public information from businesses and consumers for conducting antitrust proceedings. No single us

1 Section 46 of the Act.

2 [https://ec.europa.eu/luxembourg/news/new-guidance-facilitate-access-commission-files\\_fr](https://ec.europa.eu/luxembourg/news/new-guidance-facilitate-access-commission-files_fr)

3 This includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm an undertaking.

4 [https://ec.europa.eu/competition/antitrust/business\\_secrets\\_en.pdf](https://ec.europa.eu/competition/antitrust/business_secrets_en.pdf)

5 [https://ec.europa.eu/competition/antitrust/conf\\_rings.pdf](https://ec.europa.eu/competition/antitrust/conf_rings.pdf)

federal statute or regulation defines ‘confidential information’ in the antitrust context<sup>6</sup>. Instead, various federal statutes, rules, and policies require that the Agencies treat certain information they obtain as confidential and protect it from disclosure to the public<sup>7</sup>.

The restrictions governing the treatment of confidential information in the US continue to apply even after the Agencies have filed a complaint in a federal court or initiated administrative proceedings. Although the Agencies are expressly allowed to use confidential information produced by the investigated parties and third parties in these proceedings, such parties can request that the court grant a protective order to protect confidential information from disclosure beyond individuals identified in the order, upon a showing of ‘good cause’. In determining whether to issue such orders, the courts consider several factors including the confidentiality interests at issue, the fairness and efficiency of limiting public access to information, and the importance of the litigation to the public.

### CCI’s Recent Approach Regarding Confidentiality

CCI has been liberal so far in granting confidentiality requests of the parties where they have been able to demonstrate that the requirements under the Act and General Regulations or Leniency Regulations have been met. Similar to EU, CCI has also recently started the use of a ‘confidentiality ring’ in certain cases. This mechanism provides access to parties’ submissions to the other party’s legal counsel (internal and external) on an undertaking that such information shall not be passed on to any other officials/employees of the other party including its business, sales, and marketing teams. Accordingly, it is ensured that the commercially sensitive information of a party is not used as a tool for gaining any competitive advantage by another party. The Delhi High Court (‘DHC’) in cases involving Telefonaktiebolaget LM Ericsson (publ)<sup>8</sup> (‘Ericsson cases’) has previously ordered the creation of confidentiality clubs, comprising of a specified number of lawyers and expert witnesses. Although in the Ericsson cases, the membership of the confidentiality club was explicitly limited to external counsels, no such differentiation was observed in another DHC order<sup>9</sup>, where the term ‘legal representative’ was used.

CCI has also allowed parties in the past to set up bilateral information sharing mechanisms (with limited circulation) in order to expedite the investigation and balance the parties’ right of defence. Further, DHC is currently hearing a set of cases where the extent of CCI’s power to redact information provided by a complainant *vis-à-vis* an opposite party’s right to defence is being argued<sup>10</sup>. This case is likely to provide more detailed guidance on CCI’s powers to grant access to file to the parties during investigation. We will provide a further update on this, once the case is concluded.

### Conclusion

A robust framework for the protection of confidential information enhances the credibility of competition enforcement agencies and reinforces the ability to collect information from the parties they investigate. This proactive approach taken by CCI thus far to protect confidential information while adhering to due process requirements demonstrates that it is in line with best practices currently prevalent across jurisdictions.

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## Behavioural Cases

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### CCI Penalizes Jaiprakash Associates Limited for Contravention of Abuse of Dominance<sup>11</sup>

On August 9, 2019, CCI imposed a penalty on Jaiprakash Associates Limited (‘Jaypee’) for imposing unfair/ discriminatory conditions in a Provisional Allotment Letter (‘PAL’) in relation to independent villas developed by Jaypee in its housing project located at Greater Noida.

The allegations pertained to unfair and one sided terms invoked by Jaypee in the PAL which led to: (i) imposition of arbitrary rates by Jaypee while computing the costs of additional construction; (ii) failure by Jaypee to include details of the provision of complimentary golf mem-

<sup>6</sup> Generally, parties are granted confidentiality over commercial/financial information and privileged information if disclosure of such information would cause harm to the person who submitted the information.

<sup>7</sup> <https://www.justice.gov/sites/default/files/atr/legacy/2015/04/02/311212.pdf>

<sup>8</sup> Telefonaktiebolaget LM Ericsson (publ) v. Lava International Ltd. I.A. No. 2192/2016 in CS (OS) 764/2015, dated March 1, 2016 and Telefonktiebolaget LM Ericsson (publ) v. Xiaomi Technology and Ors., CS (Comm.) 434/2016, CC Nos. 60-65/2015, dated October 24, 2017.

<sup>9</sup> Mvf 3 Aps & ors. v. M. Sivasamy & ors. CS(OS) No. 599 of 2007 dated 31 August 2012.

<sup>10</sup> W.P.(C) 3051/2016–NTN Corporation vs the Competition Commission of India.

<sup>11</sup> Case No. 99 of 2014.



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bership, total area of the plot and additional basement area; and (iii) delay in handing over the possession of the plot.

On Jaypee's challenge over jurisdiction, CCI rejected Jaypee's argument that the matter should have been dealt under the Real Estate (Regulation and Development) Act, 2016 and the claims/remedy should be made under the Indian Contract Act, 1872, on the grounds that Jaypee's operations fell within the ambit of 'services' as per Section 2(u) of the Act.

CCI also disagreed with Jaypee's submissions on what constituted the relevant market and held that integrated townships with independent residential units provide a distinct facility to the consumers and are therefore not substitutable with apartments/ residential units/multi-storey apartments in group housing societies. Accordingly, CCI defined the relevant market as 'market for the provision of services for development and sale of independent residential units such as villas, estate homes, town homes and row-houses in integrated townships in Noida and Greater Noida regions'. On the issue of dominance, CCI noted that Jaypee had the largest market share in terms of number of units sold in the relevant market during the relevant period of FY 2009-10 to 2011-12. CCI further noted that Jaypee had sold many independent industrial units in comparison to its closest competitors and had a larger pool of financial assets and land resources. Based on the above, CCI found Jaypee to be dominant in the relevant market.

In its analysis of Jaypee's conduct, CCI analyzed the effects of each clause alleged in the complaint and held the following:

- i. **Clause Restraining Buyers from Preventing Jaypee to Construct Additional Structures/Buildings:** CCI observed that the allottee had booked a villa keeping in mind the location, open space surrounding the villa, availability of sun light and air, greenery, etc. This clause gives Jaypee unilateral powers to construct or continue to construct other buildings, adjoining areas and alter the plans, thus taking away the rights of allottees at all the stages i.e., before or after taking possession. Therefore, this clause was held to be unfair and one-sided, in violation of the provision of Section 4(2)(a)(i) of the Act.
- ii. **Clause on Charging of Interest for Delayed Payments:** CCI found that the interest rate chargeable from the allottee in case of delay in making payments was much more than interest payable by Jaypee for delay on account of handing over of possession to the allottee. CCI held the clause is heavily in favour of Jaypee and is unfair given that Jaypee incurs a lighter penalty in case of its default but the allottees end up paying a huge penalty amount in case of a default by them.
- iii. **Other Clauses in relation to Jaypee's Right to Raise Finance from Banks, No Compensation against Delay in Possession, One Sided Arbitration Clause and other miscellaneous obligations:** CCI held that these clauses are unfair, one sided in nature, and mandate that the buyers waive their essential rights.

Accordingly, CCI held that Jaypee has contravened provisions of Section 4(2)(a)(i) of the Act, and therefore, imposed penalty of 5% of the relevant turnover of Jaypee i.e., ₹ 13,82,00,000 (approx. US\$ 2,000,000).

### **CCI Imposes Penalty on Allampally Brothers Limited and 50 Others for Bid-Rigging in Supply of Cylinders to Hindustan Petroleum Corporation Limited<sup>12</sup>**

On August 9, 2019, CCI penalized 51 entities (collectively 'Opposite Parties') for big rigging in a tender floated by Hindustan Petroleum Corporation Limited ('HPCL'). The investigation began pursuant to an anonymous letter dated April 25, 2013, received by CCI, alleging cartelization among bidders in relation to two tenders floated by HPCL ('Tender No.1' and 'Tender No.2', respectively).

With respect to Tender No. 1, the Opposite Parties, *inter alia*, successfully argued that the nature of the market of supply of LPG cylinders to oil manufacturing companies ('OMCs') is oligopolistic in nature, and therefore, each seller is likely to be aware of actions and decisions of others, leading to price parallelism. Reliance was placed on Supreme Court of India's decision in **Rajasthan Cylinders and Containers Ltd. v. Union of India and Another**<sup>13</sup>, where it was held that mere quotation of identical prices cannot lead to an inference that parties have formed a cartel. The Opposite Parties further argued that bidders quoted for supplies in different states of India as per their installed capacity and rates for supplies were fixed by HPCL after negotiation with L-1 bidder. Accordingly, CCI did not find any contravention in relation to Tender No. 1.

In its analysis of Tender No. 2, CCI noted that out of the 66 participants in the tender, 51 vendors withdrew their bids out of which 46 withdrew their bids simultaneously on the same date. While the reasons were provided by the 46 participants for withdrawal of bids from each bidder, CCI did not find the reasons to be plausible. Other factors such as common agents working for

<sup>12</sup> Suo Motu Case no 01 of 2014.

<sup>13</sup> Civil Appeal No. 3546 of 2014.



the cylinder manufacturers in absence of any confidentiality agreements, email exchanges between the bidders revealing exchange of information in relation to bid price, identical nature of withdrawal letters, common IP addresses from which bids were uploaded and collusive decision making by the Opposite Parties under the guise of LPG Cylinders Manufacturers Association were also discovered during the investigation.

Accordingly, CCI held that the Opposite Parties were involved in bid-rigging and therefore, decided to impose penalty at 1% of their average relevant turnover for the financial years 2013-14, 2014-15 and 2015-16. Additionally, CCI penalized individuals officers/office bearers of the Opposite Parties who were found to be in-charge of, and responsible for the conduct of the business of the contravening companies/ association.

### **CCI penalizes SAAR IT Resources Private Limited and Two Others for Bid-Rigging in Supply of Technological Services to Pune Municipal Corporation<sup>14</sup>**

On August 2, 2019, CCI penalized SAAR IT Resources Private Limited ('SAAR IT'), CADD Systems and Services Private Limited ('CADD') and Pentacle Consultants (I) Private Limited ('Pentacle') for contravention of provisions of Section 3 of the Act.

The allegations pertain to a tender floated by the Pune Municipal Corporation ('PMC') for selection of an agency for carrying out geo-enabled tree census using Geographical Information System & Global Positioning System Technology. It was alleged that SAAR IT was the pre-determined winner in the tender and CADD and Pentacle were merely acting as proxy bidders.

Before dealing with the case on merits, CCI dismissed the preliminary objection raised by SAAR IT that the in absence of judicial member, final hearing cannot be concluded by relying in light of DHC's decision in **Mahindra Electric Mobility Limited and Another v. CCI**<sup>15</sup>, CCI also placed reliance on the order of the DHC in **Cadd Systems and Services Private Limited v. CCI**<sup>16</sup>, wherein it was held that the working of CCI cannot be brought to a standstill until the judicial member is appointed in CCI. Thereafter, CCI proceeded to deal with the case on merits.

The evidence on record demonstrated that there was a tacit understanding between SAAR IT and CADD and SAAR IT and Pentacle, pursuant to which CADD and Pentacle merely acted as proxy bidders or cover bidders for SAAR IT. Lack of proper scrutiny by PMC ensured that CADD and Pentacle could qualify in the technical round and be in the reckoning so as to benefit SAAR IT, to get the tender. If CADD and Pentacle were not eligible bidders, then the tendering process itself would have failed with there being no participants other than SAAR IT, which would have remained the lone bidder.

Further, basis the evidence gathered by investigation showing similarities observed in documentation, it appeared that the documentation for the bids was arranged by SAAR IT, CADD and Pentacle in concert with each other and the amount for earnest money for CADD and Pentacle was arranged by SAAR IT, when admittedly, both CADD and Pentacle had their own independent source of funds.

Therefore, CCI observed that the evidence submitted reveals a discernible pattern, which points towards existence of an agreement or meeting of minds amongst the bidders to collude in the tender process.

Accordingly, CCI imposed penalty of 10% of the average turnover for three financial years viz., 2015-16, 2016-17, and 2017-18, through revenue from operations and also invoked sections 48(1) and 48(2) of the Act, under which the persons in charge were also made directly liable.

### **CCI Grants 100% Penalty Waiver to NSK Limited and 50% Penalty Waiver to JTEKT Corporation for Market Allocation and Coordinating Bids in Supply of Electric Power Steering Systems<sup>17</sup>**

On August 9, 2019, CCI imposed a penalty on JTEKT Corporation ('JTEKT') and certain employees of JTEKT for contravening provisions of Section 3 of the Act by determining prices, allocating markets and bid-rigging in supply of Electric Power Steering systems ('EPS systems') to three automotive original equipment manufacturers ('OEMs').

The investigation began pursuant to a leniency application filed by NSK Limited ('NSK') admitting its participation in a cartel arrangement with JTEKT during the period 2005 till July, 2011 to coordinate prices, allocate markets and rig the bidding process for submission of quotations to three OEMs for supply of EPS systems. Subsequently, a leniency application was also filed by JTEKT disclosing the cartel.

CCI observed that the evidence collected by the Director General in relation to the meetings/contacts held between employees of NSK and JTEKT and the findings of the investigation

<sup>14</sup> Case No. 12 of 2017.

<sup>15</sup> W.P.(C) 6610/2014

<sup>16</sup> W.P.(C) 6661/2019.

<sup>17</sup> Case No. 7(1) of 2014.



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report were not refuted by the parties. With respect to the employees of NSK and JTEKT involved in the cartel, CCI noted that four individuals of NSK and seven individuals of JTEKT contravened provisions of Section 3 of the Act. On imposition of penalty, CCI granted a 100% reduction in penalty to NSK for disclosing the existence of the cartel and cooperating throughout the investigation. CCI also granted a reduction of 50% in penalty to JTEKT for adding significant value to the evidence in possession of CCI and cooperating throughout the investigation.

Accordingly, CCI penalized JTEKT at 1 times of the relevant profit derived by its Indian subsidiary from sale of EPS for the financial years 2009-10, 2010-11 and 2011-12 amounting to ₹17,07,00,000 (approx. US\$ 2,400,000). Additionally, CCI penalized individuals officers/office bearers of JTEKT who were found to be in-charge of, and responsible for the conduct of the business of JTEKT.

### **CCI Directs Investigation into the Conduct of Volleyball Federation of India and Baseline Ventures (India) Private Limited<sup>18</sup>**

On August 7, 2019, CCI directed the Director General to investigate into the allegations made by Mr. Shravan Yadav, Mr. Amitsinh Tanvar and Mr. Lavmeet Katariya (**'Informants'**) of contravention of provisions of sections 3 and 4 of the Act against Volleyball Federation of India (**'VFI'**) and a consultancy service provider for sports management, Baseline Ventures (India) Private Limited (**'Baseline'**).

The informants are international volleyball players who alleged that the agreement entered between VFI and Baseline granting exclusive rights to Baseline for organizing a volleyball league for Men, Women and beach volleyball in India for a period of 10 years is anticompetitive. The Informants contended that the agreement restricts: (i) volleyball players from participating in any other league of their choice; and (ii) other enterprises from organising any other volleyball leagues. The Informants further alleged that many international players were denied an opportunity to play in the league organized by Baseline due to arbitrary selection of players by VFI and Baseline.

Affirming that VFI falls within the definition of an 'enterprise' under Section 2(h) of the Act, CCI defined the relevant market as the '*market for organization of professional volleyball tournaments/ events in India*' and the '*market for services of volleyball players in India*'. CCI observed that VFI is the only national level volleyball federation in India, which is the sole governing body of the game of volleyball and of the players of volleyball registered or associated with it and therefore, VFI is in a dominant position in the relevant markets. With respect to VFI's conduct, CCI noted that there is an inherent conflict of interest when an entity is acting as a regulator as well as an organiser. CCI further noted that such restraints imposed by the regulator would be justified if the restraints on competition is a necessary requirement to serve the development of sport or preserve its integrity.

In its analysis of the restrictions, CCI noted that VFI has foreclosed the market for organization of professional volleyball tournaments in India and also restricted volleyball players from participating in other tournaments. Therefore, CCI formed a *prima facie* view that VFI's agreement with Baseline is anticompetitive in nature and directed the Director General to conduct an investigation against violation of Section 4 of the Act by VFI.

### **CCI Directs Probe into the Conduct of Intel Corporation and Intel Technology India Private Limited<sup>19</sup>**

On August 9, 2019, CCI directed the Director General to investigate into the allegations by Matrix Info Systems Private Limited (**'Informant'**) for contravention of Sections 3 and 4 of the Act against Intel Corporation (**'Intel Corp.'**) and Intel Technology India Private Limited (**'Intel India'**) (collectively **'Intel'**).

The allegations pertain to an amendment in the warranty policy for 'Boxed Micro-Processors' sold by Intel where Intel stopped its practice of providing a warranty on 'Boxed Micro-Processors' in India, that may have been purchased from any country other than India and initiated a practice of entertaining warranty requests for Intel Boxed Processors in India only when the same is purchased from an authorized Indian distributor of Intel in India. The Informant alleged that the amended warranty policy limits and restricts business of other resellers and parallel imports and denies market access to them and would give Intel's Indian distributors exclusive selling rights in India in violation of sections 3(4)(c) and 3(4)(d) (exclusive distribution agreement and refusal to deal respectively) of the Act. It was further alleged that Intel's practice to not acknowledge warranty on Intel's Boxed Micro-Processors purchased from sellers other than Intel's authorised distributors in India is in violation of Section 3(4)(e) (resale price main-

<sup>18</sup> Case No. 01 of 2019.

<sup>19</sup> Case No. 16 of 2018.

tenance) of the Act.

CCI defined the relevant market as market for ‘Boxed Micro-processors for Desktop PCs in the territory of India’ and ‘the market for Boxed Micro-processors for Laptop PCs in the territory of India’. On the issue of dominance, CCI relied on precedents and latest publically available reports on Intel’s market shares in the relevant market. After analyzing the amended warranty policy, CCI observed that differentiated warranty policy of Intel limits the choice of consumers and also has the potential to lead to denial of market access to the parallel importers and resellers of Intel ‘Boxed Micro-processors’ in India who are competitors of Intel’s Indian authorized distributors ultimately leading to a risk of prevalence of high pricing by Intel’s Indian authorized sellers.

Accordingly, CCI formed a *prima facie* view that the amended warranty policy is unfair in nature and violative of Section 4 of the Act. However, with respect to the allegations under Section 3(4) of the Act, CCI observed that the agreement between Intel and its authorised distributors is not in the nature of an exclusive distribution agreement and its authorised distributors may sell micro-processors of any other brand. Based on the above analysis, CCI directed the Director General to initiate an investigation.

### CCI Dismisses Allegations of Anti-Competitive Practices against Multiple Cinema Theatres<sup>20</sup>

On July 24, 2019, CCI dismissed allegations made by Unilazer Ventures Private Limited (‘**Informant**’) of the infringement of Section 3 of the Act against PVR Limited, Inox Leisure Limited, Cinepolis India Private Limited, Carnival Motion Pictures Private Limited (collectively ‘**Exhibitors**’) and FICCI Multiplex Association of India (‘**FICCI**’).

The allegations pertained to: (i) imposition of Virtual Print Fee (‘**VPF**’) post the end of period of contract by the Exhibitors coupled with an alleged worldwide agreement of Hollywood studios with multiplexes in India and collusion among FICCI and the Exhibitors to charge the same VPF; (ii) collusion among the Exhibitors under the aegis of FICCI to put forth a non-negotiable revenue sharing agreement which only favours the Exhibitors; (iii) untimely remittance of the revenue sharing meant to be forwarded to the content creators after collection of prices from customers; (iv) the practice of not sharing a portion of revenues derived by the Exhibitors from sale of food/beverages, car parking, advertising, merchandise etc. with the producers/distributors; and (v) instances of discrimination by the Exhibitors against the Informant for releasing the Informant’s film.

With respect to the allegation on collusion among the Exhibitors, CCI held that no indication of any such agreement or arrangement was placed on record and there was a lack of evidence demonstrating meeting of minds. CCI further observed that mere parallel conduct does not demonstrate collusion and noted that the Exhibitors were willing to negotiate with the Informant. With respect to the allegation on imposition of VPF, CCI observed that there was no formal/written agreement which determined the period of contract. CCI further held that the issues pertaining to terms of revenue sharing agreement are commercial /contractual in nature. With respect to the allegation of delayed payments, CCI held that there is no evidence which shows collusion among Exhibitors. Lastly, CCI dismissed the allegation on non-sharing of revenues derived from sale of food/beverages, car parking, sale of merchandise etc. on the grounds that the allegation does not fall within the ambit of the provisions of the Act. Accordingly, CCI dismissed the complaint.

### CCI Dismisses Allegations of Abuse of Dominance Against Directorate General of Foreign Trade & Ors.<sup>21</sup>

On July 25, 2019, CCI dismissed allegations made by Beach Mineral Producers Association (‘**Informant-1**’) and Mr. V. Velmurugan (‘**Informant-2**’) against Directorate General of Foreign Trade (‘**DGFT**’), Director General, DGFT (‘**OP-2**’) and Indian Rare Earths Limited (‘**Rare Earths**’), alleging violation of the provisions of Section 4 of the Act.

The DGFT is responsible for formulating and implementing the Foreign Trade Policy (‘**FTP**’). The DGFT published a notification under Section 3 of the Foreign Trade (Development and Regulation) Act, 1992, (‘**FTDR Act**’) read with the FTP for the year 2015 – 2020, Standard Operating Procedure (‘**SOP**’) with respect to export of Beach Sand Minerals (‘**BSMs**’). The Informants alleged presence of onerous conditions with respect to the SOP such as: (i) due diligence of foreign buyer by Rare Earths and end-under certification by private exporter; (ii) fixing of 3% of Free on Board (‘**FOB**’) value as commission payable to Rare Earths; (iii) sharing of commercial secrets with Rare Earths; (iv) indemnity in favour of Rare Earths; (v) provision of



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<sup>20</sup> Case No. 10 of 2019.

<sup>21</sup> Case No. 19 of 2019.



right to ban an exporter by Rare Earths etc. It was further alleged that the purpose of the SOP was to restrict competition.

CCI observed that policy formulation by DGFT regarding export of BSMS falls under the provisions of FTDR Act and the FTP, and therefore, it is not amenable for examination under provisions of the Act. Accordingly, CCI dismissed the complaint.

### **CCI Dismisses Allegations of Abuse of Dominance Against General Insurance Corporation of India<sup>22</sup>**

On July 26, 2019, CCI dismissed allegations made by Indian Chemical Council ('Informant') against General Insurance Corporation of India ('GIC') of contravention of the provisions of Section 4 of the Act.

The allegations pertain to a circular issued by the GIC to all its ceding insurance companies with whom it has entered into reinsurance treaties, notifying certain amendments to the method of calculating premium within the fire insurance segment. This resulted in a very high charge of premium compared to the premium prior to the circular. The Informant further alleged that such amendments to the premium calculation parameters: (i) lacked reasonable justifications; (ii) had no link to the underlying costs of providing reinsurance services; (iii) lacked risk management practices and commercial logic; and (iv) were against the 'Guidelines for pricing a risk' issued by the Insurance Regulatory and Development Authority of India ('IRDAI').

CCI made a reference to IRDAI for seeking its opinion on the allegations. IRDAI gave its opinion that the circular is in consonance with the provisions of the Insurance Act, 1938 and the relevant regulations issued by IRDAI.

In its analysis of the allegations, CCI held that: (i) a pure pricing decision cannot be said to give rise to any competition concern unless it is a manifestation of abuse of dominant position; (ii) the circular, neither prevents a general insurance company/ insurer to offer premium at lower rates to a primary insured/ policy holder nor does it prevent general insurance company from opting for an alternate reinsurance company, other than GIC; and (iii) the general insurance companies have the freedom to decide their premium rates as well as their reinsurer, irrespective of the said circular.

Accordingly, CCI did not find any contravention of the provisions of Section 4 of the Act against GIC.

### **CCI Dismisses Allegations of Abuse of Dominance Against OYO<sup>23</sup>**

On July 31, 2019, CCI dismissed allegations made by RKG Hospitalities Private Limited ('Informant') against Oravel Stays Private Limited ('OYO') alleging contravention of the provisions of Section 4 of the Act.

The allegations pertain to a Marketing and Operational Consulting Agreement ('Agreement') entered into between the Informant and OYO. The Informant alleged that the Agreement consists terms which are one sided, unfair and discriminatory allowing OYO to: (i) unilaterally modify the structure of the Informant's hotel; (ii) put exclusive signage of OYO brand with the Informant's hotel name; (iii) subject the hotel to incentives and disincentives as per OYO's policy based on its performance and misuse such policy by creating circumstances leading to unpleasant relationship between the Informant and its customers; (iv) deny market access to the Informant by debarring it for a period of one year from entering into agreements with other online aggregators; (v) unilaterally modify the terms of the revenue sharing agreement in relation to revenues derived from bookings done directly with partner hotel; and (vi) terminate the Agreement under certain circumstances, while the Informant could terminate the Agreement by giving 30-day written notice etc. The Informant further alleged that OYO offered predatory discounts on hotel room bookings.

CCI defined the relevant market as the 'market for franchising services for budget hotels in India'. On dominance, even though CCI noted that OYO appears to be the leading player in the relevant market with significant market shares and maximum number of budget hotels, CCI held that market share alone may not be the determinative factor for dominance. CCI further noted that franchising is only one of the many business models that a hotel can be operated under and majority of budget hotels in the country still operate as independent hotels. Further, online travel agents have been coming up with new and innovative means to provide better value to both partner hotels and consumers such as launch of assured hotel services, which involve lending of their respective brands to the budget hotels, extending their role beyond just providing intermediation services for booking of hotel rooms. CCI further observed that franchising as a business model is still in at a nascent stage and OYO is yet to access a large number of hotels.

With respect to OYO's conduct, CCI dismissed the allegation on revenue sharing agreement

<sup>22</sup> Case No. 12 of 2019.

<sup>23</sup> Case No. 03 of 2019.



and held OYO's demand to have a logical business justification on account of OYO's efforts towards branding services. On the allegation of denial of market access, CCI held that franchisee is often seen as an extension of the franchisor and is perceived as a single brand seller and the importance of contractual provisions for protecting the franchisor's know-how are likely to involve exclusivity in order to prevent the franchisee from unduly appropriating the benefits of the know-how to be distributed to competing franchisors. On the allegation in relation to subjecting hotels to disincentives, CCI held that OYO has no incentive to de-prioritise or block any particular partner hotel. With respect to the other allegations, CCI found logical business justifications for all the terms of the Agreement. Accordingly, CCI dismissed the complaint.

### **CCI Dismisses Allegations of Abuse of Dominance against certain Film Producers and Distributors of Movies in Andhra Pradesh and Telangana<sup>24</sup>**

On August 1, 2019, CCI dismissed allegations made by one Mr. Ashok Kumar Vallabhaneni ('**Informant**') against Geetha SP Entertainment LLP and 67 others (collectively '**Opposite Parties**') alleging contravention of the provisions of Sections 3 and 4 of the Act.

The allegations pertain to a Theatrical Distribution Agreement through which the Informant had purchased the distribution and exhibition rights of a movie dubbed in Telugu in the States of Andhra Pradesh and Telangana. It was alleged that the Opposite Parties cartelized amongst each other to deprive the Informant from exhibiting his movie in sufficient screens. It was further alleged that the Opposite Parties were discriminating among producers producing Telugu movies and movie dubbed in Telugu. To prove this, the Informant contended that the Opposite Parties provided many screens to 3 other Telugu movies in violation of provisions of Section 4 of the Act.

CCI observed that the Informant failed to furnish any material/ document to demonstrate a cartel amongst the Opposite Parties. With respect to the allegations on violation of Section 4 of the Act, CCI noted that Section 4 contemplates abuse of dominance by an enterprise or a group, but does not recognise collective dominance. Accordingly, CCI dismissed the complaint.

### **CCI Dismisses Allegations of Contravention of Section 3 and 4 against Commissioner of Department of Excise<sup>25</sup>**

On August 2, 2019, CCI dismissed the allegations made by United Breweries Limited ('**Informant**') against the Commissioner, Department of Excise, Entertainment and Luxury Tax, Government of National Capital Territory of Delhi ('**Opposite Party**') alleging contravention of the provisions of Sections 3(4) and 4 of the Act.

The allegations pertain to setting up of a discount price control mechanism by the Opposite Party on the L-1 licensees of wholesale supply of Indian Made Foreign Liquor ('**IMFL**') in violation of Section 3(4)(e) of the Act. The Informant further alleged imposition of unfair and discriminatory terms and conditions imposed on the L-1 licensees by the Opposite Party.

CCI observed that being a department of Government of National Capital Territory of Delhi, the Opposite Party's responsibilities to, *inter alia*, regulate liquor and narcotics, are in discharge of its statutory functions and therefore, fall within the realm of public policy and do not fall within the ambit of activities included under the definition of an 'enterprise' under the provisions of the Act. CCI further noted that the case does not involve existence of a 'vertical agreement' under Section 3(4) of the Act. Accordingly, CCI dismissed the allegations.

### **CCI Dismisses Allegations of Abuse of Dominance Against West Bengal State Electricity Distribution Company Limited<sup>26</sup>**

On August 5, 2019, CCI dismissed allegations made by National Consumers Co-operative Federation of India Limited ('**Informant**') against New Town Electric Supply Company Limited ('**NTESCL**') and West Bengal State Electricity Distribution Company Limited ('**WBSEDCL**'), (collectively, '**Discoms**'), alleging contravention of the provisions of Section 4 of the Act.

The allegations pertain to delay in services to supply electricity by the Discoms to the Informant's residential housing project located in Rajarhat. It was alleged that due to the delayed and vacillating approach of the Discoms, the Informant could not complete its project on time, leading to several cases being filed against the Informant by the customers.

CCI defined the relevant market as '*market for distribution of electricity in the licensed area of WBSEDCL served through its franchisee, NTESCL, in the state of West Bengal*'. Since NTESCL became a subsidiary of WBSEDCL, CCI assessed WBSEDCL's position for analyzing a case under Section 4 of the Act. Relying on a public report, CCI observed that WBSEDCL is in a dominant

24 Case No. 17 of 2019.

25 Case No. 22 of 2019.

26 Case No. 18 of 2019.



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*Inter alia...*

position in the relevant market.

With respect to the alleged abuse of dominance by WBSEDCL, CCI observed that the delay/insufficiency of services on behalf of Discoms in this case does not appear to be a competition issue and the elements of anti-competitive agreement and abuse of dominant position stand on a higher platform than mere deficiency in services. Further, the record of official communications between the Informant and the Discoms did not substantiate a claim of an abuse of dominant position.

### **Delhi High Court Affirms Validity of the CCI Order Passed Without the Presence of a Judicial Member<sup>27</sup>**

On July 17, 2019, DHC upheld the order passed by CCI in **Nagrik Chetna Manch v. SAAR IT Resources Private Limited and Ors.**<sup>28</sup> which was passed in the absence of a judicial member.

The petitioner contended that the orders were passed without the presence of a judicial member and were therefore in contravention with the law laid down by the Division Bench of the DHC in **Mahindra & Mahindra Ltd. & Ors v. Competition Commission of India & Anr.** The petitioner brought the court's attention to paragraph 148 of the judgment where the Division Bench of the DHC had held that at all times, when adjudicatory orders (especially, final orders) are made by CCI, the presence and participation of the judicial member is necessary. The petitioner further argued that the Court has already issued directions to the Central Government to take expeditious steps to fill the existing vacancies.

DHC observed that the Division Bench did not issue any specific direction while pronouncing the judgment which would interdict the functioning of CCI pending such appointment. DHC also relied on Section 15 of the Act and various decisions of the Supreme Court of India which clarified that 'any vacancy or defect in the constitution of the CCI shall not invalidate any proceeding of CCI'.

Accordingly, DHC held that the petition lacks merit and dismissed it.

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## **Combination Orders**

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### **CCI Approves Merger of Indiabulls Housing Finance Limited and Indiabulls Commercial Credit Limited into Lakshmi Vilas Bank Limited<sup>29</sup>**

On June 20, 2019, CCI approved the merger of Indiabulls Housing Finance Limited ('IHFL') and Indiabulls Commercial Credit Limited ('ICCL') into Lakshmi Vilas Bank Limited ('LVB') which will operate under the business name of Indiabulls Lakshmi Vilas Bank Limited. Thereafter, LVB proposed to raise funds from IHFL by way of a preferential allotment, to meet funding requirements which would increase the issued and paid-up share capital of the LVB up to ₹16,80,00,000 (approx. US\$ 2,300,000).

IHFL is a housing finance institution engaged in the business of providing home loans, provision of mutual funds and distribution of insurance products. ICCL is a wholly owned subsidiary of IHFL and is engaged in the business of providing long-term secured mortgage-backed loans. LVB is a scheduled commercial bank offering banking and ancillary financial services like distribution of insurance products and distribution of mutual funds.

CCI noted that IHFL Group and LVB overlap horizontally in the business of provision of loans in India, distribution of mutual funds, distribution of insurance policies/ products, provision of home loans, loan against property and MSME loans and distribution of life, health and general insurance products/schemes. CCI approved the combination since the incremental market share of the resultant company would be insignificant.

### **CCI Approves Acquisition of Mumbai International Airport Limited by GVK Airport Holdings Limited<sup>30</sup>**

On July 26, 2019, CCI approved the acquisition of shares of Mumbai International Airport Limited ('MIAL') by GVK Airport Holdings Limited ('GVK') increasing GVK's stake in MIAL from 50.5% to 60.5%.

GVK is an affiliate of the GVK group, which is a leading Indian conglomerate with diversified interests across various sectors including energy and resources, transportation, hospitality,

<sup>27</sup> W.P.(C) 6661/2019 & CM APPL. 28107/2019, 28108/2019.

<sup>28</sup> Case No. 12 of 2017, W.P.(C) 11467 of 2018.

<sup>29</sup> Combination Registration No. C-2019/05/662.

<sup>30</sup> Combination Registration No. C-2019/06/667.

and life sciences. MIAL is a subsidiary of GVK and operates an airport in Mumbai, India (i.e., the Chatrapati Shivaji International Airport ('CSIA')) and provides airport services at CSIA, including services and activities incidental to air transportation such as operation of terminal facilities, airport activities, ground services activities at airside and cargo handling services.

CCI approved the combination since it observed that the combination merely involves an increase in existing shareholding, it will not result in any change in the competitive landscape.



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### **CCI Approves Acquisition of Sundaram BNP Paribas Home Finance Limited by Sundaram Finance Limited<sup>31</sup>**

On July 26, 2019, CCI approved the acquisition of 49.9% equity shareholding of Sundaram BNP Paribas Home Finance Limited ('SHFL') by Sundaram Finance Limited ('SFL'). The acquisition resulted in SHFL becoming a wholly owned subsidiary of SFL since SFL held 50.1% of the equity shares of SHFL prior to the combination.

SFL is a deposit-taking non-banking financial company registered with the RBI and is primarily engaged in financing purchase of commercial vehicles, cars, construction equipment and tractors. SHFL, a housing finance company, is a joint venture between SFL and BNP Paribas Personal Finance SA ('BNPP').

CCI observed that even though SFL's distribution activity of financial products is vertically placed to the housing finance business of SHFL, the value of housing finance products distributed by SFL, for other financial institutions has not been significant to raise any competition concerns. Accordingly, CCI approved the combination.

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<sup>31</sup> Combination Registration No. C-2019/06/670.



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