



Competition Commission of India & E-Commerce: Initial Days & Way Ahead

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Competition Commission of India & E-Commerce: Initial Days & Way Ahead

Introduction

The advent of increased digitalization of the economy in recent times has led to a paradigm shift towards online trade and e-commerce, and disrupting traditional business models. Physical offices have given way to online and digital platforms across a number of sectors: be it travel (with the proliferation and growth of online travel agencies such as MakeMyTrip, Cleartrip and Yatra), entertainment (OTT platforms like Netflix and Prime Video revolutionizing viewership) or shopping either for consumer goods, electronics or groceries (Flipkart, Amazon, Myntra and Grofers to name a few).

To regulate these dynamic business practices, antitrust regulators need to first understand how these markets operate in order to determine the adequacy of traditional competition enforcement tools in these markets. To this end, in India, the report of the Competition Law Review Committee ('CLRC')¹, dedicated a chapter to examining whether the Competition Act, 2002 ('Act') needed amendments to be better equipped to regulate digital and high tech markets. Jurisdictions like European Union² ('EU'), United Kingdom³ ('UK'), Australian Competition and Consumer Commission⁴ ('ACCC') have examined, and issued industry reports in select sectors that have an increased digital/online presence. Earlier this year, the Competition Commission of India ('CCI') followed suit to issue findings from its first e-commerce market report⁵ ('E-com Report'). In this article, we explore key issues identified by CCI in its E-com Report relating to online platform markets and examine a few CCI decisions, issued around the time of the E-com Report.

Platform Neutrality: A key issue identified in the E-com Report in platform markets related to concerns surrounding (the lack of) platform neutrality. CCI noted that where online platforms serve as both a marketplace and a provider of goods or services in that market, concerns with respect to maintaining 'platform neutrality' are likely to arise. Platforms may be incentivized to provide preferential treatment with respect to their own wares or services by, for example, offering preferential listing views to their own products⁶.

Platform-to-Business Contract Terms: The E-com Report notes that opportunities offered by online market places have led to a growing dependence of businesses on these platforms; the platforms' high bargaining power enables it to unilaterally revise contract terms and impose 'unfair' terms on the providers. This, in turn, risks exclusionary or/and exploitative practices, proscribed under the Act.

Platform Parity Clause: Platform parity clauses ('PPC') are used by platforms to restrict sellers/service providers from offering their goods or services at more favourable terms to other platforms. The E-com Report took note of both, the pro-competitive effects (generating efficiencies by preventing free riding and increasing non-price competition) and anti-competitive effects (reducing price-competition and raising barriers to entry) from such PPC's and observed that their scope would need to be examined on a case by case basis as a vertical restraint or exclusionary unilateral abuse of dominance under the Act.

Exclusive Agreements: In its E-com Report, the CCI examined two kinds of exclusive arrangements commonly found on e-commerce platforms; (a) where certain products are launched and offered exclusively on a single online platform (e.g. Motorola phones exclusively available on Flipkart); and (b) where platforms list only one brand in a given product category (e.g. a food delivery platform will list only one burger joint on its platform). Consistent with its jurisdictional practice, CCI noted that although these exclusivity conditions were not *per se* anticompetitive, and a rule of reason approach needed to be adopted to examine where the anti-competitive effects arising from, these exclusivity conditions (foreclosure, entry barriers by increasing competitor costs) outweighed the pro-competitive effects (generating efficiencies and increasing inter-brand competition). Where a contracting party was in a position of dominance, CCI would also like examine the restraint as an abuse of dominance.

- 1 The Ministry of Corporate Affairs constituted an expert committee to review the Act and issued a report recommending amendments to the Act. This report was published on 14 August 2019 and culminated in a draft Competition Amendment Bill.
- 2 The report is available here: <https://ec.europa.eu/competition/publications/reports/kdo419345enn.pdf>
- 3 The report is available here: <https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel>
- 4 The report is available here: <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025>
- 5 https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf
- 6 Products under the brand name 'Amazon Basics' listed on Amazon, or setting up cloud kitchens such as under the Swiggy's 'Swiggy Access' business.

Deep Discounts: The E-Com Report identified the following three concerns arising from discounting policies by platforms: (a) discriminatory application; (b) directing service providers/sellers to offer significant discounts, adversely affecting their business model; and (c) bringing down prices to below cost, impairing the ability of offline and smaller service providers to compete. CCI then set out a framework for examining discounts offered by platforms which includes an evaluation of market power of the entity offering discounts, nature of discounts, rationale for offering discounts and effect on competition. In particular, discriminatory discounts will be examined to assess whether they are offered to forge exclusivity and curb multi-homing.

Self-Regulatory Measures: The E-Com Report also sets out certain self regulatory measures to be adopted by platforms, particularly pertaining to goods, online travel agencies and food delivery. These include: (i) setting out clearly and coherently, applicable terms and conditions adopted for search ranking, including the possibility of ranking being influenced by remuneration; (ii) data collection policies, including where such data may be shared with third parties; (iii) transparency in collecting and publishing user reviews and rating mechanisms; (iv) implementing business terms in a clear and fair manner, including notifying business users of proposed changes with sufficient notice; and (v) implementing clear and transparent discount policies involving basis for discount rates for different products/suppliers and implications for non-participation in discount schemes.

CCI's Enforcement Evolution in the E-commerce Sector

Around the time CCI issued its E-Com Report, it examined allegations of anti-competitive conduct involving e-commerce shopping platforms and online travel agencies.

When examining MakeMyTrip's ('MMT') acquisition of Go-Ibibo⁷ in October 2016, CCI examined competitive effects in the market for 'sale of travel and travel related services'. In doing so, notably, CCI did not distinguish between online and offline modes of travel bookings. Instead, it found that travel channels with a predominantly offline presence posed "significant competitive constraints" on the likes of MMT, an online travel agent ('OTA'). However, a couple of years later, when examining allegations⁸ relating to excessive discounts, exclusivity and parity clauses imposed by MMT, the CCI, in its preliminary order, examined MMT's conduct in the relevant market for 'online intermediation services for booking of hotels in India'. Noting its departure from its earlier decision, CCI held that the intervening period has established OTAs as a distinct channel for hotel bookings and hotel operators now perceive OTAs as a distinct mode of distribution. These could not be viewed as substitutable with offline modes or direct sales, without losing customer reach.

Similarly, earlier this year, in *Delhi Vyapar Mahasangh v Flipkart & Amazon*⁹ the CCI directed an investigation into Flipkart and Amazon against allegations of deep discounting, preferential listing, private labels and exclusive tie-ups (sale of mobile phones on a single shopping platform), finding that both Amazon and Flipkart exercised market power in their respective markets, creating an ecosystem in which their practice may lead to an appreciable adverse effect on competition. On this basis, CCI directed its investigative arm, the office of the director general ('DG') to initiate an investigation¹⁰. This decision too, marks a departure from its earlier findings involving a similar set of allegations, in *All India Online Vendors Association v Flipkart*¹¹ in which CCI held that there were multiple players in the online marketplace platforms. CCI went on to hold that although the size and resources of Flipkart were large, no single player would command a dominant position in the relevant market at this stage of the evolution of the market¹².

Conclusion

The CCI's recent decisional practice as set out above denotes a shift in its approach towards scrutinizing conduct in e-commerce businesses. With more and more businesses moving towards an e-commerce centric business model, much like their counterparts world over, CCI is scrutinizing the conduct of online platforms closely. The next few years will likely witness anti-trust enforcement focusing on conduct in online and digital markets, yielding a more consistent body of jurisprudence.

⁷ Combination Registration No. C – 2016/10/451

⁸ Federation of Hotel & Restaurant Associations of India v. MakeMyTrip India Pvt. Ltd, Case No. 14 of 2019

⁹ Case No. 40 of 2019.

¹⁰ Karnataka High Court has stayed CCI's order directing the DG to investigate the matter

¹¹ Case No. 20 of 2018

¹² On appeal, the National Company Law Appellate Tribunal observed that the All India Vendors Association has put enough material on record for CCI to consider the matter on merits, and remanded back the case to CCI for re-investigation.



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Behavioural Orders—CCI

CCI Directs Investigation against MakeMyTrip India Pvt. Ltd. and Oravel Stays Pvt. Ltd.

On February 24, 2020, CCI directed an investigation against MMT and Oravel Stays Pvt. Ltd. ('OYO') pursuant to a complaint by Rubtub Solutions Pvt. Ltd. ('Rubtub') alleging anti-competitive agreements and abuse of dominant position¹³.

Rubtub alleged that in 2017, MMT threatened and subsequently removed Rubtub from its platform because Rubtub did not accept MMT's investment offer. In support of its allegations, Rubtub submitted certain emails which allegedly showed the pressure imposed by MMT on it to accept MMT's investment offer. Subsequently, at Rubtub's request, MMT decided to list it back on its platform subject to the latter entering into an 'exclusivity agreement' and 'chain agreement', which Rubtub had to accept due to suffering losses on account of its removal from MMT's platform. In this regard, Rubtub submitted two clauses in its agreements with MMT: (i) a clause demanding that Rubtub maintains price parity with regard to the prices charged by it on MMT and other online travel agents; and (ii) an exclusivity restriction restraining Rubtub from listing its 'Category A' hotels on the platform of competitors of MMT such as Booking.com and PayTM.

Rubtub further alleged that these agreements were unilaterally terminated by MMT due to its agreement with OYO wherein MMT allegedly agreed to remove OYO's competitors such as Rubtub from its platform. In this regard, Rubtub submitted transcripts and electronic records of certain conversations among its personnel with the personnel of MMT which showed that MMT refused to list the hoteliers associated with Rubtub under the 'Hotel Superhero' scheme pursuant to its arrangement with OYO. Rubtub argued that the relevant market was the '*market for online intermediation services for booking of hotels in India*' and that OYO was dominant in this market—having a market share of 89%. Rubtub also relied upon a news report to show that MMT renewed its agreement with OYO for a further period of five years. Based on the above, Rubtub alleged (i) denial of market access to it by MMT and OYO from customers who prefer to make their hotel bookings on MMT; (ii) imposition of arbitrary exclusivity condition and price parity condition on it by MMT; (iii) exclusivity supply agreement between MMT and OYO; and (iv) 'refusal to deal' imposed by OYO through its arrangement with MMT.

CCI observed that the relevant markets in which MMT and OYO operate and their dominance/market power in those relevant markets has already been assessed by CCI in Case No. 14 of 2009 i.e., '*market for online intermediation services for booking of hotels in India*' and '*market for franchising services for budget hotels in India*' respectively. CCI further observed that the allegations pertaining to denial of market access, imposition of price parity condition and 'refusal to deal' were already covered by CCI's *prima facie* findings in Case No. 14 of 2009. With respect to the allegation on the exclusivity condition imposed by MMT restricting Rubtub from listing its 'Category A' hotels on the platform of Booking.com and PayTM, CCI observed that the clause *prima facie* appears to be unfair and exclusionary in nature and denies MMT's competitors access to Rubtub's hotels. Based on the above, CCI directed DG to conduct an investigation against the alleged abuse of dominance by MMT and anti-competitive agreements between MMT and OYO. Further, CCI decided to club the case with Case No. 14 of 2009 since the issues pertaining to both the cases were identical.

CCI Dismisses Allegation of Bid-Rigging against Suppliers of Shirts

On February 21, 2020, CCI dismissed a complaint by CP Cell, Directorate General Ordnance Service, Master General of Ordnance Service ('CP Cell') against 4 suppliers of shirts namely M/s NCFD ('NCFD'), M/s Kaushalya Industries ('KI'), M/s AVR Enterprises ('AVRE') and M/s PN Gupta & Sons ('PNGS') alleging bid-rigging¹⁴.

CP Cell alleged collusion by the four opposite parties while submitting bids in relation to the tender floated by it for procurement of 1,38,251 Shirt Man's Cellular Cotton 1973 Pattern (Modified) Khaki. To substantiate its allegations, CP Cell submitted that NCFD & KI (which were both L-2 in the tender) and AVRE & PNGS (which were both L-6 in the tender) quoted similar rates in response to the tender. CP Cell further alleged that the IP addresses of the opposite parties were similar.

CCI noted that CP Cell did not submit any documentary evidence pertaining to the alleged similarity of IP addresses of the opposite parties. While similar prices were quoted by the two L-2 tenderers and L-6 tenderers, CCI opined that in the absence of other evidence, price parallelism cannot be sufficient to direct an investigation. Accordingly, CCI concluded that no *prima*

¹³ Case No. 1 of 2020 (order delivered on February 24, 2020).

¹⁴ Case No.2 of 2019 (order delivered on February 21, 2020).

facie case was made out and closed the matter under Section 26(2) of the Act.

CCI Dismisses Allegation of Bid-Rigging against Suppliers of Durries

On February 21, 2020, CCI dismissed a complaint filed by CP Cell against 3 suppliers of Durries namely M/s HP State Handicraft & Handloom Corporation ('**HP Handicraft**'), M/s Standard Gram Udyog Sansthan ('**Standard Gram**') and M/s Integrated Defence Product Pvt. Ltd. ('**Integrated Defence**') alleging cartelization¹⁵.

CP Cell alleged that the three opposite parties facilitated a cartel arrangement to help and support each other to win a tender floated by it for procurement of durries to be issued to certain personnel of the Indian army. It was alleged that after failing to qualify for opening of commercial bids, Standard Gram merged with Integrated Defence. Subsequently, the ultimate winner of the tender i.e., HP Handicraft, subcontracted the manufacturing of the durries to the merged Integrated Defence entity. CP Cell submitted that in order to facilitate the cartel, Standard Gram and Integrated Defence entered into the subcontracting arrangement despite being aware that subcontracting was not allowed as per the rules of the tender.

CCI observed that there is no evidence of collusion among the opposite parties on a *prima facie* analysis. CCI further observed that the allegations pertain to non-compliance with the tender conditions and therefore, do not raise any competition concerns. Accordingly, CCI dismissed the complaint and closed the matter under Section 26(2) of the Act.

CCI Dismisses Complaint against Eastern Railways

On February 28, 2020, CCI dismissed a complaint filed by Abhiraj Associates Pvt. Ltd. ('**AAPL**') alleging that Eastern Railways has entered into an anti-competitive agreement in contravention of Section 3 of the Act¹⁶.

AAPL alleged that in July 2019, pursuant to the directions of the Indian Railway Board through its letter dated July 18 2019, Eastern Railways stopped allotment of rakes to AAPL through which AAPL used to conduct its business of exporting stone aggregates/boulders, and started allotting its rakes to Oriental Exports Pvt. Ltd. AAPL alleged that the directions were issued by the Indian Railway Board pursuant to a request made by the Bangladesh Railway Board. Based on this, AAPL alleged the existence of an 'anti-competitive agreement' between the Bangladesh Railway Board and Indian Railway Board which is further being implemented by Eastern Railways. AAPL also alleged that the conduct of Eastern Railways and the Indian Railway Board is in violation of Rule 201(1) and 201(10) of the ICRA Goods Tariff No. 41 i.e. Rules for Registration of Indent and Supply of Wagons ('**Wagon Rules**') and Section 70 of the Railways Act, 1890 ('**Railways Act**') and Article 19(1)(g) of the Constitution of India.

CCI observed that the remedy sought by AAPL pertaining to alleged violations of the Wagon Rules, Railways Act and the Constitution of India lie in other forums. With respect to the re-allocation of supply of rakes, CCI noted that such directions were passed by the Indian Railways Board pursuant to a bilateral agreement between the Indian Railways Board and the Bangladesh Railways Board and therefore, Eastern Railways does not have any incentive to give preferential treatment to a specific entity. Further, inter-governmental bilateral agreements between two sovereign countries cannot be considered as an 'agreement' under Section 2(b) of the Act. Accordingly, CCI dismissed the complaint under Section 26(2) of the Act.

CCI Dismisses a Suo-Moto Investigation against Alleged Cartelization in Supply of Anti-Vibration Rubber Products and Automotive Hoses

On February 26, 2020, CCI dismissed a suo-moto investigation in relation to alleged cartelization amongst suppliers of (i) Anti-Vibration Rubber Products ('**AVR Products**'); and (ii) Automotive Hoses (Water and Fuel) ('**Hoses**'), in relation to Requests for Quotations ('**RFQs**') issued by automobile original equipment manufacturers ('**OEMs**')¹⁷.

The investigation began pursuant to a leniency application which disclosed that certain auto-part manufacturers had reached agreements in fixing the price to be quoted for RFQs and allocation of RFQs, by exchanging information through in-person contacts, phone calls, e-mails etc. With respect to supply of AVR Products, CCI observed that while some of the auto-part manufacturers admitted having contacts with their competitors in relation to the RFQs, none of the auto-part manufacturers actually sold the said AVR Products in India.

With respect to supply of Hoses, CCI observed that while some auto-part manufacturers admitted having exchanging information with competitors in relation to the RFQs in India through emails, such emails were dated prior to May 20, 2009, i.e., prior to the enforcement of the relevant provisions of the Act. Further, other auto-part manufacturers who exchanged



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¹⁵ Case No.3 of 2019 (order delivered on February 21, 2020).

¹⁶ Case No. 37 of 2019 (order delivered on February 28, 2020).

¹⁷ Suo-Moto Case No. 1 of 2016 (Order delivered on February 26, 2020)



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information after the commencement of the Act did not take part in any information exchange pertaining to the Indian market. Based on the above, CCI concluded that no contravention of the provisions of Section 3 was made out against the manufacturers of AVR Products and Hoses and closed the matter under the provisions of Section 26(6) of the Act.

CCI finds Anti-Competitive Agreement between Bengal Chemists and Druggists Association, Alkem Laboratories and Macleods Pharmaceutical Limited, but Desists from Imposing Penalties

On March 12, 2020, CCI found that Bengal Chemists and Druggists Association ('BCDA'), Alkem Laboratories ('Alkem') and Macleods Pharmaceutical Limited ('Macleod') along with their office bearers, had contravened the provisions of Section 3 of the Act. CCI's finding was pursuant to information filed by two pharmaceutical stockists and the branch secretary of Pharmaceuticals Traders Welfare Association of Bengal, alleging restriction/control over supply of pharmaceutical drugs by the opposite parties in West Bengal¹⁸.

The allegations pertained to (i) malpractice of mandating Product Availability Information ('PAI') and Stock Availability Information ('SAI') which is in the nature of a No Objection Certificate ('NOC') for appointment of stockists from BCDA; (ii) requiring payment of illegal donations from the prospective stockists for issuance of SAI; and (iii) requiring payment of illegal donations from the Promotion cum Distributor ('PCD') agents of pharma companies for issuance of PAI.

From the evidence on record, CCI observed numerous instances wherein BCDA commenced supply of drugs to stockists after issuing SAI letters to the prospective stockists of various pharmaceutical companies. CCI further perused the statements and donation receipts submitted by various stockists along with the transcripts of telephonic conversations with pharmaceutical companies where the stockists were asked to receive NOC from BCDA before they could get products. CCI further noted that the practice of SAI was admitted by certain officers of BCDA. On the allegation pertaining to donations from PCD agents, CCI perused the statements of certain third party PCD agents recorded by the DG which confirmed that they deposited money to the BCDA to procure PAI. CCI further perused the bank details of BCDA which showed many entries of receipt of such donations from the PCD agents.

CCI further observed that Alkem and Macleod, in agreement with BCDA, indulged in practice of demanding SAI/NOC from the stockists before providing them the supply of drugs. Based on the above, CCI held that Alkem and Macleod contravened Section 3 of the Act. However, CCI decided to not impose any penalty on Alkem and Macleod keeping in mind (i) the steps taken by BCDA to remove the practice of demanding SAI/NOCs from stockists pursuant to CCI's decision in *Santuka Associates Pvt. Ltd. v AIOCD and Others*¹⁹; and (ii) the submissions made by Alkem and Macleod that they engaged in the anti-competitive conduct under threat and duress from BCDA. CCI only directed BCDA to conduct advocacy events by way of outreach activities with its District Committees/ Zone Committees and their office bearers, to impress upon them the need to comply with the provisions of the Act.

Behavioural Orders—NCLAT

National Company Law Appellate Tribunal (NCLAT) Sets Aside CCI's Closure Order in Alleged Abuse of Dominance against Flipkart

On March 4, 2020, NCLAT set aside CCI's order dismissing allegations pertaining to abuse of dominance filed by the All India Online Vendors Association ('AIOVA') against Flipkart India Private Limited ('Flipkart India') and Flipkart Internet Private Limited ('Flipkart Internet') (collectively, 'Flipkart')²⁰.

AIOVA had alleged before CCI that Flipkart India engages in preferential treatment of certain sellers by selling goods at a discounted price to companies like ws Retail which are owned by the founders of Flipkart Internet. ws Retail subsequently sold such goods on Flipkart Internet's e-commerce platform. AIOVA alleged that such acts of Flipkart India and Flipkart Internet were to the detriment of other manufacturers selling on their platforms.

In its assessment, based on the nature of the distribution chain implemented by Flipkart India, CCI defined a single market for 'services provided by online marketplace platforms for selling goods in India'. CCI noted that AIOVA's submission on Flipkart's dominance lacked any eviden-

¹⁸ Case No. 36 of 2015 (order delivered on March 12, 2020).

¹⁹ 2013 Comp.L.R. 223 (CCI)

²⁰ Competition Appeal (AT) No. 16 of 2019

tiary backing. CCI relied on publically available information to note that no single player was dominant in the relevant market owing to low entry barriers and the market structure. CCI further noted that (i) the arrangements of Flipkart India with its B2B customers are neither exclusive nor impose any restraints; (ii) the structural link between Flipkart Internet and ws Retail existed only till 2012 and ws Retail is no longer a supplier on Flipkart since April 2017; and (iii) terms and conditions imposed by Flipkart Internet on its sellers are standard in nature. Based on the above, CCI dismissed the complaint.

Upon appeal, NCLAT relied upon the decision passed by the Income Tax Appellate Tribunal ('ITAT') in *Flipkart India Private Limited v Assistant Commission of Income-Tax*²¹ ('**Flipkart ITAT Order**') where the Assessing Officer noted that Flipkart India would buy and sell goods at a loss, in order to "establish a monopoly in market by brand building by generating consumer goodwill". While these submissions of the Assessing Officer were set aside by ITAT, NCLAT opined that the conclusions drawn to impose tax were different from the facts required to be assessed by CCI to make its *prima facie* analysis under the Act. NCLAT concluded that several issues, such as predatory pricing, were pointed out by the AIOVA at the *prima facie* stage and a case for investigation was made out. Accordingly, NCLAT allowed the appeal and directed CCI to direct DG to conduct an investigation into the allegations.

NCLAT Sets Aside CCI's Order under Section 43A of the Act against M/s Eli Lilly & Company

On March 12, 2020, NCLAT set aside CCI's order imposing a penalty on M/s Eli Lilly & Company ('**Eli Lilly**') under Section 43A of the Act for failure to notify its acquisition of Novartis AG's animal health business in India ('**NAH India**') ('**NAH Acquisition**') to the CCI in compliance with provisions of Section 6(2) of the Act ('**CCI Order**')²².

In April 2014, Eli Lilly agreed to acquire the global animal health business of Novartis AG. This was notified to, and cleared by antitrust regulators across the world. The acquisition of NAH India, which was entered into by way of a separate agreement between the parties, was not notified to CCI on account of the fact that the NAH Acquisition would have benefited from the 'de minimis' exemption. After issuing a show cause notice seeking an explanation as to why the NAH Acquisition was not notified in India, CCI concluded that the benefit of the 'de minimis' exemption could not be taken by NAH India which was an unincorporated business. CCI held that for the purpose of determining whether the NAH Acquisition was exempt, the value of assets and turnover of Novartis India Limited (in which NAH India was based) were to be taken.

Upon appeal, NCLAT noted that under Section 54 of the Act, CCI is mandated to determine the applicability of the available exemptions to a party before requiring filing of a notification or commencing proceedings under Section 43A of the Act. NCLAT further referred to the clarifications provided by the Ministry of Corporate Affairs via a press release on the Press Information Bureau's website in relation to the 'de minimis exemption', which explicitly mentions that the 'de minimis exemption' was issued in order to promote the ease of doing business in the country and make India a more attractive destination for foreign investment. NCLAT noted that Eli Lilly was correct in applying the test of 'de minimis' to NAH India, which was the actual business being acquired, and set aside the CCI Order. Interestingly, NCLAT also held that the provision in the Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011, which places the obligation to file a notification upon the acquirer to be contrary to the provisions of the parent Act.

NCLAT Partially Affirms CCI's Order Penalizing Adani Gas Limited for Abusing its Dominant Position

On March 5, 2020, in cross-appeals filed by Adani Gas Limited ('**Adani**') and Faridabad Industries Association ('**FIA**'), NCLAT affirmed CCI's order penalizing Adani for abusing its dominant position in the market for supply and distribution of natural gas to industrial consumers in Faridabad. However, NCLAT revised the monetary penalty imposed by CCI²³.

To contest the relevant market defined by CCI, Adani argued before NCLAT that the piped natural gas ('**PNG**') which it supplies to industrial consumers competes with several other fuels. In the cross-appeal, FIA submitted that until November 2012, no other fuel could be used as a substitute of natural gas due to its unique characteristics, intended use and price. Moreover, members of FIA who manufacture high precision alloys are required to use PNG only.

In its assessment, NCLAT observed that during the relevant period of investigation, there was no gaseous substitute of natural gas available to industrial units in Faridabad. Further, it was not disputed by Adani that the natural gas supplied to members of FIA is primarily PNG and

²¹ ITA No. 202/Bang/2018.

²² Competition Appeal (AT) No. 3 of 2016

²³ Competition Appeal (AT) No. 33 of 2017



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therefore, distinct. Given the differences between the Gas Supply Agreements ('GSA') which Adani executed with industrial consumers from those executed with domestic, commercial and transport consumers for supply of gas, NCLAT observed that Adani itself treated industrial customers as distinct from other groups of customers. Additionally, members of FIA were solely dependent on Adani for the supply of natural gas. Accordingly, NCLAT found Adani to be dominant in the relevant market, thus affirming CCI's conclusion.

NCLAT further noted that the GSA entered into between Adani and members of the FIA had the following terms which, when imposed by a dominant enterprise such as Adani, would amount to unfair contractual conditions under Section 4 of the Act:

- i. **Billing & Payment:** this clause removed the liability on Adani for excess payment by the buyers to Adani due to erroneous billing/ invoicing on the part of Adani including interest, whereas a delayed payment by the buyer rendered him liable to pay interest with there being no corresponding obligation on Adani to pay interest;
- ii. **Termination:** this clause provided Adani with the right of termination if a buyer failed to buy 50% of the gas manufactured for such buyer. This clause only provides a short period of 45 days to the buyers to buy the gas, whereas, Adani had a longer duration available to meet a similar requirement under its agreement with Gas Authority of India Limited;
- iii. **Force Majeure:** this clause vested in Adani the discretion to accept or reject request of customers for force majeure; and
- iv. **Emergency shutdown:** this clause required the buyer to meet its payment obligation even in the event of emergency shutdown.

In light of the above, NCLAT affirmed CCI's conclusion that Adani had abused its dominant position. However, the fact that Adani had revised the impugned clauses in the GSA during the period of the investigation and thus made them more consumer friendly was seen as a mitigating factor. Accordingly, NCLAT decided to reduce the total penalty on Adani from 4% of its average annual turnover of the relevant period of investigation, to 1%.

NCLAT Affirms CCI Order Rejecting Allegations of Abuse of Dominance against SKF India Ltd.

On March 12, 2020, NCLAT dismissed an appeal filed by Asmi Metal Products Pvt. Ltd. ('Asmi Metal') against CCI's order rejecting allegations of abuse of dominant position against SKF India Ltd. ('SKF')²⁴.

Asmi Metals alleged that SKF was a dominant entity in the market for supply of bearings in 'Western India'. Further, SKF had forced Asmi Metal (which was the supplier of bearing rings and other fabricated metal products to the former) to make irrelevant expenditures on expansion of manufacturing capacity and imposed discriminatory conditions at the time of awarding contracts, thus abusing such dominant position. It was alleged that during 2004 to 2006, SKF recommended a costly plant upgradation for Asmi Metal but failed to comply with its promises in relation to payment for construction and upgradation of the plant. It was further alleged that from 2006 onwards, SKF unilaterally started importing raw materials from China instead of allowing Asmi Metal to procure them from domestic suppliers, which led to payment of heavy import duty and clearance charges by Asmi Metal, ultimately leading to closure of Asmi Metal's plant. Additionally, SKF failed to pay VAT on the steel purchased by Asmi Metal for the period 2005 – 2009 which was in violation of an agreement executed between them and led to the liability being forced upon Asmi Metal. Last, Asmi Metal alleged that an MOU was executed between them wherein the liability for any losses incurred by Asmi Metal was removed from SKF.

NCLAT rejected Asmi Metal's contention that the relevant geographic market should be 'Western India' in absence of any evidence which shows that SKF did not incur any transportation costs to supply the goods to other parts of India, concluding that the relevant geographic market is 'India'. NCLAT further held that a majority of the allegations pertained to the time period prior to 2009 when the relevant sections of the Act were not in force. In addition, as per the materials on record, NCLAT noted that the relevant market is fragmented in nature and no player enjoys a position of strength and thus SKF could not be said to be dominant. Accordingly, NCLAT dismissed the appeal.

NCLAT Dismisses an Appeal filed by Uttarakhand Agricultural Produce Marketing Board on Maintainability

On March 12, 2020, NCLAT dismissed an appeal filed by Uttarakhand Agricultural Produce Marketing Board ('**UT Marketing Board**') against the order of CCI issuing show cause notices to Garhwal Mandal Vikas Nigam Limited ('**Garhwal Mandal**') and Kumaun Mandal Vikas Nigam Limited ('**Kumaun Mandal**'), on the grounds that the appeal is not maintainable under Section 53B(a) of the Act²⁵.

The show cause notices were passed pursuant to information filed by the International Spirits and Wines Association of India alleging that UT Marketing Board, Garhwal Mandal and Kumaun Mandal had abused their dominant position in the market for the wholesale procurement of branded alcoholic beverages in their respective regions by: (i) placing of orders with alcoholic beverage manufacturers for supply of Indian Made Foreign Liquor ('**IMFL**'), in an arbitrary and discriminatory manner; (ii) discrimination against certain brands of alcoholic beverages, despite high consumer demand; (iii) non-maintenance of minimum stock levels; and (iv) non-supply of IMFL brands in accordance with the retailer's demand despite express stipulation in the wholesale order.

Pursuant to the information, CCI directed DG to investigate the matter and submit a report on the veracity of the allegations. The DG's report held UT Marketing Board to be a monopoly in the market for procurement of alcoholic beverages in the state of Uttarakhand, and held that UT Marketing Board had abused its dominant position. However, DG did not find any contravention on part of Garhwal Mandal and Kumaun Mandal. Further to the DG's report and after hearing the parties, CCI issued a show cause notice to Garhwal Mandal and Kumaun Mandal, seeking an explanation as to why their conduct should not be held to be in contravention of the provisions of Section 4 of the Act. CCI also clarified that the issuance of the show-cause notice was not a final order on merits. CCI's order was challenged by UT Marketing Board before NCLAT.

NCLAT observed that CCI had not passed any penal order against the parties under any of the provisions under Section 27 of the Act. In fact, CCI's order clarified that it was not a final order on merits. NCLAT also noted that Garhwal Mandal and Kumaun Mandal, against whom the show-cause notices had been issued were not parties to the appeal and had not challenged CCI's order. Accordingly, NCLAT held that CCI's order did not fall under any of the provisions which are 'appealable' in nature under Section 53B(a) of the Act, and dismissed the appeal.

NCLAT Affirms CCI Order against Association of Malayalam Movie Artists & Others Imposing Penalty for Anti-Competitive Agreement

On March 13, 2020, NCLAT dismissed an appeal filed by the Association of Malayalam Movie Artists ('**AMMA**'), Film Employees Federation of Kerala, FEFKA Director's Union, FEFKA Production Executive's Union (collectively '**FEFKA**') and others, against a CCI order penalizing the above parties and their office bearers for contravention of Section 3 of the Act²⁶.

The information filed by Shri T.G. Vinayakumar ('**Shri T.G.**') before CCI pertained to alleged forceful boycott of his association by the opposite parties by reducing the strength of his association and forcing its members to split and form an alternative association i.e., FEFKA. Shri T.G. alleged that the opposite parties forced various actors, technicians, producers, financiers, not to work or associate with Shri T.G. in his projects by imposing bans, which led to many artists, producers etc., leaving his projects.

Upon appeal, NCLAT assessed the following points of evidence relied on by CCI in its order:

- i. Minutes of executive and general meetings of AMMA which showed instructions by FEFKA to impose a ban on anyone working with Shri T.G.. This established the nexus between AMMA and FEFKA;
- ii. Statements of producers and actors who were forced to leave their project with Shri T.G. due to the ban imposed by the opposite parties. One producer submitted a letter sent to Shri T.G. at the time recording the reasons for cancelling the project;
- iii. Circular issued by FEFKA that disciplinary proceedings were initiated against one of the producers who worked with Shri T.G.;
- iv. Letters issued by FEFKA highlighting that no members of FEFKA were working with Shri T.G.

NCLAT opined that CCI (and DG) had rightly come to their definite conclusion regarding the violation of Section 3 read with Section 48 of the Act by the opposite parties and their office bearers. Accordingly, NCLAT saw fit to not grant any relief and dismissed the appeal.



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²⁵ Competition Appeal (AT) No. 84 of 2018

²⁶ Competition Appeal AT No. 05 of 2017 (Order delivered on March 13, 2020)



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NCLAT Affirms CCI's Order Penalizing Verifone India Sales Pvt. Ltd. for Contravention of Abuse of Dominance

On March 13, 2020, NCLAT dismissed two connected appeals filed by Verifone India Sales Pvt. Ltd. (**'Verifone'**) against two orders passed by CCI finding an abuse of dominant position by Verifone (**'CCI Orders'**). The CCI Orders were passed pursuant to information filed by Atos Worldline India Pvt. Ltd. (**'Atos'**) and Three D Integrated Solutions Ltd. (**'Three D'**)²⁷.

Atos, in its complaint (**'Atos Case'**), alleged that in 2012, Verifone sent it a draft Software Development Kit (**'SDK'**) agreement with restrictive conditions and emphasizing that the same was not open to any negotiations and amendments. Atos further alleged that Verifone delayed the supply of products to Atos, which led to losses incurred by it. Further, on receipt of letters by Atos highlighting the unreasonableness of the SDK agreement, Verifone sent a termination letter to Atos. Atos further alleged that Verifone, a dominant player in the market for 'Point of Sale' (**'POS'**) terminals, tried to leverage its dominant position in the market for 'Value Added Services' associated with POS terminals. CCI, after a detailed investigation by DG, held that Verifone had abused its dominant position and violated several provisions of the Act. For instance, the terms of the SDK agreement amounted to the imposition of unfair conditions under the provisions of Section 4(2)(a)(i) of the Act. CCI further held that Verifone's conduct limited/restricted the technical and scientific development of VAS services used in POS terminals market in India which was in contravention of Section 4(2)(b)(i) and (ii) of the Act. Last, CCI also held that the conduct of Verifone with respect to seeking disclosure of sensitive business information from the customer in the downstream market of VAS services so as to enter the said market was in contravention of the provisions of Section 4(2)(e) of the Act.

A similar complaint was filed by Three D (**'Three D Case'**) where it was alleged that Verifone supplied restricted Electronic Ticketing Machines (**'ETMS'**) with an additional requirement to purchase SDKs, thereby leveraging its strength to enter into the market for software loaded in ETMS. Three D also alleged that Verifone tried to force Three D to sign a very restrictive agreement. Three D further alleged that Verifone illegally withheld certain integral components of the SDK supplied, thereby restricting Three D from using the ETMS. CCI came to a similar conclusion as in the Atos Case.

With respect to the Atos Case, while challenging CCI's market definition *i.e.*, market for 'POS terminal in India', Verifone submitted that all electronic payment devices perform the same function, with the same end use and therefore, the relevant market should be considered as the 'market for electronic payments in India'. Similar submission was made by Verifone in the Three D Case that the relevant market cannot be held to be 'POS terminal in India' as the supply of ETMS by Verifone to Three D does not relate to supply of POS terminals by Verifone. Verifone further submitted public reports to show that it had a smaller market share compared to its competitors during the relevant period of investigation. However, NCLAT noted that given the nature of the products and the market, there was no substitute for POS terminals and thus affirmed CCI's market definition. NCLAT further held that, given the material on record and the inquiry conducted by CCI and DG, it was not inclined to interfere in CCI's orders. Accordingly, NCLAT dismissed the appeals.

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²⁷ TA (AT) Competition No. 1 of 2017 (Order delivered on March 13, 2020)



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Corporate INTL, 2016



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Chambers Forum India Awards, 2019



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



Law Firm of the Year | Best Overall Law Firm of the Year
India Business Law Journal, 2020



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



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Asian Legal Business, 2018



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M&A Announced and Completed Deals League Tables
Thomson Reuters' Emerging Markets M&A–Legal rankings, 2019



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M&A Announced Deals League Table
Bloomberg's Global M&A–Legal rankings, 2019



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Mergermarket's Global and Regional M&A–League Tables of Legal Advisors, 2019



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