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NOTE FROM THE EDITOR IN CHIEF

The Editorial Board of the Centre for Competition Law & Policy (CCLP) is delighted to bring to you Issue 2 of the CCLP newsletter. This issue focuses on all the major developments in the field of Competition Law in India, between January and April 2021. The Newsletter also contains several articles which discuss contemporary issues in the field of Competition Law. The intention behind the inclusion of the same it to promote research and advocacy in the field of Competition Law.

I would like to place on record, my sincere gratitude towards the Vice – Chancellor of The National University of Advanced Legal Studies (NUALS), Prof. (Dr.) K. C. Sunny for the guidance and support that he has extended to the CCLP and its Editorial Board in bringing forth the second issue of the Newsletter. I would also like to thank Prof. (Dr.) Mini S, for her unyielding support and enthusiasm in helping us achieve the goals we set out to achieve.

Last but not the least, I would like to extend my gratitude and congratulations to the Editors, Senior Editors and the Deputy – Editor -in - Chief of the Editorial Board. The sincerity and commitment to work that each of you have showcased during the editorial process, given the dark and uncertain times that the nation and the world is going through at present, is nothing short of inspiring. You should be as proud of yourselves as I am of you.

Vismay G.R.N.

Editor - in - Chief
Editorial Board,

The Centre for Competition Law and Policy (CCLP), NUALS.

LIST OF ABBREVIATIONS

SL. No.	ABBREVIATION	MEANING
1.	AAEC	Appreciable Adverse Effect on Competition
2.	Act	The Competition Act, 2002
3.	AIOVA	All India Online Vendors Association
4.	BCI	Bar Council of India
5.	CIRP	Corporate Insolvency Resolution Process
6.	CCI	Competition Commission of India
7.	CLRC	Competition Law Review Committee
8.	DG	Director General (as appointed u/S. 16(1) of Competition Act, 2002)
9.	EC	European Commission
10.	EU	European Union
11.	GDPR	General Data Protection Regulator
12.	IBC	Insolvency and Bankruptcy Code
13.	MCA	Ministry of Corporate Affairs
14.	NCLT	National Company Law Tribunal
15.	NCLAT	National Company Law Appellate Tribunal
16.	OECD	Organisation for Economic Co-operation and Development
17.	OTT	Over-the-Top
18.	PDP Bill	Personal Data Protection Bill, 2019
19.	S.	Section
20.	Ss.	Sections
21.	SC	Supreme Court
22.	SSNIP	Small but Significant Non-Transitory Increase in Price
23.	u/S.	Under Section
24.	UPI	Unified Payments Interface
25.	v.	Versus
26.	Vol.	Volume
27.	w.r.t	With reference to

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GATEKEEPERS AND THEIR UNRIVALLED CONTROL IN DIGITAL MARKETS

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Digital markets are an integral aspect of the modern global economy, and as a result, data has become a vital resource. Whether personal or non-personal, data is gathered, tracked, processed, circulated, and re-used on a massive scale. Though data processing and circulation can be protected by copyright, or by getting "sui generis" database rights, as deemed trade secrets, or through data privacy regulations,[1] some technology giants or data intermediaries have access, not only to data collected by them, but also to data collected by businesses using their services.[2]

Entities having the ability to process and gather data have a strategic advantage because others rely on them for information. Their role becomes analogous to that of a journalist as they filter and process information to assess what content reaches audiences and what does not, eventually being able to influence public opinions.

Furthermore, such intermediaries may also integrate additional features or content to improve effectiveness. The ability to influence public opinion of such entities can be abused in numerous anti-competitive ways.[3]Given that data access can lead to market control, this article assesses the role of gatekeepers, which significantly influences the market by being in a strategic position.

1. WHO IS A GATEKEEPER?

A 'gatekeeper', as the name implies, is someone who keeps an eye over the entry to the premises. Similarly, in a digital market, the entity that controls market access for multiple users, due to its competitive role in the concerned market is called a 'gatekeeper'.[4] The de facto ability of a gatekeeper to control entry into the market is attributed to the strategic position of the entity in the digital market.[5] Since access to digital markets are typically essential for firms to do business or meet their targeted market, the entities guarding them obtain the right to serve as gatekeepers between other firms and their target market.[6]

[1] Commission Regulation 2016/679 of Apr. 27, 2016, Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, O.J. (L 119) (European Union).

[2] Bjorn Lundqvist, *Cloud Services as the Ultimate Gate(keeper)*, 7(2) J. ANTITRUST ENFORCEMENT 220 (2019) (Hereinafter *Lundqvist*).

[3] Petri Kuoppamäki& Tone Knapstad, *Switching Costs and Abuse of Dominance in the Industrial Internet of Things Platforms*, REGULATING INDUSTRIAL INTERNET THROUGH IPR, DATA PROTECTION AND COMPETITION LAW 277 (Rosa-Maria Ballardini, *et. al.* eds., 2019).

[4] *The Autorité de la Concurrence's Contribution to the Debate on Competition Policy and Digital Challenges*, AUTORITÉ DE LA CONCURRENCE (Feb. 19, 2020), 4, https://www.autoritedelaconcurrence.fr/sites/default/files/2020-03/2020.03.02_contribution_adlc_enjeux_numeriques_vf_en.pdf.

[5] Pablo SolanoDíaz, *EU Competition Law Needs to Install a Plug-in*, 40(3) WORLD COMPETITION L. & ECON. REV. 393 (2017).

[6] Jason Furman, *Unlocking Digital Competition Report of the Digital Competition Expert Panel*, GOVERNMENT OF UK (Mar., 2019), https://assets.publishing.servic

The position of such gatekeepers is so strategic that bypassing them and entering the foreclosure, or the guarded market ecosystem becomes nigh impossible. For example, Apple does not allow any other platform to offer applications to iPhone users, except through its App Store. As a result, anyone willing to enter the market for iPhone applications cannot avoid Apple and must agree to its terms, no matter how unjust they might be.

According to Europe's proposed Digital Markets Act, a gatekeeper is an entity that has a clear economic position with a substantial impact on the domestic economy, a strong intermediation position, or a rigid and permanent position.[7] The gatekeeper's function as an entity is usually the consequence of it being a patent holder, having network effects, or technological superiority in driving traffic to its network.[8] As a result, gatekeepers serve as facilitators between multiple consumer classes, and usually, as the dominant market player, they monitor access to the markets by offering products on their platforms.

It is not necessary that the gatekeeper completely prohibits access to a critical resource or that there is no alternative. However, the gatekeeper's strategic position makes it economically or technically unreasonable for customers to circumvent it. For example, Facebook and Google act as gatekeepers for the online advertising industry.[9] Even though other companies like Microsoft,[10] offer similar services in the online advertising industry, the position of Facebook and Google remains tactically advantageous due to the comprehensive data that they have accrued over time, as most businesses cannot provide services at par with Facebook and Google due to a lack of access to such data.

However, if any company attempts to invest in data accumulation to penetrate the data driven markets, the cost of their services would be more than that provided by Facebook and Google to compensate for their initial investment, making it economically unviable to use their services and ultimately solidifying the position of gatekeepers. Therefore, the gatekeeping status may be a 'cause' or a 'consequence' of access to critical resources, which is one of the criteria used to assess an entity's gatekeeping position.[11]

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e.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf (hereinafter *Furman Report*).

[7] *Proposal For A Regulation Of The European Parliament And Of The Council On Contestable And Fair Markets In The Digital Sector (Digital Markets Act)*, EUROPEAN COMMISSION (Dec. 12, 2020), https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608116887159&uri=COM%3A2020%3A842%3AFIN (European Union) (Hereinafter *DMA Act Proposal*).

[8] *Id.*

[9] Stigler Committee on Digital Platforms, *Final Report*, THE UNIVERSITY OF CHICAGO BOOTH SCHOOL OF BUSINESS, (Sept.,2019), https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf (Hereinafter *Stigler Report*).

[10] MICROSOFT ADVERTISING, https://ads.microsoft.com/ (last visited Mar. 30, 2021).

[11] See DMA Act Proposal, *supra* note 7.

2. COMPETITIVE CONCERNS DUE TO PRESENCE OF GATEKEEPERS

In this age of information, data is an essential and scarce resource,[12] which is why the volume and intelligent use of data often become deciding factors in a company's success.[13] Gatekeepers in digital economies are the nodes in data exchange, as they have enormous data which are required by other companies to carry out their businesses. Since gatekeepers serve as intermediaries by supplying vast amounts of data to companies who rely on it, they often abuse their lasting power by using data to promote their own services or locking the other party into biased arrangements favouring them.[14]

Data collection is critical for achieving and sustaining supremacy in any of the digital market domains.[15] The market dominance gained by proximity to, or ownership of massive data sets creates entry barriers for others.[16] Furthermore, network effects induced by established organisations' data-driven strategies often push the market dynamics in their favour.[17]

Gatekeepers have access to vast amounts of data, which gives them the ability to analyse the data and realise the consumers' preference of products and services. Understanding consumer preferences provides gatekeepers with a privileged business analysis of all the carried transactions, which offers them a confidential business picture across various domains.

Gatekeepers can further assert a great deal of control over the information visible to end-users by employing various means such as paying firms to make them their default service provider[18] or by preferencing their products above that of others.[19] In a recent case, Google was fined for abusing its market supremacy as a search engine as it was favourably listing its shopping services in general search as compared to the shopping services of others.[20]

In some instances, analysis of consumer preferences can be used to develop

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[12] *The World's Most Valuable Resource is no Longer Oil, But Data*, THE ECONOMIST (May 6, 2017),https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data.

[13] *Market Study on E-Commerce in India*, COMPETITION COMMISSION OF INDIA, (Jan. 8, 2020), para. 65 – 76, http://cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf (Hereinafter *CCI report on E-Commerce*).

[14] *Id* at para. 73.

[15] Wolfgang Kerber, *Digital Markets, Data, and Privacy: Competition Law, Consumer Law, and Data Protection'*, MAGKS, (Feb., 2016), https://www.uni-marburg.de/fb02/makro/forschung/magkspapers/paper_2016/14-2016_kerber.pdf

[16] Josef Drexl, *Designing Competitive Markets for Industrial Data - Between Propertisation and Access*, MAX PLANCK INSTITUTE FOR INNOVATION AND COMPETITION (Oct. 31, 2016),http://dx.doi.org/10.2139/ssrn.2862975.

[17] *Big Data—Bringing Competition Policy to the Digital Era*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (Oct. 27, 2016), https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf.

[18] Lisa Marie Segarra, *Google to Pay Apple $12 Billion to Remain Safari's Default Search Engine in 2019: Report*, FORTUNE (Sept. 29, 2018), https://fortune.com/2018/09/29/google-apple-safari-search-engine/.

[19] Case AT. 39740, Google Search (Shopping), 2017, C (2017) 4444 Final (European Union).

[20] *Id.*

commercial tactics to maximise market share and maintain hegemony in a particular product or service segment.[21] It opens up new ways to use price manipulation to exploit the equal footing between official and independent service providers.[22] There is always the possibility that large corporations will distort the data obtained to cement their business position in the face of competition and can quickly drive economies beyond the tipping point, where a healthy competition gives way to monopoly,[23] and the gatekeepers get the ability to control the markets.

In a recent case, the CCI questioned Google's actions of arbitrarily prioritising its payment application Google Pay by using the modality of prominent placement and search manipulations. The CCI observed that Google, by mandating Google Pay for paid apps and in-app purchases in the Google Play Store, while restricting other similar payment platforms, indicated a prima facie abuse of dominance and called for a detailed investigation into the matter.[24] Further, the Android case is another example of gatekeeping,[25] in which Google was found resorting to anti-competitive practices by arbitrarily excluding smartphone makers and mobile network providers who used Google's Android platform for their devices.

Gatekeeping by a few firms to critical markets is a pertinent concern for the antitrust regulatory bodies. The major problem is that the current laws cannot control gatekeepers' behaviour until and unless these firms resort to some explicit anti-competitive conduct once they become dominant. A gatekeeping position does not mean that the entity is dominant in the market, but it only has access to critical resources for penetrating the market. However, gatekeepers' power is enough to dictate the terms of agreements between them and the dependent firm. Moreover, their cemented position does not allow others to innovate, eventually making customers dependent on them, further reinforcing their dominance in the market. When such powers become deep-rooted, it will be tough returning to the competitive market,[26] without destroying the very existence of the market itself.

3. CONCLUSION

It is not unusual for gatekeepers in digital markets to access and use the data originating from their clients. By analysing and combining data of their own and data from its clients and consumers, the gatekeepers get a more precise image of the market. Such data advantages will not only allow gatekeepers to flourish in their core market, but they can further leverage their position in one market to another market, putting other players in a disadvantageous position.

Though competition regulatory bodies worldwide recognise the void in antitrust

[21] Lundqvist, *supra* note 2.
[22] Bertin Martens, *Access to Digital Car Data and Competition in Aftermarket Maintenance Services*, 16(1) J. COMPETITION L. & ECON.116 (2020).
[23] *Statement by Executive Vice-President Margrethe Vestager on the Launch of a Sector Inquiry on the Consumer Internet of Things*, EUROPEAN COMMISSION (Jul. 16, 2020), https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1367.
[24] XYZ v. Alphabet Inc. and Ors., 07/2020 (CCI).
[25] Case AT.40099, Google Android, 2018, C(2018) 4761 Final (European Union).
[26] Stigler Report, *supra* note 9, at 79.

laws for digital markets, the legal regime to regulate the gatekeepers is building up gradually. The EC has proposed the Digital Markets Act[27] to impose ex-ante measures for gatekeepers even without any abusive conduct. Ex-ante measures are applied to mitigate the effects of a reasonably apprehensible situation.

India is a prominent market for technology firms, and it cannot escape from antitrust issues arising in the rest of the world.[28] In one of its reports concerning India's e-commerce market,[29]the CCI flagged concerns with gatekeepers acting partially and acknowledged the need for gatekeepers to adopt self- regulation for a transparent business model. However, such policies are not at par with ex-ante regulations as proposed by EC, because the CCI would remain toothless due to the absence of a scrutinizing mechanism.

India needs to introduce a mechanism to scrutinise gatekeepers in digital markets to prevent any harm to competition. At present, competition law only comes into the picture when an entity has resorted to statutory anti-competitive practices.[30] The need to control such gatekeepers primarily dealing in data becomes more prominent because India also lacks regulation to protect its user's data, and firms remain unregulated regarding processing and usage of data.

[27] DMA Act Proposal, *supra* note 7.
[28]XYZ v. Alphabet Inc. and Ors., 07/2020 (CCI).
[29] CCI Report on E-Commerce, *supra* note 13.
[30] The Competition Act, 2002, §§ 3(4) & 4, No. 12, Acts of Parliament, 2003.

HAS CCI FINALLY CONSIDERED DATA CONCERNS WHILE ADDRESSING COMPETITION ISSUES?

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Introduction

The basis of the fourth industrial revolution is connectivity and data. Data will be the new natural resource for the world, which is at the brink of an exponential change.[31] However, the Indian regulators still find it difficult to accept the same and incorporate changes to monitor the data concerns. Although efforts have been made by the regulators and CCI to investigate these issues, not much has been achieved yet.

A few months ago, an Information, underlining the anti-competitive practices prevalent in the unified payments interface ("**UPI**") market was filed by a lawyer, Ms. Harshita Chawla[32]. It was alleged that the UPI market deals with customer-sensitive data, which if compromised would lead to data privacy and national security concerns, thereby anti-competitive activities being unchecked and unregulated. However, the CCI had only briefly mentioned that the customer-sensitive data might cause a problem but did not elaborate upon the issue. The court

[31] PTI, *Mukesh Ambani says data is new oil for fourth industrial revolution*, ECONOMIC TIMES, (Feb. 15, 2017), https://economictimes.indiatimes.com/news/company/corporate-trends/mukesh-ambani-says-data-is-new-oil-for-fourth-industrial-revolution/articleshow/57173843.cms?from=mdr.
[32] Harshita Chawla v. WhatsApp Inc and Ors., Case No 15 of 2020. [CCI]

had the opportunity to create a precedent on how big data should be analysed to understand competition concerns but unfortunately failed to address the same. A similar stance was expected from the CCI when it took suo-moto cognizance of WhatsApp's new "Take-it or Leave-it" Privacy Policy 2021'' (hereinafter "**WhatsApp Privacy Case**").[33] Fortunately, the CCI has now considered the data sharing mechanisms of big companies while deciding on the abuse of dominance and has ordered a detailed investigation into this matter. This article will discuss the issues relating to data sharing and why the recent decision was the need of the hour.

Determination of Relevant Market in digital platforms

Digital platforms have high switching costs, levels of data controls, and more importance is given to the network effects. Small but Significant Non-Transitory Increase in Price ("**SSNIP**") Test or hypothetical monopoly tests in such a case cannot define a relevant market as the digital platforms primarily provide free products or services in exchange for data. To define a multi-sided market, the competition authorities should also focus on data flows along with the monetary transactions. The European Commission ("**EC**") in a consultation paper proposed a new 'tool' that empowered it to assess individual cases.[34] Germany and Austria have also proposed transaction-based thresholds for mergers in the digital economy. Germany had revised its competition law in 2017[35] and introduced S. 18(2a) to the German Competition Act[36], under which due recognition is given to the treatment of the free products or services in digital platforms. The Competition and Markets Authority ("**CMA**") of the United Kingdom, have also formulated a new 'Share of Supply Test' to tackle the issues in digital markets.[37] Thus, while deciding the relevant market, the market should not be looked at traditionally. Rather, the focus should be on the similarity of data sets required by companies to operate in the market.

Impact of Network effects

The presence of network effects, both direct and indirect, play an important role in attracting users to a platform.[38] A network effect refers to the "*effect that one user of a good or service has on the value of that product to other existing or potential users.*"[39] For example, people

[33] In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users, Suo Moto Case No. 01 of 2021.

[34] ASCOLA Annual Conference, *Competition in a Digital Age: Changing Enforcement for Changing Times*EUROPEAN UNION, (Apr. 23, 2020), https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-digital-age-changing-enforcement-changing-times_en .

[35] Act against Restraints of Competition, § 18(2a),Act of 12 July 2018, Bundeskartellamt der Justiz und fur Verbraucherschutz (2018).

[36] Id.

[37] Competition Market Authorities, *Merger Assessment Guidelines* (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970322/MAGs_for_publication_2021_.pdf.

[38] UNCTAD, *Competition Issues in the Digital Economy* (May 1, 2019), https://unctad.org/system/files/official-document/ciclpd54_en.pdf.

[39] U.N. Economic Commission for Latin America and the Caribbean, *Data, Algorithms and Policies: Redefining the Digital World*, LC/CMSI.6/4(2018).

may use a particular over-the-top ("**OTT**") messaging platform because their peers use the same. The value of using digital platforms directly depends on the number of users on the platform. An OTT messaging platform can work only when the users are registered on the same network. Therefore, due to direct network effects,[40] the value of such a platform increases, as users attract more users towards the platform, creating entry barriers for new entrants and enhancing the quality of services through an increase in the database.

It can be said that network effects would only be a barrier to entry if there are switching costs on any of the sides of the platform.[41] An important success factor of platforms is their ability to create connections between relevant users.

No application in the country can compete with WhatsApp on engagements. According to the CCI, this was the reason to announce the "Take-it or Leave-it Policy" without any fear of losing out to competitors. Even though other apps like Signal and Telegram were promoted after the announcement of the new policy, there was no such loss of customer base for WhatsApp.[42] Thus, the CCI was convinced that network effects are a huge barrier for other players in the market of OTT messaging apps through smartphones in India.

Data and Competition Law

Data-driven network effects, economies of scale, and control of data create high barriers to entry. For example, Google has the required resources to identify users' search data and improve their algorithms, but new entrants do not have this advantage. In today's world, most start-ups enter the market but after being unable to compete with the big companies, get acquired by them. Therefore, the business models now, are based on a growth model wherein the foremost requirement is an increase in the number of users and not profits.

While deciding upon this issue, the CCI held that in digital markets, unreasonable data collection and sharing thereof, may grant competitive advantage to the dominant players and may result in exploitative as well as exclusionary effects, which is a subject matter of examination under competition law.[43]

WhatsApp adopting a "Take-it or Leave-it Policy" can also be attributed to the fact that India lacks a data protection legislation akin to that of the European Union's ("**EU**") General Data Protection Regulator ("**GDPR**"), which allows data collection only with the consent of the user.[44] The GDPR mandates an "opt-out" option, for sharing user content with the data controllers. In 2019, Facebook was handed a fine by the German

[40] Tim Stobierski, *What are Network Effects?*,HARVARD BUSINESS SCHOOL ONLINE, (Nov 12, 2020), https://online.hbs.edu/blog/post/what-are-network-effects.

[41] Meru Travels Solutions Pvt. Ltd. v. Competition Commission of India & Uber India Systems Pvt. Ltd., Appeal No 31/2016 [COMPAT].

[42] In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users, Suo Moto Case No. 01 of 2021, p. 20.

[43] Id.

[44] General Data Protection Regime, Article 6, (EU) 2016/679, European Parliament and Council (2016).

Bundeskartellamt for forcing its users to mandatorily allow Facebook to combine the data from other sources within its umbrella, such as Instagram and WhatsApp.[45]

The adoption of the Personal Data Protection Bill, 2019[46] ("**PDP Bill**") in India will ensure that users have control over the processing of personal data[47] in the digital market. At present, the intervention of the CCI is imminent and crucial.

The CCI delved deeper into the issues to understand the data concerns and was convinced that today's consumers value non-price parameters of services viz. quality, customer service, innovation, etc. equally if not more important as the price.[48] Moreover, these digital enterprises rely on data and data analytics, to a large extent. The cross-linking and user data integration, as done in various deals not only strengthens the data advantage but also reinforces the market power of dominant firms. Thus, the CCI has rightly ordered for a detailed investigation based on the above reasoning.

Draft (Competition) Amendment Bill, 2020[49]

Digital business models are generating economic value differently as discussed in the network effect section. Therefore, the Competition Law Review Committee ("**CLRC**") Report[50] in 2019 had suggested new thresholds for merger notification which would enable the CCI to make sector-specific thresholds. U/S. 5 of the Competition Act, 2002[51]merger thresholds are crossed only when assets or turnover are beyond a certain limit. This report suggested additional criteria based on deal value, size of the transaction, or any other criterion primarily to capture transactions in the digital market. This was accepted by the Draft (Competition) Amendment Bill, 2020 which has been awaiting public comments for over a year.

In the *Microsoft/LinkedIn* merger[52], the EC had stated that even though privacy concerns are the subject matter of data protection laws, it can be considered as a non-price competition factor in merger control assessments to the extent that consumers saw it as a significant factor in the quality of the services offered. The competition policies in the EU address digitization under two aspects. *Firstly*, the data control by the dominant player is

[45] Bundeskartellamt, Facebook, B6-22/16, (Feb. 6, 2019), https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5.

[46] The Personal Data Protection Bill, 2019, Bill No. 373 of 2019, (Dec. 11, 2019).

[47] Anurag Vaishnav, *The Personal Data Protection Bill, 2019: All you need to know*, PRS LEGISLATIVE RESEARCH, (2019), https://www.prsindia.org/theprsblog/personal-data-protection-bill-2019-all-you-need-know.

[48] Id.

[49] Draft (Competition) Amendment Bill, Feb. 20, 2020.

[50] Report of Competition Law Review Committee, MINISTRY OF CORPORATE AFFAIRS, (Jul. 26, 2019) https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf.

[51] Competition Act, 2002, § 5, No. 12 of 2003, Acts of Parliament (2002).

[52] Case M.8124 – Microsoft / LinkedIn, Regulation (EC) No. 139/2004 Merger Procedure (2016), https://ec.europa.eu/competition/mergers/cases/decisions/m8124_1349_5.pdf.

given due importance. *Secondly*, they focus on market structure, market power, dominance, as well as on market entry barriers arising from the control of big data.[53] The author proposes that a similar approach should be adopted in India, to tackle competition issues relating to big companies such as Google and Facebook.

In India, minimal importance is being given to such issues. In 2016, when the privacy policy of WhatsApp was challenged, the CCI had held that privacy laws were beyond their jurisdiction.[54] In its order approving Facebook Inc's acquisition of Reliance Industries Ltd., the CCI warned the parties regarding 'anti-competitive data sharing in the future.[55] However, the privacy concerns were not considered.

This time, however, the CCI has held a different stance. This is because WhatsApp has not given any option to users to opt-out from the new privacy policy which it had given earlier in 2016. Thus, WhatsApp has forced customers to comply with the new policies, which is prima facie treated as an abuse of their dominant position.

[53] Josef Drexl, *Designing Competitive Markets for Industrial Data – Between Propertisation and Access*, MAX PLANCK INSTITUTE FOR INNOVATION & COMPETITION RESEARCH PAPER NO. 16-13 (2016).

[54] Vinod Kumar Gupta v. WhatsApp Inc., Case No. 99 of 2016. [CCI]

[55] Order u/S. 31(1) of the Competition Act, 2002, Combination Registration No. C-2020/06/747, CCI. (June 24, 2020) https://www.cci.gov.in/sites/default/files/Notice_order_document/order-747.pdf.

Conclusion

Since the Competition Act was enacted in 2002, it rightly neglected the importance of data concerns. But after almost 20 years, there is a change is imperative. Although the Draft Amendment Bill, 2020 had proposed to include data as a threshold requirement for considering merger controls, it has still not been enacted.

The CCI had recognised consolidation of data and its role in creating barriers to entry for competitors as a parameter to determine possible Appreciable Adverse Effect on Competition for the first time in 2018. The CCI has time and again discussed the issue but has never ordered a detailed investigation based on data concerns, until this time. The CCI has finally considered data concerns in the WhatsApp Privacy case, but this cannot be treated as a precedent until the Director-General expresses a similar opinion and holds the companies liable for abuse of their dominant position based on data concerns.

COMPETITION LAW IN E-COMMERCE: A NEW PARADIGM

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Introduction

Gone are the times when people used to shop physically. Nowadays, we cannot imagine our lives without e-commerce websites like Amazon, Flipkart etc., which enable us to order even geographically distant things from the comfort of our

homes. In today's times of technological advancement and globalization, e-commerce has gained tremendous significance. However, lately, the small retailers and brick and mortar stores have raised several red flags concerning their anti-competitive practices. CCI has attempted to deal with these cases in an appropriate manner and has recently made efforts to understand this relatively new concept in a better way. This article attempts to analyze such instances and further elaborate the role of the CCI in regulating e-commerce.

Interplay between Competition law and Various Sectors

Over the past few years, the CCI has received several complaints against e-commerce companies, alleging violations of the Competition Act, 2002.[56] In 2017, Meru Travel Solutions Pvt. Ltd. alleged that Ola and Uber had abused their dominant position in the 'relevant market' and had also entered into anti-competitive agreements placing exclusivity restrictions on their driver-partners. The CCI ultimately concluded that no prima facie case of violation of Sections 3 & 4 of the Act was made out.[57] This case assumes significance as it addresses the hitherto untouched issue of common ownership among competing firms and how it can have an anti-competitive effect if such ownership amounts to an effective control. The Commission made it clear that though the present case was not fit for investigation, it would not hesitate to take action against common investments in e-commerce companies if they proved to be a roadblock in maintaining fair competition.[58] More recently, in 2018, these taxi companies were again accused of price fixing by using an algorithm; which not only deprived the drivers of an opportunity to compete with each other but also prevented the riders from negotiating prices with the drivers. The CCI ruled that there was no cartelization due to algorithmically fixed prices and that the fare was estimated taking into account several factors like traffic, festivals etc.[59] However, the decision received severe criticism on the ground that there existed a 'hub and spoke' cartel where the cab aggregator (hub) set the prices for the drivers (spokes) by way of a common algorithm.[60] While the Supreme Court and the NCLAT upheld CCI's stand[61], it should be noted that the UK Supreme Court has used fixing of fares as one of the

[56] Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

[57] In Re: Meru Travel Solutions Pvt. Ltd. and M/s ANI Technologies Pvt. Ltd.& Ors., Case No. 25-28 of 2017.

[58] Parag Shrivastava and Poonam Pal Sharma, *The Common Ownerships Conundrum*, INDIA CORP LAW(Mar. 16, 2021, 05:30 PM),https://indiacorplaw.in/2018/10/common-ownerships-conundrum.html.

[59] Sneha Johari, *CCI: Taxi companies Ola and Uber not Price Fixing or circumventing Competition Rules*, MEDIANAMA(Mar. 17, 2021, 08:23 PM), https://www.medianama.com/2018/11/223-cci-ola-uber-not-price-fixing/.

[60]ChandolaBasu, *Algorithms and Collusion: Has the CCI got it wrong?*, KLUWER COMPETITION LAW BLOG (Mar. 18, 2021, 03:20 PM), http://competitionlawblog.kluwercompetitionlaw.com/2019/02/28/algorithms-and-collusion-has-the-cci-got-it-wrong/.

[61]SamanwayaRautray, *Supreme Court backs CCI and NCLAT, says Ola and Uber driver not in cahoots*, THE ECONOMIC TIMES (Mar. 19, 2021, 02:45 PM), https://economictimes.indiatimes.com/news/politics-and-nation/sc-backs-cci-nclat-says-ola-uber-drivers-not-in-cahoots/articleshow/79746124.cms.

grounds for declaring Uber drivers as regular workers.[62]

Even the food delivery sector is not immune to the growing influence of online commerce. Besides several complaints filed with the CCI by small shopkeepers, about 500 restaurants made a representation to the CCI and PMO against food delivery apps like Zomato, Swiggy, Food Panda, Uber Eats etc. It contained a number of allegations which included abuse of dominant position, predatory pricing, in-house kitchens, deep discounting and internal sourcing.[63] In pursuance of the same, the Department of Industry and Internal Trade ("**DPIIT**") called for a meeting of key stakeholders from the food service industry with the objective of 'discussing mutual areas of interest for both sides and developing viable solutions for equitable growth'.[64] The Commission followed upon the same with another meeting to understand the contemporary trends of e-commerce and address persistent issues for ensuring co-existence of freedom of trade of small retailers and restaurants and innovations of online platforms.[65]

As far as the travel and accommodation sector is concerned, the anti-monopoly watchdog directed an investigation against MakeMyTrip and Oyo for the second time in six months. A probe into their unfair business practices was ordered in 2020 based on the complaint of Rubtub Solutions, the operator of Treebo Hotels. It was alleged that the travel service provider was abusing its dominant position in the market to restrict the entry of new players, by excluding the complainant from listing on its website. Later, when such restrictions were lifted, conditions like maintaining price parity and exclusivity in listing were imposed upon Treebo. Finding merit in the allegations, the CCI declared that both MakeMyTrip and Oyo had entered a vertical arrangement having an 'appreciable adverse effect on competition'.[66]

Another addition to this list is that of the e-commerce giants Amazon and Flipkart, given their ongoing feud with the CCI. In January 2020, the DG was directed to

[62] Aashish Aryan, *Explained: Will the UK ruling on Uber drivers have any impact in India?*, THE INDIAN EXPRESS (Mar. 20, 2021, 11:00 AM), https://indianexpress.com/article/explained/explained-will-uk-ruling-on-uber-drivers-have-an-impact-on-india-7197086/.

[63] Shubham Borkar and Poulomi Goswami, *Competition Law vis-á-vis Food Delivery Apps in India and its Impact on Small Restaurants*, MONDAQ (May 23, 2019), https://www.mondaq.com/india/antitrust-eu-competition-/808174/competition-law-in-india-vis-a-vis-food-delivery-apps-in-india-zomato-swiggy-foodpanda-uber-eats-and-its-impact-on-small-restaurants.

[64] Kritika Suneja and AlnoorPeermohamed, *Govt. summons Zomato, Swiggy and others over deep discounting, predatory pricing*, THE ECONOMIC TIMES (Mar. 22, 2021, 09:14 AM), https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/come-to-the-table-govt-tells-restaurants-foodtech/articleshow/70066210.cms.

[65] Ratna Bhushan, *CCI calls Meeting with Restaurants' body, EY to discuss E-commerce policy*, THE ECONOMIC TIMES (Mar. 24, 2021, 07:15 PM), https://economictimes.indiatimes.com/news/economy/policy/cci-calls-meeting-with-restaurants-body-ey-to-discuss-ecommerce-policy/articleshow/70219078.cms?from=mdr.

[66] Dhirendra Tripathi, *CCI finds merit in Treebo's complaint against MakeMyTrip, Oyo for further probe*, LIVEMINT(Mar. 25, 2021, 12:35 PM), https://www.livemint.com/companies/news/cci-finds-merit-in-treebo-s-complaint-against-makemytrip-oyo-for-further-probe-11582560640882.html.

investigate these companies on a complaint by Delhi VyaparMahasangh regarding deep discounting and tie-ups with preferred sellers.[67] However, Amazon obtained a stay from the Karnataka High Court against the probe order, claiming that the Commission's actions were nothing but an 'open-ended fishing expedition'. Shortly after, Flipkart also joined its rival in challenging the investigation. An interesting point that should be highlighted is the NCLAT order in the All-India Online Vendors Association ("**AIOVA**") – Flipkart case[68] regarding abuse of dominance, which overturned CCI's decision that was rendered in favour of Flipkart. Experts have predicted that the decision of the appellate body will have major implications on the above-mentioned case as Amazon had relied on this case heavily for the purpose of obtaining its stay order.[69] Presently, an appeal filed by the complainant and its parent body, the Confederation of All India Traders (CAIT) is pending before the Karnataka High Court[70], which is also hearing CCI's petition against the stay order as per the Apex Court's directions.[71]

Analysis

From the abovementioned instances, a few observations can be made. Firstly, the competition issues are not limited to any industry or sector. Moreover, the attempts of e-commerce companies to diversify further complicate the situation and endanger fair competition. Secondly, there has been a shift in CCI's attitude towards such companies. Earlier, the CCI used to consider e-commerce to be at a nascent stage in India and thus, incapable of dominating retailers. But with the passage of time, it has been realized that the reach of these companies in today's times is growing rapidly. This is evident from its recent orders where it has unequivocally declared that it will not hesitate to act against e-commerce companies if the need arises. While this increasing sense of awareness is important, there are several concepts relating to use of modern technology and new economic models which are still unexplored.

With the dominance of e-commerce companies being perceived as an imminent threat, the CCI decided to have a better understanding of the contemporary trend of e-commerce and its implications on

[67] Ruchika Chitravanshi, *CCI to probe Amazon, Flipkart for deep discounts, preferred sellers model*, BUSINESS STANDARD (Mar. 26, 2021, 06:55 PM), https://www.business-standard.com/article/companies/cci-to-probe-amazon-flipkart-for-deep-discounts-preferred-sellers-model-120011301150_1.html.

[68] All India Online Vendors Association v. Competition Commission of India & Ors., Compt. App. (AT) No. 16 of 2019.

[69] *Unfair Practices: NCLAT directs Competition watchdog to probe Flipkart*, THE ECONOMIC TIMES (Mar. 28, 2021, 02:10 PM), https://economictimes.indiatimes.com/industry/services/retail/unfair-practices-nclat-directs-competition-watchdog-to-probe-flipkart/articleshow/74471069.cms.

[70] JapnamBindra, *Apex Court dismisses plea against Flipkart, Amazon*, LIVEMINT, (Mar. 29, 2021, 09:36 PM), https://www.livemint.com/companies/news/apex-court-dismisses-cci-plea-against-flipkart-amazon-11603765606067.html.

[71] Peerzada Abrar, *Karnataka HC starts hearing CCI petition against Amazon, Flipkart*, BUSINESS STANDARD, January 19, 2021, (Mar. 30, 2021, 10:21 AM), https://www.business-standard.com/article/companies/karnataka-hc-starts-hearing-cci-petition-against-amazon-flipkart-121011900029_1.html.

competition. This led to an 'E-Commerce Market Study' being conducted by CCI, whose report was released in January 2020. Through this study, it sought to identify impediments posed by e-commerce to fair competition to prioritize its enforcement and advocacy policies accordingly. Key issues highlighted therein are as follows:[72]

1. Platform Neutrality – The tendency of online platforms to act both as marketplace and a competitor on the marketplace gives the platform leverage in several aspects, be it having access to competitively relevant data, ability to manipulate search rankings of competitors, dictating terms and conditions of listing etc.

2. Platform-to-business Contract Terms – There is a fundamental difference between the objectives of the platforms and business users, due to which platforms engage in unilateral revision of contract terms, use of exploitative tactics like deep discounting and insistence on using the platform's delivery fleet.

3. Platform Price Parity clause – To ensure lowest price of goods and services for their platforms, price parity clause is imposed on business users. This effectively restricts them from offering their goods or services at a lower price on other platforms.

4. Exclusive Agreements – Certain business users commit to being listed exclusively on a particular platform or where a platform lists only a particular brand in a product category.

5. Deep Discounting – Platforms decide the discount scheme themselves without involvement of business users resulting in lack of transparency. Sometimes, deep discounting also leads to predatory pricing.

While the Commission declared that it would deal with the aforesaid issues on a case-to-case basis, it urged the e-commerce companies to self-regulate themselves to do away with information asymmetry and bargaining power imbalance. The measures recommended by the fair-trade watchdog include laying down a framework for the basic contractual terms between platforms and business users, making a clear policy with respect to discounts, maintaining transparency over user reviews and ratings, publicizing a general description of the search ranking parameters etc.[73]

Conclusion

In conclusion, competition law has assumed a new dimension where e-commerce is concerned. For any country, traditional commerce, and e-commerce both are equally important. Tasked with the responsibility of maintaining a balance between the two sides, the regulatory authority CCI has finally taken up a more active role on this front. While conducting the market study to understand online commerce trends and issues is a good first step, there is still a long way to go in terms

[72] *Market Study on E-Commerce in India: Key Findings and Observations*, COMPETITION COMMISSION OF INDIA, 20-34 (Jan. 2020), https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf.

[73] *Id* at 36-37.

of enforcement. Also, with e-commerce being a multi-disciplinary concept, corresponding policies need to be prepared keeping in mind the motto of CCI, i.e., 'fair competition for the greater good'.

LACUNAE IN ANTI-DUMPING LAW: NEED FOR A REFINED COMPETITION LAW

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"Regardless of the industry, competition law is meant to benefit consumers – not competitors."

- ***Marvin Ammori***

Introduction

Competition challenges are getting more prominent in the contemporary regime of technology and advancement. The primary objective of the Competition Act, 2002 ("**the Act**") is to eliminate hindrances to fair competition and promote and maintain healthy competition in the country.

However, the enforcement of certain laws is contradictory to the nature of competition law. Therefore, it is highly imperative to consider the laws which have a negative impact on healthy competition in India. One among such laws is the anti-dumping law. Anti-dumping law is a mere protectionist tool that aims to protect the domestic industries irrespective of their standard against dumping of products at the cost of consumer welfare. The imposition of anti-dumping duty results in a plethora of anti-competitive effects on the economy and market.

Before the Act was enacted, the Supreme Court delivered a judgment in the case of *Haridas Export v. All India Float Glass Association*,[74] where it was held that both the Customs Tariff Act, 1975, and the Monopolies and Restrictive Trade Practices Act, 1961, operated in two separate and independent fields. This judgment, however, may not be in pace with the changing competition challenges.

Rejecting this view, this paper aims to understand the jurisprudence behind both the laws and focus on harmonising competition law with anti-dumping law. This paper further discusses the need to revamp competition law by incorporating the provisions of anti-dumping law under the competition law regime for better enforcement.

Implications of Anti-Dumping Law on Competition

There are certain procedures under anti-dumping law that stand to destroy the very basic objectives of competition law. *Firstly*, to initiate anti-dumping duty process, an application has to be forwarded by the "Domestic Industry," that is interpreted as the domestic producers, of the like products as a whole, or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except when producers are related to the exporters or importers, or are themselves, importers of the allegedly dumped product, the term "domestic

[74]Haridas Export v. All India Float Glass Association, (2002) INSC 298.

industry" may be interpreted as referring to the rest of the producers.[75]

Therefore, the above-mentioned definition makes it clear that all the domestic manufacturers must be grouped, to bring an action and make the importer liable. This is anti-competitive in nature and it ultimately leads to collusion. This anti-dumping procedure is against the objective of competition law. In *All India Tyre Dealers Federation v. Tyre manufacturers*,[76] the court ordered that the act of colluding by the tyre manufacturers for filing an anti-dumping petition shall be considered anti-competitive.

Secondly, the investigating authorities usually favour the domestic industry as anti-dumping law is a protectionist tool. Having a lot of discretionary power, the investigating authorities favour the domestic industry and make a finding which is advantageous to the domestic industry.

Thirdly, the anti-dumping law protects domestic producers irrespective of their standards. Less efficient industries are also protected within the ambit of anti-dumping law. This feature of the anti-dumping law is detrimental to healthy competition and the Act requires the less efficient industries to exit the market if they are not competent enough.

Threat to Consumer's Welfare

S. 9A of the Customs Tariff Act[77] prohibits not only predatory pricing but also price discrimination. In contrast to this, competition law allows price discrimination if it is welfare enhancing. The provisions of anti-dumping law being contrary to competition law, it is the consumers who are ultimately affected.

The anti-dumping provisions are ignorant of the benefits available to the domestic market, even if it is at a lower price. These benefits include, the consumers paying a lower price, which coerces the domestic industries to produce economically efficient products and ultimately augments innovation.[78]

However, the imposition of anti-dumping duties shrinks the import competition that detrimentally affects the rights of the consumers u/S. 2(9) of the Consumer Protection Act, 2019. Wherein, S. 2(9)(iii)[79] states that the consumers should be assured access to quality products at competitive prices. However, the anti-dumping law protects the producers at the expense of hindering the consumer rights u/S. 2(9) of the Consumer Protection Act, 2019 that ultimately leads to high prices, poor quality products, and less consumer choice of products.

[75] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994, Article 4, https://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm#ArticleIV.

[76] All India Tyre Dealers Federation v. Tyre manufacturers, (2013) COMP LR 92 (CCI).

[77] Customs Tariff Act, 1975, § 9A, No. 51, Acts of Parliament, 1975 (India).

[78] RishabKhare, *Anti-dumping law and competition law: A case of intersecting lines*, MONDAQ, https://www.mondaq.com/india/antitrust-eu-competition-/782654/anti-dumping-law-and-competition-law-a-case-of-intersecting-lines.

[79] The Consumer Protection Act, § 2(9), Acts of Parliament, 2019 (India).

Moreover, this practice of imposing anti-dumping duty shall be a restrictive trade practice u/S. 2(41) of the Consumer Protection Act, 2019,[80] as it tends to bring manipulation of price and affects the flow of supply.[81]Thus, anti-dumping law can be justified neither under competition law nor under consumer protection law.

Issues for Advocacy

As mentioned above, the anti-dumping law largely contradicts competition law and causes an adverse effect on competition. It is high time that the issues should be considered and resolved.

The anti-dumping structure paves the way to the domestic producers with an upper hand and they take the aid of the government to prevent foreign competition even when there is no real proof of dumping. Anti-dumping laws are vague and ambiguous, creating confusion. Since there are many standards, the producers are not aware of the standards on which they are accountable.[82]For instance, an OECD study[83] showed that the measure of anti-dumping 'can be abused for a protectionist purpose.'

Anti-dumping law also prevents a valid contract that can take place between parties at a mutually agreed price. This affects their rights from the standpoint of the contracting parties. They protect the minority group i.e., the producers, and neglect the welfare of the majority i.e., the consumers. Thus, the authors feel that the anti-dumping measures are unethically used as a weapon to curb healthy competition.

Harmonious Construction of the Two Regimes

Considering the above effects, the government must take steps to dismantle the anti-dumping law and integrate it with the competition law. However, it shall not be feasible to pursue the same unilaterally. A notable solution to this is to negotiate bilateral agreements. There are certain regional trade agreements in which the member countries have taken measures to abolish the anti-dumping law. For example, the Closer Economic Relations Agreement,[84] that was signed between Australia and New Zealand.

Further, another option is to bring stricter standards in the investigation process of anti-dumping cases. The definition of 'dumping' shall be revamped, restricting its scope to predatory price alone. The authorities must consider the factor of public interest before imposing duties. Anti-dumping duty shall be levied only if the dumping hampers public welfare.

[80] Id, § 2(41).
[81]Sakshi Shairwal and Sampoorna Chatterjee, *Anti-dumping law and competition law: An Overview*, LEXOLOGY, https://www.lexology.com/library/detail.aspx?g=7337adbb-edbb-4f0e-a189-6a8bd6704ecc.
[82]SeyedehsaedehKazemi, *Antidumping and Competition Law: A Critique*, 4 INTERNATIONAL JOURNAL OF MULTIDISCIPLINARY RESEARCH AND DEVELOPMENT, pp. 216-220 (2017).
[83] International Trade and Investment Division, *Trade and Competition: Frictions after the Uruguay round*, OECD (Economics Department, Working Paper No. 165), https://www.oecd.org/regreform/reform/1863507.pdf.
[84] Closer Economic Relations Agreement, 1983, No. 2, https://newzealand.embassy.gov.au/wltn/CloseEconRel.html.

Some countries like Australia,[85] Canada, and, the European Union, have already inaugurated the concept of the 'Public Interest' test.

Lastly, when the anti-dumping laws have such anti-competitive effects, it would be just to have an opinion from the CCI regarding the same. The CCI may consider resolving the conflicts existing between the two laws, which makes the process of investigation more efficient.

S. 21 of the Act states that, wherein the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken, or proposes to take, is or would be, contrary to any of the provisions of this Act, then such statutory authority may make a reference in respect of such issue to the CCI.[86]

With respect to S. 21 of the Act, when any issue is contradicting the provisions of the competition law, a reference shall be made by the statutory authority to the CCI and act in accordance with the findings of the CCI. This would minimize the conflict between the two laws.

Need for a Refined Competition Law

While anti-dumping laws have had large implications on the competition in the market, the Act is silent on these aspects. There have been contrasting provisions under both laws. The CCI, being more effective in dealing with issues that affect competition and placing paramount importance on consumer welfare, must exercise power to decide on the same. Hence, the authors feel that the Act can be expanded by incorporating the following provisions of the anti-dumping law;

1. An acceptable and appropriate definition of the term "Dumping" shall be brought under the definition clause of the Act.

2. The list of pre-conditions required for the establishment of anti-dumping shall be made crystal clear.

3. Exclusive provisions shall be inserted towards an investigation of anti-dumping cases.

4. An expert committee shall be constituted to assess the material injury to the domestic producers. Also, consumer welfare shall be prominently considered under such assessment.

5. Any imposition of anti-dumping duty shall be subject to review by the CCI. Such review shall be done either *suo moto* or on any request received from the interested party. In addition to this, provisions for appeal must be incorporated.

Several countries across the globe have taken steps towards giving supremacy to antitrust laws. In the case of *United States of America v. SKWMetalsand Alloys INC., and Charles Zak*[87] three of the largest ferrosilicon producers formed a cartel. Under the anti-dumping regime in the USA, this cartel was able to impose anti-dumping duty on any exporter and was

[85] AlyceCassettai, *What is the Public Interest Test?*,RYAN &DUREY SOLICITORS, https://ryandurey.com/what-is-the-public-interest-test/.

[86] The Competition Act, § 21, No. 12, Acts of Parliament, 2002 (India).

[87] United States of America v. SKW Metals and Alloys INC., and Charles Zak, (2000) 195 F.3d 83.

eventually imposed on a Brazilian exporter. The members of the cartel suffered civil and criminal consequences. Further, the International Trade Commission also revoked the anti-dumping orders. It may thus be concluded that anti-trust laws are given prominence over anti-dumping laws in the United States.

Similarly in the European Union ("**EU**"), the EU Treaty distinctly states that if the implementation of any policy is inconsistent with Article 81 (Restrictive Practices), and Article 82 (Abuse of Market Dominance), the same shall not be admitted. Such price undertakings that are anti-competitive shall not be recognized.[88]

Conclusion

Though anti-dumping law and competition law emerge from the same tree, there are a lot of differences between the two with regard to their objectives. Consumer welfare is the goal of all legislation. However, anti-dumping law serves to protect domestic producers at the cost of consumer welfare. The provisions of anti-dumping law are being misused and have deviated from their original motive. Hence, harmonization of the two laws is highly demanded at present.

Therefore, phasing out anti-dumping law in favor of a refined version of competition law is imperative to ensure fair competition in the market and utmost consumer welfare. The CCI must pay attention to this serious concern as it would perturb the competition policy regime in the long run.

[88] *Supra*, at 81.

COMBATING CARTELS VIA LENIENCY: HISTORY, CONCERNS AND THE WAY FORWARD

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Introduction

In competition law, a cartel is a lobby of competitors who set production levels, or allocate consumers, vendors, countries, or lines of commerce to share or split markets, all of which encompass different dimensions of anti-competitive practices. S. 2 and S. 3 of the Competition Act, 2002, [hereinafter, "the Act"] define cartels and lay out a comprehensive entailment of anti-competitive agreements respectively, while S. 19 of the Act empowers the CCI to inquire into agreements of an enterprise which maybe in contravention of the Act. The CCI also has the authority to levy a penalty of up to three times the earnings, or 10 percent of each participating company's revenue on each year of perpetuation of a cartel arrangement, whichever is greater.

The cartels, in order to avoid the proceedings against them, tend to function furtively. In order to facilitate the combat against the cartels, the Commission has introduced the leniency program. A dearth of evidence makes the initiation of proceedings unlikely, however strong the likelihood of the existence of the cartel may be. The crux of the leniency program is the exchange of information by the cartel members to the Commission for up to 100% reduction of the penalty which would have been levied, had they been caught in such cartelization. There must be a "vital disclosure" by the applicant which

would fundamentally involve full and true information.

The (Lesser Penalty) Regulations, 2009, along with S. 46 of the Act gives the Commission the authority to impose a lesser penalty. An applicant who has appealed under the leniency provisions must have stopped being a part of the cartel. Further, the information furnished by the first applicant must enable the commission to form a prima facie opinion about the existence of the cartel, for which the penalty may be reduced upto 100%.[89] For the second and the subsequent applicants, the information furnished must be novel and the scope for penalty reduction decreases to 50% and 30% respectively.

Background

The Indian regime revolving around the cartel leniency program was primarily run at the discretion of the CCI prior to the 2017 Amendment. Such a mechanism witnessed some pointed discrepancies in terms of the penalty-benefit ratio. In the Brushless DC Fans case,[90] CCI granted a 75% penalty reduction for the first applicant with his leniency application and evidence adduced thereto. The whole of the immunity benefits was not provided to this applicant because the commission had already formed a prima facie opinion before being approached. However, this trend was inconsistent with the Zinc-carbon dry cell manufactures cartel case,[91] where a 100% reduction in penalty of the first applicant was followed by a 20%-30% penalty reduction of the other two consecutive applicants in light of their cooperation in the investigation. The latter further makes the evaluative mechanism of the program obscure. Suppose the first applicant was awarded a full reduction and the subsequent applicants were still entitled to a penalty reduction. In that case, it can be inferred that the criteria for an absolute abatement may not require a full disclosure of all the material facts relevant to the cartel, notwithstanding the knowledge of the applicant.

It can be noted that a comprehensive set of penalty guidelines, which could be detrimental in ascertaining the quantum of the abatement, is imperative. It is, however, pertinent to note that the 2017 Amendment to the Lesser Penalty Regulations, brought a steep development by making it compulsory for the Commission to reduce the penalty when all the conditions for the disclosure are met. The quantum of the penalty reduction is upon the Commission to decide and the same needs an evaluative framework for determination. Albeit the merits will differ from case to case and so would the question for competition law, a set of guidelines can streamline the process of determining the reduction in a considerably uniform manner.

In order to further concretize the objective of the Competition Act, the Competition Law Review Committee submitted its report to the MCA which contained certain

[89] The Competition Act, 2002, §26(1), Acts of Parliament, 2002 (India).

[90] In Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items, Suo Moto Case No. 03 of 2014.

[91] In Re: Cartelisation in respect of zinc carbon dry cell batteries market in India, Suo Motu Case No. 03 of 2017.

recommendations for the leniency program.[92] Some significant changes were also introduced in the Leniency Draft Regulation Amendment Bill, 2020, which is a welcome step. Broadly, it has proposed certain organizational changes in tandem with the role of a governing body, the DG and the CCI. In addition to this, the Bill also talks about widening the scope of applicants, allowing withdrawal of applications while retaining the evidence, and granting powers to the DG to impose criminal sanctions.

Recommendations to Improve the Leniency Program in the Indian Scenario.

OECD, has observed that the regulations lack codification with respect to the phrase "vital disclosure" and leave it open to subjectivity. This invites a dilemma in the mind of a potential applicant as to whether his information is "vital" and if so, to what extent.[93] US and EU antitrust laws have such codification in granting amnesty which, in turn, enable the applicants to approach the Commission with an informed state of mind. Some other recommendations are:

Amnesty/ leniency plus: It is pertinent to note that the regulations have to not only restrict averting people actively involved in cartelization, but also attract people into bringing to the fore, more such instances in their knowledge. In order to ensure the same, the provision of "leniency plus" can prove helpful. Under this scheme, an enterprise or individual willing to disclose any information to the antitrust authority about its involvement with another cartel activity also evades penalty.[94] It not only provides information about the cartel that the applicant comes forward with, but any other cartel that may be in place.[95] This scheme serves the purpose of deterrence, one of the four-fold strategies employed by the OECD in order to curb cartels, the other three being detection, penalty, and cessation. It is to be noted that this provision has been added in the Draft Leniency Regulation Amendment Bill, 2020.

Marker system: In order to facilitate data chronology in a regular fashion, it is also important to incorporate a "marker system." The very nature of cartelization demands involvement of more than one party in its activities. In a situation where there are two or more applications before the Commission at the same time, which is not uncommon in the history of leniency applications, questions can be raised with regards to the basis on which one applicant was placed before the other. Hence, as a procedural safeguard, it is of utmost importance for the Commission to maintain a concrete leniency queue designed for the purpose of preserving and protecting the cartel member's place.

[92] REPORT OF THE COMPETITION LAW REVIEW COMMITTEE, July 2019, https://www.ies.gov.in/pdfs/Report-CompetitionCLRC.pdf.

[93] OECD, *Review of the Recommendation of the Council concerning Effective Action against Hard Core Cartels*, DAF/COMP (2019) 13.

[94] Udai S. Mehta, *Designing Effective Leniency Programme for India: Need of the Hour*, CUTS INTERNATIONAL, https://cuts-ccier.org/wp-content/uploads/2019/01/Designing_Effective_Leniency_Programme_for_India-Need_of_the_Hour.pdf.

[95] *Id.*

Procedural fairness: In the case of *Premier Rubber Mills v. Union of India*,[96] it was held that a prima facie formation of opinion on the account of vital disclosure does not entail an adjudicatory action against any party. It was observed that at such stage, an application for audi alteram partem is uncalled for. However, the role of the Commission in this regard cannot do away with the natural justice obligations under the garb of performing purely executive actions. The function of the Commission in dispute resolution or case disposal has to be seen as a quasi-judicial function in order to ensure a seemingly fair procedure.

Hypothetical Applications: India's leniency regime is still in a relatively nascent and evolving stage as compared to advanced leniency programs such as in the EU. The latter's leniency system has an option for a "hypothetical application," which is a mechanism mitigating the apprehensions of hesitant applicants.[97] It allows the applicants to submit a detailed list of evidence to the Commission which will determine whether the list qualifies the immunity threshold. Such a list may not contain the name of the members of the cartel and the applicant. An example of the listed evidence could be related to a meeting of the cartel members which could include the relevant discussions that occurred in such meeting.[98] This allows the applicant to first ensure whether their application will qualify under the program without disclosing the identities of the parties involved. Bringing about a similar system in India can help safeguard the interests of the potential applicants and pacify their concerns.

Conclusion

The 2020 Draft Amendment has taken significant measures in order to fill the lacunae in the prevailing mechanism of leniency regulations. It has, in some way or the other, reduced the lopsided discretionary power with the CCI. In theory, many changes introduced in the amendment have extracted successful provisions from the US/EU and the way forward is highly likely to engage more people in the loop because of better employed strategies. Having said that, the aforementioned suggestions can ensure a more full-proof cartel leniency system.

CASE COMMENT: CCI'S ORDER TO MAKEMYTRIP TO RE-LIST FABHOTELS AND TREEBO HOTELS

CCI Case No. 14 of 2019 and Case No. 1 of 2020

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Background and Factual Context

In pursuance of an interim relief granted by the CCI on 09 March 2021, an order u/S. 33 of the Competition Act, 2002[99] was passed under which MakeMyTrip Pvt. Ltd. ("**MMT**") and Ibibo Group Private Limited or Go-Ibibo ("**Go-Ibibo**") were

[96] Premier Rubber Mills v. Union of India, W.P.(C) 1969/2016.
[97] Press Release, *Competition: Revised Leniency Notice — Frequently Asked Questions*, European Commission, Dec. 7, 2006, MEMO/06/469.
[98] Bertus van Barlingen, *The European Commission's 2002 Leniency Notice after one year of operation*, EC Competition Policy Newsletter, No. 2, Summer 2003, pp. 16.
[99] Competition Act, 2002, § 33, Parliament of India 2002 (India).

directed to re-list the properties of FabHotels (Casa2 Stays Pvt. Ltd.) and Treebo Hotels (Rubtub Solutions Pvt. Ltd.) (collectively and further referred to as 'The Applicants') on its online portals.[100]

This order was issued as a result of the actions engaged in by MMT and OYO wherein they allegedly entered into a vertical arrangement that caused an Appreciable Adverse Effect on Competition ("**AAEC**") in the market; especially on companies likeTreebo and FabHotels.[101]

Subsequently, the Applicants then approached the regulatory watchdog in order to obtain an interim relief and get re-listed on the online portals of MMT and Go-Ibibo. The main contention put forth in favour of this relief order was the undeniable and irreparable harm meted out to the Applicants due to the terms of the anti-competitive arrangement between MMT, Go-Ibibo and OYO. This arrangement was alleged to be manipulating market dynamics and causing a hindrance to the free and fair flow of competition.[102] A vital element to be noted in this instance was also the huge losses that the hotel industries were coping withas a result of the restrictions imposed by the Pandemic in 2020.

Analysis

In order to come to an accurate assessment of the anti-competitive nature of the impugned arrangement, they analysed the facts of the case in relation to the ingredients set forth by the Supreme Court in *CCI v. SAIL*[103] which included:

• Proof with clear terms and no reasonable doubt that the impugned act has been committed and is in violation of the provisions of the Competition Act.

• Irrevocable and irreparable damage that the impugned arrangement is causing or its likeliness to cause an AAEC in the market sphere.

In the instant case, the CCI believed that the actions meted out against the Applicants were truly depreciating their business and compromised on the fairness of market competition. This caused an AAEC for MMT and Go-Ibibo and it met the standard of requirement needed to pass an interim order in favour of the Applicants. They also realised that the passing of such an order would not only relieve the Applicants of the inconvenience causedbut would also benefit MMT and Go-Ibibo as they would earn more revenue through commissions of increased bookings of the Applicant's hotels.[104]

Another important consideration considered by the CCI was the increase in the dependency of online platforms with

[100] Interim_Order_14-of-2019 and 01-of-2020.pdf (cci.gov.in)
[101] Alnoor Peermohamed, *OYO Rooms: CCI tells MakeMyTrip to relist Oyo rivals Treebo, FabHotels*, THE ECONOMIC TIMES, (March 30, 2021, 9:30pm), https://economictimes.indiatimes.com/tech/startups/cci-tells-makemytrip-to-relist-oyo-rivals-treebo-fabhotels/articleshow/81421118.cms.
[102] Sandip Soni, *CCI asks MakeMyTrip to relist FabHotels*, THE FINANCIAL EXPRESS, (March 10, 2021, 7.30 pm), https://www.financialexpress.com/industry/sme/cci-asks-makemytrip-to-relist-fabhotels-treebo-nearly-3-years-after-their-delisting-post-tie-up-with-oyo/2210018/.
[103] CCI v. SAIL, 2010 (10) SCC 744.
[104] *Id*. at 3.

the imposition of restrictions after the onset of the COVID-19 pandemic. This meant that a denial or obstruction in the access of listing a company in such dominant online platforms, as was termed in the impugned arrangement, could be extremely detrimental to businesses of such companies, who depended on online portals to reach their end-consumers. Therefore, the CCI concluded that the arrangement that caused the delisting of the Applicant companies was adversely affecting the level of competition in the market and in pursuance of this, directed MMT and Go-Ibibo to re-list the Applicants on their online portals.

Observations and Conclusion

The Hotel Booking market has undergone immense fluctuations in recent times due to the unprecedented nature of the pandemic. It has become a highly competitive industry with close-cut competition between different players in the industry. This order brought to light the willingness of the CCI to intervene in cases dealing with anti-competitive agreements entered into by dominant online portals in light of the transition to the virtual mode of business as brought about by the pandemic. It is essential for the Competition regulatory authority to exercise its vigilance to ensure that market competition and its virtues are respected and upheld by players even in the online mode of business in contemporary times. The digital space is undeniably and inevitably assuming an accentuated level of importance and dependency and this change must be considered from the perspective of competition law as well.

CASE SUMMARIES

Competition Commission of India

IN RE: S. KANNAN, MANAGING PARTNER, M/S ARCUS ENTERPRISES V. ASIAN PAINTS LIMITED, CASE NO. 53 OF 2020.

Date of order: 12.04.2021

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Ratio: Allegation of abuse of dominant position does not arise merely when a criminal complaint has been filed.

Brief Facts: The information was filed by the informant (S. Kannan) u/S. 19(1)(a) of the Act against the opposite party, Asian Paints Limited, alleging contravention of S. 3 and 4 of the Act. The informant was involved in a small-scale business of manufacturing primers and paints under the brand name ‘Arcus’. In a complaint filed by the opposite parties, it was claimed that M/s Arcus Enterprises was selling damaged products under the brand name ‘Asian Paints’. The informant alleged that the complaint filed was false and this was done to drive competition out of the market and deny market access to competitors, claiming the Opposite Parties to be in contravention of S. 3(4) and 4 of the Act.

Analysis: The CCI noted that the matter arose when a criminal complaint was instituted against the Informant by the Opposite Parties. The CCI noted that no facts or evidence had been brought forward by the informant to sustain his allegations of violation of either of the provisions of S. 3 or S. 4 of the Act. The

CCI believed there was no information as to how S. 4 of the Act was being attracted here. It also stated that merely filing a criminal complaint was not an abuse under the provisions of the Act and that there was no competition concern that arose in the same matter. Therefore, the CCI closed the case stating that there exists no prima facie case.

TAMIL NADU POWER PRODUCER ASSOCIATION V. CHETTINAD INTERNATIONAL COAL TERMINAL PRIVATE LIMITED AND KAMARAJAR PORT LIMITED, CASE NO. 73 OF 2015.

Date of Order: 9.04.2021

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Ratio: The dominance u/S. 4 in the relevant market must be proved when the case is brought before the CCI.

Brief Facts: The information was filed by Tamil Nadu Power Producers Association (informant) u/S. 19(1)(a) against ChettinadInternational Coal Terminal Private Limited ("**CICTPL**") and Kamarajar Port Limited (opposite parties) alleging contravention of S. 4 of the Act. It was claimed that the imposition of mandatory Coordination and Liasoning ("**C&L**") services charges to be payable to third-party service providers as a condition for hiring the services of the CICPTL for importing coal was an abuse of dominant position.

Analysis: The information against Kamarajar Port was closed as no allegation was found against it by the DG. Regarding the CICTPL, the CCI noted that the relevant market would be *'provision of common user coal terminal services at seaports in and around Kamarajar Port, including CICTPL and common user coal terminals Krishnapatnam Port'.*

The CCI observed that in the relevant market, the Krishnapatnam port posed significant competition to the CICTPL. The coal handling capacity, resources, and assets of the Krishnapatnam port had increased significantly; however, the capacity of the CICTPL decreased from 2013-14 onwards. Thus, CICTPL was not dominant; thereby, allegations of charging mandatory C&L service charges did not sustain.

The CCI also made observations on the mandatory third-party C&L services charged by the CICTPL. It stated that it would be unfair for users to pay separate charges to third-party service providers when the CICTPL provided such services. The CCI noted a link between the CICTPL and third-party service providers as some of the employees were shareholders and promoters of third-party service providers companies. However, the CCI closed the case as the CICTPL was not dominant when the case was brought before it.

MR. M. L. RAVI, ADVOCATE V. SUPERINTENDING ENGINEER, CONSTRUCTION AND MAINTENANCE DEPARTMENT, HIGHWAYS DEPARTMENT, TRICHY CIRCLE OF THE STATE OF TAMIL NADU, CASE NO. 51 OF 2020.

Date of order: 08.04.2021

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Brief Facts: The information was filed by the Informant (Mr. M. L. Ravi, Advocate) u/S. 19(1)(a) of the Act against the Opposite Party (Superintending Engineer, Construction and Maintenance Department, Highways Department, Trichy Circle of the State of Tamil Nadu). It was claimed that the Opposite Party is slowly changing its general contract system from *input based* to *Output based* or *Performance based* to favour the dominant parties in the Contract Business. Additionally, since 2012, various tenders have been issued by grouping many small projects. It was alleged that this practice severely hampered small businesses as they do not have the deep pockets to take up and complete the said large-scale combined projects. The Informant further alleged that the conditions and prerequisites for participating in tender bids had been mandated in such a manner that they were unreasonable and differentiated against the smaller businessmen of the industry. It was also alleged that these conditions were not in line with industry standards elsewhere.

Analysis: The CCI noted that the first step in the assessment of a case for alleged violation of S. 4 is to determine whether the OP is an Enterprise under the Act. By reference to the precedent judgment of *Shri Rajat Verma v. Public Works (B&R) Department & Ors.***,** it was held that the OP is an enterprise u/S 2(h) of the Act. The next step was to analyse whether the OP dominated the '*relevant market*' as per S. 2(3) of the Act. It was observed that even though a definitive relevant market cannot be highlighted, it must be analysed whether the OP's conduct was abusive of its dominant position in the industry. It was understood that the shift towards a Performance Based Contract system was brought about by a change in policy by the Tamil Nadu Legislative Assembly in 2011-12 and was not an arbitrary decision taken by the OP. Furthermore, all the actions and requirements mandated by the OP were in accordance with the law. Therefore, the CCI held that there was no prima facie case of contravention of the provisions of S. 4 of the Act.

IN RE: INTERNATIONAL SPIRITS AND WINES ASSOCIATION OF INDIA (ISWAI) & UTTARAKHAND AGRICULTURAL PRODUCE MARKETING BOARD, CASE NO. 02 OF 2016.

Date of order: 30.03.2021

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Ratio: If an arbitrary action, even by State authorities, results in denial of market access to private entities, it is considered an abuse of dominant position.

Brief Facts: The International Spirits & Wine Association of India ("**ISWAI**") had approached the CCI in 2016 under S. 19(1)(a) of the Act claiming that the Uttarakhand Agricultural Produce Marketing Board ("**UKAPMB**") was contravening S. 4 of the Act by trying to drive them out of the state by favouring other suppliers and restricting their orders to minimal since the state government took over the liquor wholesale business in 2015 for a year.

Analysis: The CCI noted that the main issue was that the UKAPMB placed orders

in a manner that was allegedly arbitrary and discriminatory, which resulted in a drop in market shares of USL and Pernod Ricard. This was further proved by the DG investigation, which found that there was a significant shortfall in the sales volume of IMFL of both USL and Pernod during the period from May 2015 to April 2016 as compared to the corresponding period in earlier years. Upon revocation of the Liquor Wholesale Order, the sales volume of both these companies recorded significant growth in their sales.

IN RE: AIR CARGO AGENTS ASSOCIATION OF INDIA & INTERNATIONAL AIR TRANSPORT ASSOCIATION, CASE NO. 79 OF 2012.

Date of order: 31.03.2021

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Ratio: In any case of alleged abuse of dominant position, delineation of the relevant market is important as it sets out the boundaries of competition analysis. The process of defining the relevant market is, in essence, a process of determining the substitutable goods or services as also to delineate the geographic scope within which such goods or services compete.

Brief Facts: The information was filed by the informant, Air Cargo Agents Association of India ("**ACAAI**") u/S 19(1)(a) of the Act against the opposite parties [International Air Transport Association and International Air Transport Association (India) Pvt. Ltd.] alleging contravention of the provisions of Ss. 3 and 4 of the Act. The major grievance of the informant seems to be related to accreditation of cargo agents and introduction of CASS in India by the opposite parties and alleged imposition of unilateral, unfair, and abusive conditions by IATA on the cargo agents through its resolutions.

Analysis: The CCI notes that the relevant product market would comprise all services available to air cargo agents for settling their bills or invoices by the airlines for air cargo and accordingly, the CCI opined that the relevant product market in the present case might be taken as *'market for account settlement services in respect of air cargo segment'*. It was held that the opposite parties did not enjoy any dominant position in the relevant market for account settlement services. This was in respect of the air cargo segment in India during the relevant period for purposes of provisions of S. 4 as the market share of opposite parties was 'Nil' and CASS was not mandatory but an option for cargo agents. Thus, there existed substitutability in the relevant market and, therefore, no case of contravention of provisions of Act was made out against opposite parties.

VIKAS VERMA V. ADANI PORTS AND SPECIAL ECONOMIC ZONES LTD.,CASE NO. 02 OF 2021
Date of Order: 24/03/2021

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Ratio: The mere existence of dominance bereft of any abusive conduct under the provisions of S. 4 of the Act could not be held to be the basis to order an

investigation. There is neither any allegation nor any evidence of abusive conduct u/S. 4(2) of the Act before the CCI.

Brief Facts: The Informant (Vikas Verma) alleges that the resolution plan for acquisition of OP2 (Dighi Port Ltd.) by OP1 (Adani Ports and Special Economic Zone Ltd.) which was approved by OP3 (Mr. Shailen Shah, RP) with the alleged assistance of OP4 (Bank of India), would lead to the increase in dominance of OP1 in the relevant market which would result in a monopolistic environment. He further argued that the resolution proposal approved by the NCLT and confirmed by the NCLAT was without the CCI's Permission which was against S. 31(4) of the I&B Code. This is, thus, ex facie illegal and is an abuse of the dominant position in terms of the provisions of S. 4 of the Act.

Analysis: The CCI held that its approval was not necessary for the aforementioned combination as it was below the threshold limit. With regards to the allegations of violation of S.4, even though OP had increased its dominance, the mere existence of dominance bereft of any abusive conduct could not be held to be the basis to order an investigation. There was neither allegation nor evidence of abuse of dominant position u/S. 4. CCI opined that there exists no prima facie case under the provisions of Ss. 3 and 4 of the Act and the information filed was directed to be closed forthwith, u/S. 26(2) of the Act.

PRACHI AGARWAL V. URBANCLAP TECHNOLOGIES INDIA PRIVATE LIMITED, CASE NO. 30 OF 2020.

Date of order: 24.03.2021

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Ratio: Recommending the products to be given to consumers in the course of a service, so long as it was not restrictive in nature, would not amount to Abuse of Dominant Position in a relevant market.

Brief Facts: The informant, Ms. Prachi Agarwal, had alleged unfair practice and abuse of dominant position by the opposite party, Urbanclap Technologies India Pvt Ltd, which provides an online platform via web and mobile app through which various beauty and housekeeping services are provided to consumers. The argument put forth by the informant was that the professionals who avail said services by the opposite party are forced to purchase the products from the Opposite Party itself. As a result, under s. 4(2)(a)(i) of the act, it was alleged that both the professionals and the consumers are forced to restrict their use to the brands offered by the opposite party.

Analysis: The CCI delineated the relevant market in the case as "Salon Home service through App/internet browsing in towns and cities of India". The Opposite Party clarified that the initial kit is the only purchase mandated to the professionals. Afterwards, the choice of products is based on assured quality, consumer demand and feedback of prior users. Also, the opposite party argued, contrary to the informant's allegations, there was no imposition of a mandate for the purchase to be made from themselves.

With regard to the allegation of dominant position enjoyed by the opposite party, the CCI noted that the opposite party had not been abusive in nature since there was no stipulation that the partners must necessarily buy the products from themselves. The products recommended were to ensure quality, brand image and goodwill, and thus the practice could not be held as unfair and abusive.

IN RE: UPDATED TERMS OF SERVICE AND PRIVACY POLICY FOR WHATSAPP USERS, SUO MOTO CASE NO. 01 OF 2021.

Date of order: 24.03.2021

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Ratio: The CCI opinionated that WhatsApp had prima facie contravened the provisions of S. 4 of the Act through its exploitative and exclusionary conduct in the garb of a policy update**.**

Brief Facts: In January, WhatsApp unilaterally asked its users to accept new terms that would allow it to share more private information with its parent company, Facebook, for advertising and commercial purposes. As a result of this notification, the CCI decided to take suo motu cognisance of the matter. WhatsApp made a preliminary objection and submitted that its current Terms of Service and Privacy Policy as well as the proposed update in the same fall within the purview of the information technology law framework and these issues are currently sub judice before various courts and other fora in India.

Analysis: Having considered the overarching terms and conditions of the new policy, the CCI was of prima facie opinion that the 'take-it-or-leave-it' nature of privacy policy and terms of service of WhatsApp and the information sharing stipulations mentioned therein merit a detailed investigation in view of the market position and market power enjoyed by WhatsApp. The CCI also noted that users were not provided with the appropriate granular choice to object to or opt-out of the specific data sharing terms, adding that the reduction in consumer data protection and loss of control over personalised data can be taken as reduction in quality under the antitrust law. Further, WhatsApp, operating in the 'market for Over-The-Top (OTT) messaging apps through smart phones in India', was found to be dominant in the relevant market. As a result, the regulator observed that the unfair terms and conditions imposed by a dominant player and the potential distortion of a competitive market through non-price parameters could result in violations of 'abuse of dominance' provisions u/S. 4(2) of the Competition Act. The CCI directed the DG to submit its report in 60 days.

GUJARAT PAPER MILLS ASSOCIATION V. INDIAN CORRUGATED CASE MANUFACTURERS ASSOCIATION & ORS., CASE NO. 28 OF 2020.

Date of order: 19.03.2021

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Ratio: Presumption of AAEC does not arise in the absence of an agreement in

terms of the specified activities in S. 3(3) of the Act.

Brief Facts: The Informant, an association of kraft papers manufacturers, alleged that the Opposite Party ("**OP**"), corrugated box manufacturers, had formed a cartel and created an artificial shortage of corrugated boxes by closing down their manufacturing units. The Informant brought forward a resolution of OP discouraging members from directly approaching brand owners, a letter asking the Informant to fix the price of kraft paper, a letter asking members not to take deliveries from the paper mills and emails cancelling purchase orders and refusal to take deliveries. All this was alleged to violate S. 3(3)(a) and 3(3)(b) of the Act. The OPs raised doubts regarding the authenticity of the allegations as an investigation was on-going against the Informant. They held they were in no position to control the members, clarified they wanted to discuss hardships faced by their members because of the coordinated closure of paper mills and frequent price increase, wanted to ensure uninterrupted supply of raw material and was not asking to collude.

Analysis: In *Advertising Agencies Guild v. IBF & its Members*, the legal contours within which trade associations can operate was laid out. Here the OPs conduct was in protest of cartelization by the kraft paper mills and the increase in prices.

The CCI noted that OPs conduct was equated to buyer's cartel. *In Re. XYZ v. Indian Oil Corporation & Ors.*, it was held that the potential theories of harm and conditions necessary for inflicting competitive harm need to be examined in the buyer's cartel as it leads to direct benefits for consumers. The CCI noted that in the absence of an agreement, the raising of the presumption of AAEC is not possible. The emails were only recommendatory; the members had continued to accept deliveries and operated their business as usual. So, no case was made against the OPs.

IN RE: PEOPLE'S ALL INDIA ANTI-CORRUPTION AND CRIME PREVENTION SOCIETY & USHA INTERNATIONAL LTD., CASE NO. 90 OF 2016.

Date of order: 17.03.2021

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Ratio: Cartelisation including bid-rigging is a pernicious form of competition law contravention. Any party willing to advance justification has to give proper reasoning with clear and cogent evidence for the same. Vague assertions would not help such parties to evade the responsibility cast upon them under the provisions of S. 3 of the Act.

The existence of an anti-competitive practice or agreement is inferred from a number of coincidences and incidences, which, taken together, may in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.

Brief Facts: The Information in the present case was filed by People's All India Anti-Corruption and Crime Prevention Society u/S. 19(l)(a) of the Competition Act, 2002 against the opposite parties (Usha International Ltd.,

Klassy Computers, Nayan Agencies, Jawahar Brothers and Pune Zilla Parishad) alleging contravention of provisions of S. 3(3) of the Act. , OP-5 invited bids, ('Impugned Tender'), from eligible vendors for procurement of Picofall-cum-Sewing Machine with Indian Standard Institute (ISI) mark for distribution amongst the people belonging to backward classes, women, and disabled persons living in the rural areas of Pune district under a scheme announced by the Social Welfare Department of the Government of Maharashtra. It was alleged that OP-1 has indulged in bid rigging and also entered into an agreement with OP-2, OP-3, OP-4, and OP-5 to eliminate competition in the market which is in violation of the provisions of the Act. Accordingly, the CCI passed an order u/S. 26(1) of the Act directing the DG to cause an investigation into the matter.

Analysis: DG found that OP-1 to OP-4 were in active collusion and there was meeting of minds between them and thereby, they have violated the provisions of S. 3(3)(d) read with S. 3(1) of the Act. Further, two individuals of OP-1 and 4 individuals of OP-4 were found to be responsible u/S. 48 of the Act for their conduct. The CCI noted that the bid values quoted by these OPs in the Impugned Tender were very close to each other and it was highly unlikely in normal market conditions. In a competitive bidding, it is expected of the bidders to quote their rates in a competitive and independent manner after considering their input costs and prevailing market conditions and the Act prohibits any anti-competitive agreement which manipulates the fair price discovery.

The CCI believed since, bid rigging in the Impugned Tender stands established, the statutory presumption of appreciable adverse effect on competition automatically follows. Such conduct in public procurements has an adverse impact on the exchequer and is a brazen defiance of the responsibility cast under the Act. Thus, the CCI held that agreement amongst OP-2 to OP-4 to rig bids in the Impugned Tender floated by OP-5, was in contravention of the provisions of S.3(1) read with S. 3(3)(d) of the Act and directed the OPs and the individuals liable under S. 48 of the Act to deposit the penalty amount.

GAIL (INDIA) LIMITED AND EAGLE BURGMANN INDIA PRIVATE LIMITED, CASE NO. 01 OF 2021.

Date of Order: 10.03.2021

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Ratio: Enterprises cannot be held liable for charging exorbitant prices u/S. 4 of the Act without having a dominant position in the relevant market.

Brief Facts: The information was filed by the GAIL India Ltd. (informant) u/S. 19(1)(a) of the Act against the Eagle Burgmann India Private Ltd. (opposite party) alleging the contravention of S. 4(1) read with S. 4(2)(a)(ii) of the Act. It was claimed that the OP charged exorbitant prices for the mechanical seals used in the Petrochemical Steel Plant. It was further alleged that the seals supplied by the OP were customized and were not interchangeable. Thus, the OP created a

'lock in' effect by abusing its dominant monopolistic position.

Analysis: The CCI noted that the relevant market would be the *'market for mechanical seals'*. Regarding the allegation of the dominant position enjoyed by the OP, the CCI stated that there were many competitors in the market. The market structure indicated that none of the competitors, including the OP, did possess a significant market share. Concerning the allegation of non-interchangeability, the CCI observed that the informant did not adduce any reason for not having detailed drawings of the mechanical seals, which is one of the important documents. Thus, the CCI held that the OP did not enjoy a dominant position in the market, and there exists no prima facie case.

IN RE: FEDERATION OF HOTEL & RESTAURANT ASSOCIATIONS OF INDIA (FHRAI) & ORS. AND MAKEMYTRIP INDIA PVT. LTD & ORS; WITH, IN RE: RUBTUB SOLUTIONS PVT. LTD. AND MAKEMYTRIP INDIA PVT. LTD & ORS., CASE NO. 14 OF 2019 & CASE NO. 1 OF 2020.

Date of order: 09.03.2021

Coram: Mr. Ashok Kumar Gupta; Ms Sangeeta Verma; Mr. Bhagwant Singh Bishnoi.

Ratio: For applying S. 33, there should be existence of a prima facie case; balance of convenience in favour of the claimant; and that irreparable damage would be caused to the claimant if the interim relief is not provided

Brief Facts: Previously the CCI had assessed the practices of MakeMyTrip India Pvt. Ltd ("**MMT**") and Oravel Stays Pvt. Ltd. ("**OYO**") as it had been alleged that they had entered into a commercial agreement where MMT had agreed to give preferential treatment to OYO, affecting other competitors in the market. Casa2 Stays Pvt. Ltd. ("**FabHotels**") and Rubtub Solutions Pvt. Ltd. ("**Treebo** ") approached the CCI to seek interim relief under S.33 of the Act praying for an order directing MMT and Go-Ibibo to re-list their properties on the latter's portals.

Analysis: The CCI considers the decision of *Competition Commission of India v. Steel Authority of India Ltd.*, (2010) 10 SCC 744 which clarified that for the application of S. 33- the CCI has to record its satisfaction, that an act in contravention of the provisions has been committed and continues to be committed or is about to be committed; that it was necessary to issue order of restraint and that from the record before it, there is every likelihood that the party would suffer irreparable and irretrievable damage, or there is definite apprehension that it would have adverse effect on competition in the market.

The CCI does not deviate from the market delineation which was arrived at in the prima facie order (*market for online intermediation services for booking of hotels in India*) and it continued with the finding that MMT-Go was dominant in the relevant market. Applying the aforementioned conditions, the CCI found the action of delisting and denial of logistical support by MMT to be affecting competition owing to denial of access and foreclosure. Accordingly, the CCI allowed for the interim order and directed the

relisting of FabHotels and Treebo on the online portals.

M/S INTERNATIONAL SUBSCRIPTION AGENCY V. FEDERATION OF PUBLISHERS AND BOOKSELLER'S ASSOCIATIONS IN INDIA ("FPBAI"), CASE NO. 33 OF 2019.

Date of order: 23.2.2021

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Ratio: Directions issued by a federation cannot be considered to be merely 'recommendatory' if coercion is involved to ensure compliance. Further, if such directions are *prime facie* found to be anti-competitive, they require a valid and logically sound justification to be held reasonable.

Brief Facts: The informant, a subscription agent, filed the information against the Federation of Publishers and Bookseller's Associations in India ("**FPBAI**") stating that the latter have acted beyond their mandate by issuing a direction to all the members to not give discounts on the publishers' prices to the Indian subscribers. Further, the informant alleged that the threat of coercive action is levelled against members who refuse to comply with said direction. Considering that membership with the FPBAI is important for the business of subscription agents in India, the informant claims that this practice of the FPBAI is in contravention of S. 3(1) of the Act read with S. 3(3). Upon examination, the CCI too found this practice of the FPBAI to be violative of the Act and directed the DG to investigate. In response to the DG's report which found the FPBAI to be engaging in anti-competitive practices, the FPBAI stated that their impugned direction against providing discounts was merely recommendatory in nature, and that the direction was made purely to prevent piracy.

Analysis: The court noted that the FPBAI's direction cannot be considered to be merely recommendatory in nature as they used coercive action against members to force them to comply. Further, there was not much of a logical relation between the impugned direction and the prevention of privacy, and thus the justification provided by the FPBAI is not satisfactory. The CCI consequently held the FPBAI to be guilty of contravention of the provisions of S. 3 (3) (a) and 3 (3) (b) read with S. 3 (1) of the Act.

IN RE: ALLEGED CARTELISATION IN THE AIRLINES INDUSTRY, CASE NO. 03 OF 2015.

Date of order: 22.02.2021

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Ratio: Parallel conduct is actionable under S. 3(3) of the Act only when the adaptation to the market conditions is not done independently and is attributable to information exchanged between the competitors or through some other collusive conduct, the object of which is to influence the market.

Brief Facts: The case originated through a letter from the Lok Sabha Secretariat requesting an examination of whether there is any evidence of cartelisation in the airlines sector. The matter was examined,

and information was sought from various airlines and the Directorate General of Civil Aviation (DG). The CCI analysed the data and formed a *prime facie* opinion that the airlines were indeed engaged in anti-competitive conduct in contravention of S. 3(1) of the Act read with S. 3(3). Subsequently, an order was passed directing the DG to investigate. The DG then submitted an extensive investigation with the conclusion that there was no cartelisation in the airline sector.

Analysis: The CCI agreed with the DG's report that there was no anti-competitive conduct among the airline companies that were examined. It was noted that for a violation of S. 3(1) to occur, there must be adaptation to market conditions that is done in collusion with other market players, evidenced by exchange of relevant information among the said players. As no evidence could be found to establish the existence of a cartel, the CCI held that there was no contravention of S. 3(1) of the Act read with S. 3(3).

IN RE: ALLEGED BID-RIGGING IN TENDERS INVITED BY DEPARTMENT OF PRINTING FOR PRINTING, PACKING AND DISPATCH OF CONFIDENTIAL DOCUMENTS, CASE NO. 03 OF 2019.

Date of order: 12.02.2021

Coram: Mr Ashok Kumar Gupta; Ms Sangeeta Verma; Mr Bhagwant Singh Bishnoi

Brief Facts: The present case originated from complaints received by the CCI alleging coordination amongst Chandra Prabhu Offset Printing Works Pvt. Ltd, United India Tradex Pvt. Ltd. and Saraswati Offset Printers Pvt. Ltd. in rigging and conspiring to fix bids in Tenders issued by Department of Printing, Ministry of Urban Development for printing, packing and dispatch of confidential documents. The coordination has been alleged to be in contravention of the provisions of S. 3(3)(d) read with S. 3(1) of the Competition Act, 2002.

Analysis: The CCI was prima facie satisfied that Chandraprabhu and United India Tradex, though purportedly competing in the market, were owned and or managed by the same set of people and funds were exchanged amongst them on various instances. The CCI was of the opinion that despite being competitors, these companies had taken advantage of their close linkages to manipulate the process of bidding. Accordingly, passed an order u/S. 26(1) of the Act directing the Director-General to cause an investigation into the matter.

The investigation brought out close linkages between the Opposite Parties based on common directorship, *inter se* shareholding and commercial transactions between the Opposite Parties in loan exchanges, fund transfers, etc. The CCI observed that United India Tradex and Chandraprabhu were related parties in terms of the Companies Act, 2013. The *inter-se* dealings between them are explained to be on account of their historic business linkages, and such dealings thus appear to be in the usual course of business. As per the investigation, there was nothing on record to suggest that the Opposite Parties joined hands to manipulate the process of bidding, and no case of contravention of the provisions of S. 3(3) of the Act was made out from the facts and circumstances of the case.

Accordingly, the CCI ordered the matter to be closed in terms of S. 26(6) of the Act.

BHUSHAN GIRDHAR V. P.P. BUILDWELL& ORS., CASE NO. 40 OF 2020.

Date of order: 01.02.2021

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Ratio: The first step in the assessment of a case for alleged violation of the provisions of the Act, is to define the relevant market. It is imperative that the geographic and commercial conditions of the area are observed in order to determine the market considered in a given issue.

Brief Facts: The information was filed by the informant (Mr. Bhushan Girdhar) u/S. 19(1)(a) of the Act against the opposite parties (P.P. Buildwell Private Limited and Classic Care Utilities Private Limited) alleging contravention of provisions of S. 4 of the Act. It was claimed that the opposite party was charging an exorbitant amount in the name of maintenance of the common area, fixed cost of electricity, per unit electricity charges, parking charges, etc. It was further alleged that they did not allow any other maintenance agency to enter into the service providing contract and thus, created a situation of monopoly.

Analysis: The CCI noted that the first step in the assessment of a case for alleged violation of S. 4 is to define the relevant market. Taking into consideration the scope and prospect of a commercial space and the geographical conditions in the area, the CCI was of the view that the relevant market would be '*the market for provision of services for development and sale of commercial/office space in Delhi*'.

About the allegation of dominant position enjoyed by the opposite party, the CCI noted that the former was just one of the real estate developers in Delhi and that there were many other firms in the region offering similar services. Hence, owing to the presence of similar service providers, the buyers were not dependent upon the opposite party for the provisioning of commercial/office space. Thus, the CCI held that the opposite party did not enjoy a dominant position in the market and there exists no prima facie case.

BAGLEKAR AKASH KUMAR V. GOOGLE LLC AND ORS., CASE NO. 39 OF 2020.

Date of order: 29.01.2021

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Ratio: Mere integration of Google Meet tab within Gmail does not amount to any contravention of the Act as users have the choice to use either of the Apps with all their functionalities without necessarily having to use the other.

Brief Facts: The information was filed by the informant (Mr. Baglekar Akash Kumar) u/S. 19(1)(a) of the Act against the opposite parties (Google LLC and Google India Digital Services Private Limited) alleging contravention of provisions of S. 4 of the Act. It was claimed that Gmail enjoys a 'dominant position' in the emailing and direct messaging market. It was also further alleged that Google, which is a dominant player in the internet-related services and products, has

integrated the Meet App into the Gmail App which amounts to abuse of dominant position by Google, viz. use of its dominant position in one relevant market to enter into other relevant markets as per S. 4(2)(e) of the Act.

Analysis: The CCI noted that users of Gmail are not coerced into using Google Meet, and there does not appear to be any adverse consequences on the users of Gmail for not using Google Meet. Further, it was added that anyone with a Google Account could create an online meeting using Google Meet. For creating a Google account, the user need not be a user of Gmail. The user can use email ID created on any other platform for creating a Google account. Therefore, users have the choice to use either of the Apps with all their functionalities without necessarily having to use the other. Thus, the CCI noted that there was no case to be made out against the opposite parties.

AUTOMOTIVE TYRES MANUFACTURERS ASSOCIATION V. GENERAL INSURANCE CORPORATION OF INDIA., CASE NO. 21 OF 2020.

Date of order: 27.01.2021

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Ratio: GIC has not placed any restriction on any insurance company, and they still have the commercial freedom to price their policy as they deem fit.

Brief Facts: The information was filed by the informant (Automotive Tyres Manufacturers Association) u/S. 19(1)(a) of the Act against the opposite party (General Insurance Corporation of India) alleging contravention of provisions of S. 3 and 4 of the Act. The informant alleged that the policyholders were being subjected to exorbitant premiums by insurers and this amounted to abuse of its dominant position to impose unfair and excessive pricing. It was also averred that the opposite party has distinct advantages such as the right of first refusal over reinsurance placements in India coupled with a statutory cession of 5%, by which competitors are unable to operate on a level playing field. Further, the opposite party's exclusion of contagious disease losses was alleged to be anti-competitive and their refusal of reinsurance support in case insurers offer discounts on the minimum premium rates was claimed to amount to resale price maintenance.

Analysis: The CCI noted that setting of premium rates for reinsurance policies would be based on many factors and without proper evidence being furnished, the allegations of ''excessive pricing' cannot be analysed. With respect to the allegation regarding resale price maintenance, it was held that this argument had no merit as the opposite party had not placed any restrictions and insurance companies still have commercial freedom to price their policy as they deem fit according to the market conditions. The CCI also noted that the exclusion of any loss by contagious disease existed even prior to the onset of the COVID-19 pandemic. There was no 'refusal to deal' as the companies were entirely free to offer any kind of insurance to the policyholders.

PRAMOD MAHAJAN V. ICICI BANK, CASE NO. 52 OF 2020.

Date of order: 27.01.2021

Coram: Mr Ashok Kumar Gupta; Ms Sangeeta Verma; Mr Bhagwant Singh Bishnoi

Ratio: To ascertain whether conduct amounts to abuse u/S. 4 of the Act, first, the relevant market needs to be delineated, followed by an assessment of whether the party enjoys a position of strength required to operate independently of the market forces in the relevant market. If a party is found to be in such a position, then it is to be examined whether the impugned conduct of the party can be considered an abuse of dominant position under the Act.

Brief Facts: The Information was filed by Shri Pramod Mahajan u/S. 19(1)(a) of the Competition Act, 2002, against ICICI Bank, alleging violation of the provisions of Ss. 3 and 4 of the Act. The Informant was aggrieved by the increase in the rate of interest charged by the Opposite Party on the home loan facility availed by him without any prior notice and was also aggrieved with the terms and conditions of the loan agreement, which were alleged to be one-sided and discriminatory in nature and purportedly included by all banks in their loan agreement including the Opposite Party.

Analysis: The CCI observed that there are several public and private sector banks, NBFCs and HFCs operating in the home loan market in India, providing various options to consumers for availing home loans. The existence of a large number of players in the home loan market showed that the Opposite Party could not operate independently in the market and, hence, cannot be considered in a position of dominance in the relevant market as identified above. Therefore, the CCI believed in the absence of dominance, the issue of abuse of dominance did not arise and hence no case of contravention of the provisions of S. 4 of the Act was made out against the Opposite Party.

THUPILIRAVEENDRA BABU V. BCI, CASE NO. 50 OF 2020.

Date of Decision: 20.01.2021

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma, Mr. Bhagwat Singh Bishnoi

Ratio: BCI cannot be an 'enterprise' u/S. 2(h) of the Competition Act as it does not perform economic or commercial functions and qualifies as a regulatory body. It has not abused its position under the Competition Act.

Brief Facts: In the instant case, the informant filed information u/S. 19 (1)(a) of the Competition Act, 2002 alleging violations u/S. 4 by the BCI. The factual nexus consisted of the informant, presently working as an executive engineer in the CPWD, who wished to pursue legal studies post voluntary retirement. Clause 28 of Schedule III, Rule 11 to Part IV in the Rules of Legal Education, 2008 states that candidates belonging to General Category, aged more than 30 years are barred from pursuing legal education. He alleged that this created indirect barriers to enter the legal profession and thus the BCI and its members were exploiting their dominant position in contravention of S. 4 of the Act and indulged in the colourable exercise of power.

Analysis: CCI scrutinised the status of BCI as an enterprise u/S. 2(h) of the Act, which defined it as a person or department of the Government engaged in economic or commercial functions. Further, it observed that BCI's (statutory body) functions included laying down benchmarks for the promotion of legal education in India. Additionally, S. 49 of the Advocates Act, 1961 empowers the BCI to make rules that include minimum qualifications required for admission to a course of law. Referring to the case of *In re DilipModwil and Insurance Regulatory and Development Authority (IRDA),* the Commission observed that any entity would be an enterprise if it is engaged in economic and commercial activities. Regulatory functions, thus, would not come under the ambit of the CCI.

The CCI observed that there was no prima faciecase u/S. 4 of the Act and no relief could be sought u/S. 33 of the Act. BCI had not indulged in the misuse of dominant position u/S. 4 of the Act.

GURGAON INSTITUTIONAL WELFARE ASSOCIATION AND HARYANA URBAN DEVELOPMENT AUTHORITY, CASE NO. 94 OF 2016.

Date of Order- 19.01.2021

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Ratio: If a sovereign authority performs commercial functions, then it is amenable to the jurisdiction of the CCI.

Brief Facts: The informant filed an information u/S. 19(1)(a) of the Act against the OP (Haryana Urban Development Authority) alleging a contravention of S. 4 of the Act. It was alleged that the OP was dominant in the sale of institutional plots in Haryana and provided plots on a 'free hold basis' upon the full payment of consideration. However, when allottees approached OP for an execution of the sale deed, OP manipulated the conditions of the allotment by restricting the 'free hold' rights of allottees. On the other hand, OP challenged the maintainability of information and claimed it was not an enterprise u/S. 2(h) of the Act as it was performing the sovereign function.

Analysis: The CCI observed that the Haryana Urban Development Authority (HUDA) was a statutory body established under HUDA Act. However, the sale and purchase of plots for consideration to third parties was not a sovereign function. Therefore, it was an enterprise u/S. 2(h) of the Act.

CCI noted that HUDA's institutional plots were allotted for a pre-defined specific purpose and were not substitutable with other types of plots in Haryana. Therefore, the 'relevant market' u/S. 4 would be '*market for development and sale of institutional plots in Haryana'.*

Regarding the allegation of abuse of dominant position, the CCI noted that OP allotted plots at prices below the market prices in the public interest. It was a policy decision of HUDA not to allow the subsequent sale of plots for earning profits. Therefore, the CCI held that OP did not abuse its dominant position u/S. 4 of the Act.

IN RE: ALLEGED CARTELISATION BY TWO BIDDERS/FIRMS IN PROCUREMENT/ TENDER FOR PURCHASE OF SURGICAL DISPOSABLE ITEMS ON A TWO-YEAR CONTRACT BASIS BY AIIMS., CASE NO. 01/2018.

Date of Order- 14.01.2021

Coram: Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Ratio: The existence of price collusion is not sufficient to hold the parties liable for bid-rigging. Instead, price parallelism and plus factors have to be shown to establish the conduct to be collusive.

Brief Facts: The CCI took a *suo moto* inquiry of the alleged cartelisation by two firms- Romsons Scientific & Surgical Industrial Pvt. Ltd. and BSN Medical Pvt. Ltd. in respect of a tender invited by AIIMS. It was alleged that the OPs had entered into price collusion by quoting identical prices for the tender, thereby contravening S. 3 of the Act.

Analysis: The CCI observed that OP1 and OP2 quoted similar prices for item no. 5 to 8. However, the CCI believed that there was no circumstantial evidence to indicate that any communications took place for fixing the prices for bids. The possibility of a cartel's existence was very low as the market was characterised by multiple players and high bargaining powers. Further, OP 1 had quoted a rate based on 'per box', whereas OP2 had quoted a rate based on 'per unit'. The OPs also justified their prices quoted for tender as they quoted similar prices for other tenders or sales made by them to big institutions.

The CCI also noted that both the parties were at different places and their cost structures were different. Therefore, the similar price of products was a coincidence rather than a concerted act. Thus, the CCI held that the OPs had not contravened S. 3 of the Act.

YOGESH V. MUNICIPAL CORPORATION OF GREATER MUMBAI AND ORS., CASE NO. 44 OF 2020.

Date of order: 29.12.2020

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Ratio: Mere contravention of the CVC Guidelines, in the absence of any material showing contravention of the provisions of the Act, does not *ipso facto* imply violation of the provisions of the Act.

Brief Facts: The information has been filed by informant (Shri Yogesh) u/S. 19(1)(a) of the Act against the opposite partie, Municipal Corporation of Greater Mumbai (MCGM) and Others alleging MGCM to be limiting the ability of bidders to participate in the tender by requiring an MOU for Pulse Plasma Technology, which is provided in India only by Dattatreya Inc., who enjoys a monopoly in the sector. Which thereby creates an adverse effect on competition. It was claimed that the said plasma technology has no nexus with the contractual work in question. It was also found that the tender requirements were in violation of the CVC Guidelines.

Analysis: The CCI stated that based on the information, the allegations relate to s. 4 of the Act which prescribes Abuse of

Dominant Position and the informant has neither alleged nor delineated any relevant market for the same. The CCI held that from a competition law perspective, in the case of public procurers, such as MGCM, the decision making is more structured and reflected in procurement procedures than in a typical consumer.

The CCI also stated that the said matter has not been filed by the Bucon-Gypsum-Bitcon (JV) itself but by its employee. The CCI held that there exists no prima facie case and the matter was ordered to be closed.

PIYUSH V. UNIPRO TECHNO INFRASTRUCTURE PRIVATE LIMITED AND ORS., CASE **NO. 46 OF 2020.**

Date of order: 29.12.2020

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Ratio: For Allegations of contravention of S. 3 of the Act as well as for allegations of cartelisation, it is imperative that there must be a prima faciecase. Allegations on the mere possibility of deliberate inflation of tender prices will not sustain under the absence of material evidence.

Brief Facts: The information was filed by the informant (Mr. Piyush) u/S. 19(1)(a) of the Act against the opposite parties (Unipro Techno Infrastructure Pvt. Ltd and others,) alleging contravention of S. 3 of the Act. It was claimed that the cartel ofthe OPs deliberately failed to participate in the tenders that the Public Health Engineering Department ("**PHED**") Rajasthan had invited under the Atal Mission for Rejuvenation and UrbanTransformation (ATUL) Mission and pressurized willing firms, not to participate as well as using their political dominance. It was alleged that out of the 21 districts under the mission, 11 were rigged by a cartel of 9 companies with an aim to artificially inflate the costs up to 20-30%. This alleged conduct of the OPs led to a loss of Rs. 150 Crores. It was also alleged that the OPs refused to compete with each other and divided the 11 Districts amongst themselves.

Analysis: The CCI noted that the only material provided by the Informant in lieu of his allegations were news reports/articles. Since from the said materials and other documents presented by the Informant does not readily discern any collusiveness or cartelisation of the OPs and does not indicate that the increase in costs was a result of any anti-competitive practices.

Based on the aforementioned, the CCI opined that there is no prima faciecontravention of the provisions of S. 3 of the Act by the OPs

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ARRDY ENGINEERING INNOVATIONS PVT. LTD. V. HERAEUS TECHNOLOGIES PVT. LTD. AND ORS., CASE NO. 47 OF 2020.

Date: 11.12. 2020

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Ratio: The mere business linkage and common directorship does not constitute a violation of Sec.3 (3) and quoting lower prices in different tenders/ bidding processes by itself cannot be taken as predatory pricing.

Brief Facts: The information was filed by the informant (Arrdy Engineering Innovations Pvt. Ltd.) against the opposite parties (Heraeus Technologies Pvt. Ltd. and 6 others) alleging a contravention of Ss. 3 and 4 of the Act. It was claimed that OPs were involved in bid-rigging and were artificially lowering prices to an uneconomic level, thereby adversely affecting competition in India. It was also pointed out that the OP (Heraeus Group of Companies) was involved in similar anti-competitive practices in the US and was directed to divest its assets.

Analysis: The CCI noted that mere business linkage and common directorship does not constitute a violation of S.3 (3) without proper evidence indicating concerted action, which the informant has failed to provide. With regard to violation of S.4 of the act, the CCI noted that there is nothing to substantiate the fact that all the OPs are a part of the same group, and the informant has failed to propose a relevant market or to highlight any abusive behaviour by OPs which can be said to violate the provisions of S. 4(2). The CCI also noted that quoting lower prices in different tenders/ bidding processes by itself cannot be taken as predation; the informant has also failed to allege any predatory pricing. Due to the absence of any material to show all OPs as part of the group and dominance of such group in any relevant market, the CCI deemed it unnecessary to examine the alleged abuse and closed forthwith in terms of the provisions contained in S. 26(2) of the Act.

SUNIL GOYAL V. GREATER NOIDA INDUSTRIAL DEVELOPMENT AUTHORITY, CASE NO. 26 OF 2020.

Date of order: 17.11.2020.

Coram: Mr. Ashok Kumar Gupta, Ms. Sangeeta Verma, Mr. Bhagwant Singh Bishnoi.

Ratio: The aim and object of the Competition Act is to prevent practices having adverse effects on competition, to promote competition and protect consumer interest. Individual consumer interests are to be dealt with by the Consumer Protection Act and falls outside the scope of Competition Law.

Brief Facts: The Informant, Sunil Goyal had alleged, *inter alia*, contravention of S. 4 of the Act by the Opposite Parties, the Greater NOIDA Industrial Development Authority [‘OP’]. The Informant had been allotted a plot from the OP who informed all allottees to pay pending water bills, failing which the OP would disconnect their water connections. The Informant subsequently received a bill dated 01.07.2015 for a sum of 14,128.75/- which the Informant paid along with a request for disconnection of water supply. OP however, sent another bill dated 07.01.2016 for a sum of 19189.70/- for the same period. Though the Informant contested the same, another bill was sent on 26.02.2020 without disconnection being carried out. The Informant claimed that OP was raising illegal and unjust demands for water charges and abusing its dominant position by increasing the water charges by 10% every year, and also prayed for interim relief. The OP refuted the claims so made.

Analysis: Considering that the primary issue being the demand for water charges despite the other factors involved, the CCI

found this to be a case which falls outside the purview of competition law and had to be taken before the appropriate forum like the remedies provided for by the Consumer Protection Act, which relates to individual consumer interests.

VIJAY CHAUDHRY V. INDIA YAMAHA MOTOR (P.) LTD., CASE NO. 27 OF 2020.

Date of order: 07.09.2020.

Coram: Mr. Ashok Kumar Gupta, Ms. Sangeeta Verma, Mr. Bhagwant Singh Bishnoi.

Ratio: The Opposite Party not being dominant in the relevant markets, the question of abuse of dominance does not arise.

Brief Facts: The Informant, Vijay Chaudhary who had been an authorised dealer for Yamaha motorcycles and scooters in Jodhpur, filed the information alleging contravention of S. 4 of the Act by the Opposite Parties ['OP'], Yamaha Motor Pvt. Ltd, based on Yamaha's action in terminating his dealership without reasons. The Informant also challenged the appointment of another dealer in Jodhpur, closing his account much before the issuance of termination of notice, and hampering his business as he was unable to punch warranties and suffered losses on unsold stock. The OP had alleged illegal use of their brand name and signage by the Informant and had also allegedly instructed banks to not finance vehicles sold by the Informant and created hindrances to the registration of vehicles sold by him.

Analysis: The allegations being that of abuse of dominance had to be determined by first delineating the relevant market. The informant had been dealing in Yamaha motorcycles and scooters and considering other factors, the relevant market was found to be the *market for manufacture and sale of scooters* and *market for manufacture and sale of motorcycles* within India. It also found that the dealership having been terminated in 2017, the market position which existed then has to be considered wherein Yamaha had less than 10% and did not have significant market share in a market with well entrenched inter-brand competition. Thus, Yamaha was not dominant in the relevant market and consequently, there could be no question of abuse of dominance under S. 4. The CCI notes that this position would not change if the relevant geographic market was confined to the State of Rajasthan alone. The information was subsequently directed to be closed under S. 26(2).

DHIRAJ GUPTA V. DELHI METRO RAIL CORPORATION,CASE NO. 24 of 2020

Date of order. 26.08.2020

Coram: Mr. Ashok Kumar Gupta, Ms. Sangeeta Verma, Mr. Bhagwant Singh Bishnoi

Ratio: The question of abuse of dominance does not arise when the opposite party is not dominant in the relevant market.

Brief Facts: The information was filed by the informant (Dhiraj Gupta) u/S. 19(1)(a) of the Act against the opposite party, Delhi Metro Rail Corporation Limited (DMRC) alleging abuse of dominant position in contravention of S. 4 of the Act. The informant alleged that the opposite party

was fixing predatory prices for services of parking using their dominant position. It was further alleged that the opposite party had indirectly forced the informant to follow the obligations by the act of blacklisting it from future tenders.

Analysis: The CCI, firstly examined whether the opposite party comes under the definition of 'an enterprise' under the provisions of the Act and if so, the relevant market of the opposite party for it to come under the purview of the Act. The CCI noted that the opposite party provides a Mass Rapid Transport System (MRTS) in the National Capital Region (NCR) and engages in the development, maintenance, and management of the metro system for mass transportation. As these activities come under the ambit of economic activities, the CCI opined that the opposite party is an enterprise u/S. 2(h) of the Act. Further the CCI was of the view that the relevant market would be *'procurement of services for provision of parking lot management in Delhi*'.

With regard to the alleged dominant position that the opposite party enjoyed in the relevant market, the CCI compared the data of parking lots owned but outsourced for management to third parties with other players in the same market. The CCI found that the opposite party did not have the ability to operate independently and was not found to be the dominant procurer of parking lot management services in Delhi. Thus, the CCI found no prima facie case from the circumstances and closed the case.

IN REFERENCE OF FORMATION OF CARTEL IN THE SUPPLY OF 14.2 KG LPG CYLINDERS FITTED WITH S.C. VALVES PROCURED BY BPCL V. GINNI INDUSTRIES AND ORS. MANU/CI/0259/2020

Date of order. 26.08.2020

Coram: Mr. Ashok Kumar Gupta, Ms. Sangeeta Verma, Mr. Bhagwant Singh Bishnoi

Ratio: The prevalent condition of the relevant market has to be given priority over contravention of the provision u/S. 3(3) of the Act.

Brief Facts: The investigation was commenced suo-moto by the CCI in 2014 when the CCI noticed that the price bids of bidders in the tender of 2010 for Bharat Petroleum Corporation Limited (BPCL) inviting bids for 55 plants in 18 states were either identical or nearly identical. The CCI ordered a detailed investigation into the conduct of 17 opposite parties in the case. The investigation of conduct of 6 opposite parties was considered as the other 11 parties had already been penalized for similar conduct in another investigation. The investigation found the conduct of 5 opposite parties as violative of S. 3(3) of the Act. The sixth, Ginni Industries were not found to be in contravention of any provisions of the Act on investigation.

Analysis: The CCI was to find out whether there was a cartelization in contravention of S. 3(3) of the Act. The CCI referred to the decision of the Supreme Court in *Rajasthan Cylinders and Containers Limited v. Union of India* to support the view that the investigation in the market in the present case has yielded no different results. The report is based on an examination of the procurer, BPCL,

found that for finalising the L-1 rate, BPCL negotiates with the bidders and it is BPCL which decides the price at which the tender has to be awarded.

In light of the referred decision of the Supreme Court, the CCI proceeded to close the case on account of the prevalent market conditions in the industry.

HARSHITA CHAWLA V. WHATSAPP INC. AND ORS., CASE NO. 15 OF 2020

Date of Order. 18.08.2020

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Ratio: Given that WhatsApp categorically offers full discretion to its users with regard to opting in for its payment service, there seems to be no element of coercion involved as alleged by the Informant, and hence it follows that there has been no abuse of its dominant position by WhatsApp. Further, the CCI added that UPI enabled digital market is already established with eminent players competing enthusiastically, and it appeared improbable that WhatsApp Pay will consequently claim a more vital position only on account of its pre-installation.

Brief Facts: The information was filed by the Informant (Ms. Harshita Chawla) under S.19(1)(a) of the Act against the opposite parties (WhatsApp Inc. and Facebook Inc.) alleging contravention of the provisions of S.4 of the Act. The Informant has alleged that the pre-installation of the payment option into the messenger App amounts to imposition of an unfair condition on the user by a dominant entity, i.e., WhatsApp messenger, thus violating S.4(2)(a)(i). Further, the bundling of its messaging services with the UPI-enabled Digital Payments Apps contravenes S.4(2)(d). Pre-installation of WhatsApp Pay is WhatsApp leveraging its dominance in the first relevant market to favour and protect its position in another relevant market (UPI enabled digital market), thereby violating S. 4(2)(e) of the Act. Concerns related to data security of personal information were also raised before the CCI.

The opposite parties have alleged that the Informant has no locus standi due to not being an aggrieved party herself. WhatsApp further stated that the Informant incorrectly defined the relevant market to be the 'market for internet-based instant messaging apps in India' whereas WhatsApp operates in a much broader market under 'market for user attention.' WhatsApp claimed that it does not enjoy a dominant position in the market proposed, and a snapshot of historical market shares of WhatsApp did not give an accurate representation of the market power of a firm. It maintains that there is no imposition or element of coercion as users retain full discretion on whether to register for or use WhatsApp Pay. WhatsApp submitted that the payments feature is not a separate product but an additional feature, so the question of bundling does not arise.

Analysis: CCI observed that an Informant need not necessarily be an aggrieved party to file a case under the Act since neither the spirit of the Act nor any specific provision calls for such a narrow interpretation of the definition. CCI disagreed with the relevant market

proposed by WhatsApp and observed that the first relevant market would be the 'market for Over-The-Top (OTT) messaging apps through smartphones in India' and the second relevant market would be 'market for UPI enabled Digital Payments Apps in India.' It held WhatsApp to be prima facie dominant in the 'market for OTT messaging apps through smartphones in India.' It also found that consumers are at their free will to use WhatsApp Pay; they can use UPI-enabled payment services other than WhatsApp. Mere installation of WhatsApp does not mean they are forced to use WhatsApp Pay for payments. This manner of introduction of a new service cannot be said to be a case of bundling of services; it is instead to be understood as a practice of 'tying' in terms of the antitrust context, whereby the sale of one product requires the customer to also buy another product as a condition of the first transaction. The Informant has alleged that WhatsApp/Facebook have access to data which they are using to carry out targeted advertising. There is neither any concrete allegation nor any specific information to support the competition concern of the Informant. Thus, CCI did not find any contravention of the provisions of S. 4 of the Act against WhatsApp or Facebook and directed closure u/S. 26(2) of the Act.

MAINEJER PRASAD GUPTA V. BAJAJ AUTO LTD. AND ORS., CASE NO. 23 OF 2020

Date of Order. 06.08.2020

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Ratio: In the absence of any market power held by Bajaj and SK Automobiles, CCI rejected allegations of abuse of dominance and noted that submission of an application form in response to an advertisement is a mere invitation to offer and unless accepted by the other party does not result in an agreement/contract. There is no evidence that the application of the Informant has been accepted and, in these circumstances, mere submission of an application will not confer any right on the Informant.

Brief Facts: The information was filed by Mr. Mainejer Prasad Gupta (Informant) against Bajaj Auto Ltd. (Bajaj Auto/OP-1) and M/s S.K. Automobiles (OP-2), alleging contravention of provisions of Ss. 3 and 4 of the Competition Act, 2002. The Informant had applied for a dealership in Hojai, Assam, in response to an advertisement issued by Bajaj. However, the said dealership was not granted to any person from Hojai town; rather, it was allotted in another town called Nilbagan to OP2. It has been alleged that the allotment of the dealership in favour of OP2, without giving an opportunity to the Informant, has led to limiting and controlling the market in violation of S. 3(3) of the Act and amounts to execution of "exclusive distribution agreement" u/S.3(4) of the Act. Further, since OP2 is Bajaj's existing dealer, in Nagaon and Tezpur, in Assam, it abused its dominance by colluding with Bajaj and procured the dealership, thus violating S.4 of the Act.

Analysis: CCI noted that the relationship between the opposite parties is that of a manufacturer and distributor who are not horizontally placed and is therefore not amenable to examination under S.3(3) of

the Act. CCI dismissed allegations of exclusive distribution agreements given Bajaj only had a market share of 12% in the overall market of two-wheelers in India. Further, OP2 was not considered as having any market power by its dealership in Tezpur, particularly given there are other dealers of other brands in and around Hojai, even if the geographic market were to be defined very narrowly. The CCI is, therefore, of the opinion that there exists no prima facie case and directs the closure of the case u/S. 26(2) of the Act.

CHIEF MATERIALS MANAGER, SOUTH EASTERN RAILWAY AND ORS. V. HINDUSTAN COMPOSITES LTD. AND ORS., REFERENCE CASE NOS. 03 OF 2016, 05 OF 2016, 01 OF 2018, 04 OF 2018 AND 08 OF 2018.

Date of order: 10.07.2020

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Ratio: Agreements that are likely to cause AAEC come u/S. 3(1) and if any agreement of the types specified u/S. 3(3) of the Act is established, it is presumed to have AAEC. Also, even if the party is a monopolistic buyer, it is a consumer whose accrual of benefits needs to be considered.

Brief Facts: Allegations were received from various Railway Zones/Divisions about cartelisation in the CBB market. The cases were clubbed together, and a DG was asked to investigate. During the investigation, another case with similar allegations was received. It was clubbed with the other cases after receipt of the investigation report. The DG went through various tenders from 2009 to 2017 and took statements from the opposite party's officials. They found a WhatsApp group, e-mails and other communications showing involvement of 10 of the 12 opposite parties in cartel arrangements for rigging tenders.

Analysis: The CCI held that S. 3(1) prohibits agreements that are likely to cause AAEC. If an agreement of the types specified u/S. 3(3) of the Act is established, it is presumed to have an AAEC. According to *Rajasthan Cylinders and Containers Ltd. v. Union of India and Ors.*, presumption of AAEC can be rebutted by providing evidence to the contrary and considering all or any of the factors in S. 19(3). The parties did not rebut the presumption.

The CCI held that though Indian Railways is a monopolistic buyer, it should have freedom to make choice on goods and service providers, market conditions are no defence to the conduct of the parties. As the opposite parties cooperated with the investigation, were MSMEs, had small annual turnovers and given the situation that the pandemic brought about, the CCI did not impose any monetary penalty.

SANDEEP MISHRA V. NATIONAL HIGHWAYS AUTHORITY OF INDIA, CASE NO. 13 OF 2020.

Date of order: 08.07.2020

Coram: Mr. Ashok Kumar Gupta; Ms. Sangeeta Verma; Mr. Bhagwant Singh Bishnoi

Ratio: The procurer/buyer can specify conditions/technical specifications in the tender document as per its requirements.

Brief Facts: The informant (Mr. Sandeep Mishra) alleged that the National Highways Authority of India ("**NHAI**") sub-criteria for experience in its RFP for engaging consultants is in contravention to the provisions of S. 4 of the Act. He held that the criteria are different from that of the Ministry of Road Transport and Highways ("**MoRTH**") and that the opposite party is abusing its dominant position in the market. NHAI responded that it follows the standard RFP document issued by MoRTH and that depending upon the nature of works under consideration, project specific changes may be incorporated which are also in accordance with MoRTH standard.

Analysis: CCI held that because it is engaged in economic activities and is not performing any sovereign functions, NHAI is an *'enterprise'* u/S. 2(h). The Informant had not delineated the relevant market, so the CCI determined it as the *'Market for procurement of highway engineering consultancy services in the Territory of India'* and held that NHAI is a key player in the relevant market. However, there was no abuse of dominant position because it was held in *Suntec Energy Systems and National Dairy Development Board and Anr.* that it is the right of a consumer to decide the appropriate eligibility conditions based on its requirements. The prescription of eligibility criteria was not unfair/discriminatory and any service provider with the prescribed certification was eligible to participate in the tender. The CCI held that there was no case against the opposite party.

PRASHANT PROPERTIES PVT LTD V. SPS STEEL ROLLING MILLS LTD., CASE 17 OF 2020

Date of Order: 08.07.2020

Coram: Ashok Kumar Gupta, Chairperson, Sangeeta Verma and Bhagwant Singh Bishnoi.

Brief Facts: In 2014, SPS Steel Rolling Mills Ltd. ("**SPS**") and Prashant Properties Pvt. Ltd. (the Informant) entered into a Permissive User Agreement ("**PUA**") that allowed the informant to use a family of trademarks in lieu of approximately Rs. 15 crores which was owed to the informant by virtue of him being an Operational Creditor of SPS.

In 2019, Shakambhari Ispa & Power Limited ("**SIPL**") filed for a CIRP against SPS and an order, by the NCLT of Kolkata, was passed affecting the same. Following this, the informant filed a Title Suit to uphold the validity of the PUA, and a decree of perpetual injunction restraining SIPL and its agents from terminating the PUA. The trial court granted an interim injunction in favour of the informant which was challenged by the opposite party by preferring a Miscellaneous Appeal to the District Court. The District Court granted a stay on the ad interim injunction until the disposal of the miscellaneous appeal. Thus, the aggrieved informant has preferred this instant revisional application against the said stay order.

Analysis: The Informant alleged that SIPL abused its dominant position by issuing a public notice that threatened civil and criminal prosecution against any entity who used those family of trademarks for their business activities. However, the CCI investigated the matter and found that there is no evidence proving the legal right of the Informant about the trademarks.

Also, the informant failed to prove the existence of anti-competitive behaviour or consumer harm. The Public Notice was only a tool used by SPS and SILP to promote their right to safeguard against the misuse of their trademarks, which they are legally entitled to. Thus, the CCI disposed the matter by dismissing the allegations of abuse of dominant position levelled against SPS and SIPL and further on, as SIPL is a successful resolution applicant, under the CIPR, it may control the management of SPS under the orders of the NCLT, Kolkata.

HIGH COURTS

NUZIVEEDU SEEDS LTD. AND ORS. V. MAHYCO MONSANTO BIOTECH (INDIA) PVT. LTD.,COMMERCIAL ARBITRATION PETITION NO. 737 OF 2019 (HIGH COURT OF BOMBAY).

Date of Order: 23.07.2020

Coram: R.D. Dhanuka, J.

Ratio: The jurisdiction of the CCI and the Arbitral Tribunal is different in nature. The CCI does not have the power to grant a monetary claim under a sub-license agreement, which primarily rests with Civil Courts or the Arbitral Tribunal.

Brief Facts: In 2004, the Petitioner and the Respondent signed a Sub-License Agreement ("**SLA**") according to which, the Respondent gave 50 cotton seeds of transgenic variety with Bt. traits to the Petitioner. After the expiry of SLA of 2004, another SLA was entered into in 2015.

The Petitioner stated that as per the agreement, the Respondent was required to pay the amount on every 450gm packet of Bt. Cotton seeds. The Respondent had only paid Rs. 50 lakhs in this regard. Also, in 2015, the petitioner and other seed producing companies sent letters to the respondent questioning the exorbitant amounts charged by him and seeking refunds of the excess amounts paid from 2010 to 2014. However, the respondent did not pay heed to the same and the respondent filed a petition under S. 9 of the Arbitration Act against the petitioner inter alia praying for an order of deposit of the amount claimed against the petitioner under the said 2015 SLA. Later, the respondents filed a Notice to discontinue the SLA 2015.

The Petitioner complained about the abusive conduct of the Respondent, charging high trait value over the State Government Price Control Notifications. The CCI held that the provisions of S. 3(4) and S. 4 of the Competition Act were violated and ordered the DG to investigate in this regard. The investigation took two years to bear fruit due to the non-cooperative nature of the respondent entity.

In 2016, the Respondent filed an infringement suit against the Petitioner on the ground that the patent rights of the Respondent were violated by selling the cotton seeds with Bt. trait. The Petitioner filed a counterclaim on the ground that the plants, plant varieties, seeds, and seed production activities were excluded from the Patents Act, 1970.

The Respondent invoked the Arbitration Agreement for settling the issue by way of Arbitration.

The Petitioner filed an application under S. 16 of the Arbitration Act praying for the dismissal of the claims made by the Respondent. The Arbitral Tribunal dismissed the application filed by the Petitioner and an Arbitral Award was made directing the Petitioner to pay Rs. 117.46 crores for the trait value as per the SLA with appropriate interest rates. This commercial arbitration appeal challenges the award.

Analysis: The Court stated that the jurisdiction of the CCI and the Arbitral Tribunal is different in nature. Additionally, it was observed that S. 61 of the Competition Act was not applicable in this case, as the nature of the disputes is different in relation to the Arbitration Tribunal and the CCI. It was stated that the issues raised by the petitioner of whether the 2015 SLA is void or whether the respondent had abused the dominant position can only be decided by the CCI; and the monetary claims are to be adjudicated upon by the Arbitral Tribunal. The CCI has no power to grant the monetary claim under the SLA, 2015 and thus, the Civil Court or the Arbitral Tribunal has the jurisdiction to adjudicate upon the claims made by the respondent.

NCLAT

SOWIL LIMITED V. COMPETITION COMMISSION OF INDIA & OTHERS, COMPETITION APPEAL (AT) NO. 17 OF 2020.

Date of order: 04.11.2020.

Coram: Justice A.I.S. Cheema, Dr. Ashok Kumar Mishra.

Ratio: Duty to make out a prima facie case on contravention of provisions of the Act falls on the Informant and not on the CCI.

Brief Facts: An appeal u/S. 53 B of the Act was filed by the Appellants, Sowil Limited, against a CCI order u/S. 26(2).

On 26th June 2019, the Ministry of Railways Research Designs & Standards Organisation [‘RDSO’] invited bids for tender for the ‘*Project of monitoring health of ballast bed with the help of GPR Technology for Through Ballast Renewal and formation rehabilitation on Indian Railways.*’ The Appellant claimed that it approached Respondent No.2, Hexagon Geosystems India Pvt. Ltd. [‘Hexagon’] for “*supply of rolling stock mounted GPR for ballast inspection at high speeds*” in order to compete for Tender. Based on a market survey, the Appellants found that the cost of the product came to Rs. 1,41,69,824/- at the conversion rate of Rs. 92.20. Hexagon quoted Rs. 4,86,40,005/- at the conversion rate of Rs. 77.37. Despite attempts to negotiate, Hexagon did not agree to give a discount more than 17 percent and the price quoted was 200 percent higher than what Hexagon was offering to other players.

The CCI concluded that there was no contravention of the provisions of the Act based on the Information submitted by the Appellant and on information from RDSO. The CCI also noted that there had been failure on the part of the Sowil to define the relevant market. There were multiple other major players in the market for rolling stock mounted GPR for ballast inspection in India, which negated the possibility of dominance.

Analysis: The NCLAT found that the Appellant tried to put the burden on CCI to delineate the relevant market instead of establishing it by itself. The NCLAT noted that the Appellant had not approached other players in the market. Hexagon had also responded to the Tender and so the Appellant had approached its own competitor for supply and raised such grievances. The appeal was therefore dismissed as there was no case made out to sustain the appeal.

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