

Competition & Antitrust



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This newsletter is authored by the Competition & Antitrust team at Lakshmikumaran & Sridharan. It includes original articles and research pieces on competition law. It also reviews recent case laws and details regulatory as well as news updates on the subject.



ARTICLE



Blockchain technology on the CCI's radar

In its role as the market regulator, the Competition Commission of India has to constantly stay abreast with developments that impact businesses and affect market dynamics. In April 2021, the CCI published one such paper in collaboration with Ernest & Young LLP on the ground-breaking Blockchain technology, that many experts have predicted will revolutionize the way businesses are conducted. Although currently, blockchain is only known for its application in various cryptocurrencies, CCI notes that different sector such as healthcare, real estate, E-commerce, and even high-end fashion have begun to explore possible applications of the technology.

In this article, **Neelambara Sandeepan (Joint Partner)** and **Shikhar Tyagi (Associate)** discuss competition impact on the evolution of this technology as envisaged in the CCI's publication.

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RATIO DECIDENDI

1. CCI holds that the Uttarakhand Agricultural Produce Marketing Board was abusing its dominant position in the sale of Indian Made Foreign Liquor within Uttarakhand.

KEY POINTS

Cutting off supply / distribution of particular brands, thereby allowing market access to only a dominant entity leads to abuse of its dominant position by such entity. An effective push to competition happens when efficiency of slower moving products is enhanced such that a demand is created for them, not *vice versa*.

BRIEF FACTS

An information was filed by International Spirits and Wines Association of India ("**Informant**") alleging a contravention of Section 4 of the Act by the Uttarakhand Agricultural Produce Marketing Board ("**OP-1**"), Garhwal Mandal Vikas Nigam Ltd. ("**OP-2**"), and Kumaun Mandal Vikas Nigam Ltd. ("**OP-3**") (OP-1, OP-2, and OP-3 are collectively referred to as the "**OPs**").

OP-1 is a body corporate established under the Uttarakhand Agriculture Produce Marketing (Development and Regulation) Act, 2011. It was appointed, by the State of Uttarakhand vide a Liquor Wholesale Order, as the exclusive wholesale licensee for foreign liquor/beer/wine, including Indian Made Foreign Liquor ("**IMFL**"), in the State of Uttarakhand. OP-2 and OP-3 are companies incorporated under the erstwhile Companies Act, 1956 and are fully owned by the State of Uttarakhand. They were appointed as the exclusive sub-wholesalers for the abovementioned alcoholic beverages in the divisions of Garhwal and Kumaun respectively.

The Informant alleged that the OPs were procuring and distributing IMFL in an arbitrary and discriminatory manner with no heed to the consumer demand. Despite high demand for some brands, the OPs were not procuring those brands from the manufacturers, thereby discriminating against manufacturers of those brands. It was also alleged that the OPs were not maintaining minimum stock levels of all the brands as contemplated in the Liquor Wholesale Order. It was also alleged that OP-1 imposed unfair and onerous conditions on the IMFL manufacturers including, *inter alia*, payment for stock sold instead of stock delivered by them and right of OP-1 to terminate the contract unilaterally.

OBSERVATIONS OF THE CCI

Whether the CCI has jurisdiction over the issue?

CCI noted that the Liquor Wholesale Order contained a dispute resolution mechanism in case of breach of the order by OP-1 but, this does not oust the jurisdiction of CCI to examine if any abusive conduct has taken place that hampers competition in the market. The impact of the Liquor Wholesale Order, and its provisions, with respect to dominant position and abuse thereof, could be scrutinized by the CCI under the Act. The fact that multiple proceedings have been initiated before multiple forums, does not bar CCI from taking cognizance of the conduct of OP-1.

Whether OP-1, OP-2 and OP-3 were dominant in the relevant market?

CCI noted that with respect to procurement of IMFL, the State of Uttarakhand is the geographic market and with respect to supply/distribution, the market is sub-divided into Garhwal and Kumaun region. Therefore, the relevant market was held to be:

- a. market for wholesale procurement of branded alcoholic beverages in the State of Uttarakhand;
- b. market for distribution of branded alcoholic beverages in the licensed area of OP-2; and
- c. market for distribution of branded alcoholic beverages in the licensed area of OP-3.

The market share of OP-1, OP-2, and OP-3, in their respective relevant markets was 100%. There was no alternative route or potential competition to any of the OPs. Hence, there were high barriers to entry in the market. The manufacturers were entirely dependent on OPs for access to the retailers and in turn, the retailers and consumers were also totally dependent upon the OPs and therefore, OP-1, OP-2, and OP-3 were dominant in their respective relevant markets.

Whether OP-1, OP-2, and/or OP-3 abused their dominance?

CCI observed that multiple retailers had written to OPs, requesting them to provide brand-wise supply of liquor. Despite that, the brands demanded by them were not supplied. This resulted in a significant drop of market shares of United Spirits Limited (USL) and Pernod brands of liquor as their respective market shares significantly dropped while OPs were operating in the market; and when OPs exited the market, their market shares increased exorbitantly. CCI opined

that such fluctuation cannot be attributed to consumer preference as preferences cannot be so volatile in nature. OP-1 simply did not make available the preferred brands, thereby causing harm to the consumer and competition.

Further, CCI noted that by implementing this discriminatory policy, OP-1 enabled some brands to attain an undue advantage over others, thereby harming the sales of others, distorting the market, and disregarding consumer preferences. By not placing any orders from brands such as USL and Pernod for many months, OP-1 restricted the market access for these brands thereby abusing its dominant position within the market for wholesale procurement of branded alcoholic beverages in the State of Uttarakhand.

Additionally, OP-1 imposed unfair and unilateral terms and conditions over the manufacturers just because it was in a position to impose one-sided contractual obligations. These procurement clauses also became abusive on account of the arbitrary procurement and distribution of IMFL by OP-1.

Finally, CCI held that OP-2 and OP-3 were not liable since they raised indents to OP-1 to supply the brands demanded. OP-2 and OP-3 were entirely dependent on OP-1 and could not do anything to ensure supply of all the brands if OP-1 chose to restrict supply only to a few select brands. Hence, they were not held liable under the provisions of the Act.



CONCLUSION

Therefore, CCI held that the practices of OP-1 amounted to abuse of its dominant position and were therefore violative of Sections 4(2)(c), 4(2)(b)(i), and 4(2)(a)(i) of the Act. After considering all the mitigating factors, CCI imposed a fine of INR 1 crore on OP-1 under Section 27(b) of the Act. *(International Spirits and Wines Association of India and Uttarakhand Agricultural Produce Marketing Board & Ors., CCI Case No. 02 of 2016; order dated 30.03.2021)*

2. Delhi High Court upholds CCI's order, directing investigation into the new privacy policy rolled out by Whatsapp LLC

KEY POINTS

Mere pendency of some issues before the Hon'ble Supreme Court of India ("**Supreme Court**"), or any of the High Courts does not necessarily bar CCI from exercising jurisdiction otherwise vested with it under the Act.

BRIEF FACTS

Whatsapp LLC ("**WhatsApp**") is the proprietor of the popular Over-the-top ("**OTT**") smartphone messaging application ("**App**") 'WhatsApp Messenger'; which is used for sending and receiving variety of media texts, photos and videos, calls etc. through the internet. In 2014, WhatsApp was acquired by Facebook Inc. ("**Facebook**") which owns and operates the popular social media platform 'Facebook' (Whatsapp and Facebook are collectively termed as "**Petitioners**"). Smartphone users that wish to install Whatsapp are required to accept the user policy, which includes a privacy policy underlining how whatsapp may protect and / or use data of the users. The said privacy policy was updated in 2016 and then again in 2021. Under the 2016 update, existing users were given a one-time opportunity to 'opt-out' of WhatsApp sharing their 'user data' with Facebook. The 'opt-out' option was not made available to users that joined WhatsApp after the release of 2016 update; and the same is under challenge before Supreme Court.

The most recent update to the privacy policy was released in 2021 ("**2021 Update**"), which made it mandatory for all WhatsApp users to accept the new privacy policy and agree to share their user data with Facebook. Writ petition were also filed before the Delhi High Court ("**DHC**") and Supreme Court on the grounds that the 2021 Update violated the fundamental right to privacy and allowed WhatsApp to share user data without any government regulation. Even though the challenge to the 2021 Update is pending before the constitutional courts, CCI took *suo motu* cognizance of the issue and passed an order under Section 26(1) of the Act, thereby directing the Director General ("**DG**") investigate the ramifications of the 2021 Update *viz* competition and data policy. Aggrieved by the said Section 26(1) order, the Petitioners filed a writ before DHC, contending that CCI had overreached its jurisdiction by exercising *suo motu* powers when the same matter was already pending before Supreme Court.

OBSERVATIONS OF THE CCI

Whether CCI, at this stage, has jurisdiction to take this suo moto action against the Petitioners?

At the stage of issuing an order under Section 26(1) of the Act, the CCI is merely required to form a *prima facie* opinion. The *prima facie* order is purely administrative in nature and does not entail any consequence on the civil rights of the Petitioners. CCI has *prima facie* concluded that Whatsapp is dominant in the relevant market of OTT messaging apps through smartphones in India and the concentration of data in WhatsApp and Facebook itself may raise competition concerns as data-sharing amounts to degradation of non-price parameters of competition. Thus, there are competition law issues associated with the 2021 Update.

Although the question regarding the 2016 Update/2021 Update not giving an option to users for opting-out from sharing their data with Facebook is also an issue before the Supreme Court and DHC; CCI is not completely denuded of the jurisdiction vested with it under the Act. Therefore, it is not a question of lack of jurisdiction of CCI, but rather one of prudence and discretion. Any findings given by CCI on any of the issues would be subject to the findings of the Supreme Court and DHC.

Whether CCI has correctly arraigned Facebook as a necessary party for the proceedings?

Though the 2021 Update has been rolled out by Whatsapp, Facebook is its parent entity and an integral part of the investigation since the allegations in relation to sharing of data by Whatsapp with Facebook would necessarily require the presence of Facebook in such an investigation.



CONCLUSION

Merely because an issue is pending before the Supreme Court or DHC, CCI cannot be said to have been divested of the jurisdiction it otherwise possessed under the Act. Therefore, DHC upheld the order passed by CCI under Section 26(1), directing the DG to investigate Whatsapp and Facebook for violations of Section 4 of the Act. (*WhatsApp LLC v. Competition Commission of India, W.P. (c) No. 4378 of 2021; order dated 13.04.2021.*)(Note: Currently, this order is under challenge before the Hon'ble DHC through separate Letters Patent Appeals filed by both WhatsApp and Facebook)

3. CCI dismisses information filed against Asian Paints Ltd. for violation of Sections 3 and 4 of the Act.

KEY POINTS

Filing a criminal complaint against another enterprise in the same sector cannot be said to have been done with a view to oust competition from the relevant market in the absence of any additional evidence to indicate contraventions of Section 3 and / or 4 of the Act.

BRIEF FACTS

The information was filed by one Mr. S. Kannan ("**Informant**") against (i) Asian Paints Ltd. ("**Asian Paints**"), (ii) Mr. K.B.S. Anand, Managing Director, Asian Paints, and (iii) Mr. K. Sundaram, Additional Manager for IPR, Asian Paints, (collectively referred to as the "**OPs**").

The Informant runs a small-scale-industry by the name of M/s Arcus Enterprises ("**Arcus**") that is engaged in the business of manufacturing primers and paints under the brand-name 'Arcus'. Besides this, Arcus also purchases discarded paints and uses them as raw material for further processing by treating, recycling and altering them, thereby, making them usable products. Asian Paints is a body corporate that manufactures paints.

In the information filed before CCI, it was alleged that the OPs had lodged a false criminal complaint against Arcus at the Arcot Town Police Station. In the first information report ("**FIR**"), the OPs had alleged that Arcus is selling damaged products under the Asian Paints brand. Therefore, the Informant contended before CCI that Asian Paints was attempting to abuse its dominance to harass, humiliate, and drive out competitors from the market. Thus, Informant alleged contravention of the provisions of Sections 4 and 3(4) of the Act.

OBSERVATIONS OF THE CCI

Whether filing of the criminal complaint against Arcus amounts to contraventions of the provisions of the Act?

- (i) Since there was no relationship, either horizontal or vertical, between Asian Paints and Arcus, there was no violation of Section 3 of the Act.
- (ii) The informant was unable to produce any additional material on record,

beyond the filing of the criminal complaint. Therefore, the mere filing of criminal complaint cannot be said to be with an aim to oust competition from the market and therefore, it would not amount to abuse within Section 4 of the Act.



CONCLUSION:

Since there were no facts and evidence on record that indicated violation of either Section 3 or Section 4 of the Act, the CCI opined that no prima facie case is made out against the OPs. Therefore, no investigation was initiated against them and the information was closed under Section 26(2) of the Act. *(S. Kannan and Asian Paints Ltd., & Ors., CCI Case No. 53 of 2020; order dated 12.04.2021)*

4. CCI closes information filed against the Superintendent Engineer of Highways Department, State of Tamil Nadu for violation of Section 4 of the Act.

KEY POINTS

The consumer, based on his requirements / commercial considerations, has the freedom to specify and choose the kind of service, machineries, timelines, mode and the manner in which it requires the same, provided that no provision of the Act is violated. The public procurement procedure should yield the best possible and efficient outcome both from the procurer's perspective and from the perspective of the public good by allowing maximum participation from entities to ensure competition.

BRIEF FACTS

The information was filed by a Mr. M.L. Ravi ("**Informant**"), against the Superintendent Engineer, Construction and Maintenance, Highways Department, Trichy circle of the State of Tamil Nadu ("**OP**") alleging violation of provisions of the Act.

The Informant alleged that the OP, which is the government department responsible for maintaining and improving roads under the control of Government of Tamil Nadu, was using a Performance based Maintenance Contract system ("**PBMC**") for allotting tenders for road construction and management, thereby lessening competition in the market by restricting the competition only amongst the big players of the market. Informant also alleged that the OP imposed unfair conditions in the tenders, such as (i) the requirement for filing a hard copy along with online submission of the bid, (ii) registration with the Tamil Nadu Highways department, and (iii) the requirement of owning as many as 78 machineries, with a working conditions certificate for each of the machineries from the concerned Divisional Engineer (H) for quality control as a pre-requisite for submitting a valid bid.

OBSERVATIONS OF THE CCI

Whether the OP, which is a government department, falls within the definition of an enterprise under the Act?

OP is a government department engaged in the activity of developing and maintaining roads in the State of Tamil Nadu. In its role, OP invites tenders for

carrying out various activities entrusted to it and therefore, it has an interface with the market of construction of roads in the State. Hence, it would fall within the definition of an enterprise under Section 2(h) of the Act.

Whether the conduct of OP leads to an abuse under the provisions of Section 4 of the Act?

PBMC was introduced as a way of tendering, as a policy decision, by the Government of the Tamil Nadu based on the announcement in the Legislative Assembly in financial year ("**FY**") 2019-20, keeping in view the objective of need for development of road infrastructure. Since sufficient bids were received by the Government when tenders were released under PBMC system, it was held that it is not the case that PBMC system benefits only a few entities. The system benefits public at large. The procurer has a right to choose the process to be implemented.

With respect to the other conditions imposed by OP in their tenders, CCI summarily noted that the allegations of abuse are not made out against the OP.



CONCLUSION

In light of the abovementioned findings, CCI found that no *prima facie* case is made out against OP and therefore directed the matter to be closed in terms of the provisions contained in Section 26(2) of the Act. (*M. L. Ravi and Superintendent Engineer, CCI Case No. 51 of 2020; Order dated 08.04.2021*)

5. CCI dismisses information filed against Greater Noida Industrial Development Authority and New Okhla Industrial Development Authority for violation of Section 4 of the Act.

KEY POINTS

A statutory body exercising economic functions cannot not be said to have abused its dominant position in a particular relevant market for any decisions taken as part of the policy making process, which apply equally to all market participants.

BRIEF FACTS

Three separate informations were filed by the Confederation of Real Estate Developers Association of India - Western Utility Promoters, Supertech Ltd., and one undisclosed informant ("**Informants**") against Greater Noida Industrial Development Authority ("**GNIDA**") and New Okhla Industrial Development Authority ("**NOIDA**") for violation of the provisions of Section 4 of the Act. GNIDA is the sole/nodal authority responsible for development of Greater Noida region, established under the UP Industrial Area Development Act, 1976. NOIDA is the sole/nodal authority responsible for development of Noida region. For the development of land parcels in their respective regions, GNIDA / NOIDA floated various schemes which detailed land use, terms and conditions for development, eligibility details, bidding details etc. and basis these schemes, potential bidders (developers) submitted bids for the development of the land parcel. Thereafter the successful bidders were allotted a land parcel letter and then a lease deed was entered into between GNIDA / NOIDA and the proposed developer. Informants alleged certain conduct and terms of lease deed of GNIDA/NOIDA as anti-competitive. These included:

- i. Demanding additional farmer compensation from the developers even though no document stipulated such payment obligations.
- ii. Non-disclosure and allotment of encumbered land (riddled with disputes) to the developers and charging premium as well as lease rent for the same.
- iii. Non-grant of zero period when the project land was either not handed over to the developers or failure on GNIDA/NOIDA's part to execute external developmental works.
- iv. Demanding hefty sums of money and imposing interest and penal interest when the developers were not even given peaceful possession of the land.
- v. No liability on GNIDA/NOIDA of providing clear land to the developers, whereas the developers have to adhere to strict timelines.

- vi. No clause which grants the developer any choice to opt for cancellation and refund of the deposited amounts in the event of any deviation or breach on part of GNIDA/NOIDA.

OBSERVATIONS OF THE CCI

Whether the proceedings are maintainable before CCI?

In instances where GNIDA / NOIDA discharge activities that are economic in nature, and not a mere discharge of statutory powers, they would fall within the definition of an enterprise under Section 2(h) of the Act. The service under question relates to allotment of land to developers and not to acquisition of land by GNIDA / NOIDA under the principle of *eminent domain*; and therefore, would not fall under the exception of sovereign function of the Government and can be subjected to scrutiny for violation of Section 4 of the Act.

Further, CCI noted that although the information arises from unfair / discriminatory conditions or price imposed on a party in a contractual arrangement, they can be scrutinized by the CCI for violation of Section 4 of the Act. Jurisdiction of CCI is not ousted merely because the dispute is contractual in nature. Even if developers enter the lease deed voluntarily, that does not imply that they cannot approach CCI alleging contravention of the Act. Therefore, the present proceedings were held to be maintainable.

Whether GNIDA/NOIDA are dominant in their respective relevant markets?

CCI noted that (i) residential and commercial properties are not substitutable and (ii) the relevant market would have to be restricted to Greater Noida / Noida since the region was distinctly homogeneous and different from the conditions prevailing in other regions due to location and consumer preferences.

Accordingly, CCI delineated the relevant market as the market for allotment of land for development of group housing projects in Greater Noida (in information against GNIDA) and NOIDA (in information against NOIDA). Further, CCI also noted that all developers who wished to participate in schemes and set-up projects in Greater Noida / Noida area were bound to abide by GNIDA / NOIDA's scheme documents and the policies as they were the sole authorities to regulate urban development in the Greater Noida / Noida region. They operated independently in their relevant markets without any competitive constraints and were therefore, held to be dominant in their respective relevant markets.

Whether GNIDA/NOIDA abused their dominance in their respective relevant markets?

The CCI looked at five of the six abovementioned "abusive" terms/conduct alleged to have been done by GNIDA/NOIDA.

- i. The demand for additional farmer compensation from the developers was not a competition law issue and CCI opined that it was not the appropriate authority to interfere in the issue.
- ii. Non-disclosure and allotment of encumbered land to developers and charging premium as well as lease rent for the same was not anti-competitive since the information about the status of the land was transparently made available to the potential developers and it was held that buyers or developers cannot be absolved of their own lack of due diligence or otherwise consensual behaviour.
- iii. There was no contractual obligation upon GNIDA / NOIDA to grant 'zero period to developers. GNIDA / NOIDA came out with a benevolent policy to offer some solace to the developers but eventually rolled back the policy as a purely administrative decision. The policy was rolled back uniformly for all developers and there was no discrimination. Therefore, CCI refused to interfere with this administrative decision. Further, CCI found that there was no major delay in completion of external works by GNIDA / NOIDA and the same was *sine qua non* for the timely completion of the project and therefore, no interference was done on this allegation as well.
- iv. On the hefty demand of money and imposition of interest and penal interest even when developers were not given peaceful possession of the land, CCI noted that lease deed is executed only for transfer of vacant and unencumbered possession of the land to the lessee, however, there may be unforeseen instances where disputes have arisen after transfer of the possession to the lessee. In addition to this, penalties were laid down in a transparent manner and therefore, no abuse of dominance can be made out for this conduct.
- v. On the issue of no liability on GNIDA/NOIDA for providing clear land to the developers, whereas the developers have to adhere to strict timelines, CCI held that the acquisition is a long and complex process and GNIDA/NOIDA enters into the lease deed for the land only when it is acquired and is in its possession. Thus, it was deemed unnecessary to have any clauses that direct GNIDA/NOIDA to hand over possession of land. GNIDA/NOIDA does not have the power/duty/obligation to undertake the task of management of law and order over the property of lessee. After the land is leased, GNIDA/NOIDA have no obligation to clear the land. It was held that there are strict guidelines for the developers because it is in the interest of home buyers. Thus, this term was not held to be an abuse of dominance.



CONCLUSION

CCI concluded that no *prima facie* case could be made out against GNIDA/NOIDA for violation of the provisions of Section 4 of the Act and therefore, the matter was closed in terms of the provisions of Section 26(2) of the Act. (*Confederation of Real Estate Developers and Greater Noida Industrial Development Authority, CCI Cases No. 34, 37, and 38 of 2020; order dated 04.05.2021*)

6. CCI directs DG to initiate investigation into anti-competitive conduct by Tata Motors Ltd.

KEY POINTS

Even if there is a delay in filing of information on behalf of the informants, the Act does not envisage any period of limitation as inquiries conducted by CCI are proceedings *in rem*. There can be no limitation period in competition law as in a changing and evolving market scenario, it cannot be determined with any exactitude as to when an anti-competitive behaviour commenced or morphed into another type of behaviour and when such conduct was terminated.

Additionally, all proceedings before CCI are inquisitorial, any member of public can bring any anti-competitive behaviour to the notice of CCI and there are no strict *locus standi* requirements.

BRIEF FACTS

Two separate informations were filed by Neha Gupta (a practicing advocate) and Nishant P. Bhutada (an authorised dealer of Tata Motors Ltd.) (“Neha Gupta and Nishant Bhutada are collectively referred to as **“Informants”**) against (i) Tata Motors Ltd. (**“Tata Motors”**), (ii) Tata Capital Finance Services Ltd. (**“TCFS”**), and (iii) Tata Motors Finance Ltd. (**“TMF”**) for violations of the provisions of Section 3 and Section 4 of the Act (Tata Motors, TCFS, and TMF are collectively referred to as the **“OPs”**). Tata Motors is a subsidiary of Tata Sons and is engaged in the business of, *inter alia*, manufacture and sale of commercial vehicles across India. TCFS and TMF are non-banking finance corporations (**“NBFCs”**) which also form a part of the Tata Sons group. In the course of its regular business, Tata Motors appoints authorized dealers across India, to sell its commercial vehicles, spare parts, accessories, and provide after sales services and value-added services. In the information, it was alleged that Tata Motors coerced its authorized dealers to order vehicles according to OP’s whims and fancies, thereby restricting such dealers from starting, acquiring, or indulging in any new business even if it not related to the automobile sector. It was also alleged that Tata Motors forces its authorized dealers to raise finance / loans from TCFS and TMF by not issuing comfort letters allowing dealers to avail loans from other lenders in the market. Additionally, the information also alleged that Tata Motors enters into exclusive distribution agreements that confine the authorized dealers to sell only within their allotted territories.

OBSERVATIONS OF THE CCI

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Whether the proceedings are maintainable before CCI?

CCI dealt with three preliminary considerations before delving into the merits of the matter. Firstly, it was contended that the matter was purely contractual and therefore CCI would not have jurisdiction. CCI rejected this contention and held that if an anti-competitive condition / conduct can be made out that arises from a contract, it will fall under the domain of CCI. Allegations in the present information relate to competition concerns posed by contractual obligations and therefore, CCI will have jurisdiction in the present proceedings.

Secondly, it was contended that the information was filed after a period of significant delay from when the parties had entered into the contract and therefore would be barred by limitation. This contention was also rejected and CCI held that the Act does not envisage any period of limitation as inquiries conducted by CCI are proceedings *in rem*. There can be no limitation period in competition law, as in a changing and evolving market scenario, it cannot be determined with any exactitude as to when an anti-competitive behaviour commenced or morphed into another type of behaviour and when such conduct was terminated.

CCI also dealt with a contention regarding the *locus standi* for the informants to file the present information and held that as the proceedings before CCI are inquisitorial in nature, any member of the public can bring any anti-competitive behaviour to the notice of CCI and there are no strict *locus standi* requirements.

Therefore, it was held that CCI has the jurisdiction to proceed with the matter.

Whether OP is dominant in the relevant market?

While delineating the relevant market, CCI noted that the information pertained only to sale of vehicles belonging to the 'commercial vehicle' category. Further, commercial vehicles fall under a separate category of vehicles, when compared with passenger vehicles and utility vehicles, in terms of speed, mileage, appearance, engine capacity, and usage, and because the conditions of demand and supply do not differ from one region to another throughout India, the relevant market was defined as the market for manufacture and sale of commercial vehicles in India.

CCI noted that Tata Motors had itself claimed in its Annual Report for FY 2019-20 that it had a 43% market share in the pan-India commercial vehicle segment. In another Annual Report, Tata Motors had claimed to be a leader in

India's commercial vehicle market. Therefore, Tata Motors had a high market share as compared to the competing manufacturers. Accordingly, CCI held that it *prima facie* enjoys a dominant position in the relevant market.

Whether the contractual obligations imposed by Tata Motors upon its authorized dealers violate any provisions of the Act?

CCI opined that the practice of coercing authorized dealers to order vehicles as per Tata Motors's own needs and requirements might have resulted in swarming the dealers with a stock of slow-moving vehicles which may impair the financial ability and competitiveness of the dealers. This practice, *prima facie*, appeared to be an unfair imposition upon the dealers which contravened Sections 4(2)(a)(i) and 4(2)(d) of the Act.

Additionally, the practice of not allowing dealers to start, acquire or indulge in any new business appeared to be unduly restrictive and expansive in its coverage which interfered with the freedom of trade of dealers. It resulted in denial of market access to the dealers to other markets in contravention of Sections 4(2)(a)(i) and 4(2)(c) of the Act.

On the practice of not giving comfort letters for availing financial assistance from other lenders, CCI did not find any merit in the allegation of the Informants. There was nothing on record to show that Tata Motors imposed such a requirement on its authorized dealers and therefore, that allegation failed.

Finally, CCI held that the exclusive distribution agreement which restricted authorized dealers to only one territory was also held to be *prima facie* a violation of Section 3(4)(c) of the Act even though Tata Motors contended that such restriction is imposed to incentivize dealers to make investment in developing their dealership business and such restriction enhances inter-brand competition.



CONCLUSION

Therefore, CCI concluded that a *prima facie* case could be made out for contravention of Sections 3(4) and 4 of the Act by TM. Accordingly, the DG was directed to initiate an investigation into the conduct highlighted in the information. (*Neha Gupta and Tata Motors Ltd., CCI Cases No. 21 of 2019 and 16 of 2020; order dated 04.05.2021*)

NEWS NUGGETS

1. IBM receives deemed approval from CCI for restructuring Indian business under the fast-track channel

IBM has received CCI's approval under its Green Channel scheme for reorganising its India based global managed infrastructure service ("**MIS**") business. Currently, IBM's MIS business is under Network Solutions Pvt. Ltd. and IBM India, which are indirect, wholly owned subsidiaries of IBM Corp. IBM estimates that the transaction will be completed towards the end of the year and pursuant to its completion, IBM's MIS business will be split off into two newly incorporated entities – Kyndryl Holdings LLC and Grand Ocean Managed Infrastructure Services Pvt. Ltd.

2. USFTC suggests that Apple's repair policy may be anti-competitive

The United States Federal Trade Commission ("**USFTC**") has recently published a report labelling Apple's device repair policy 'anti-competitive' and 'restrictive' as it 'stifle's independent repair businesses from fixing its devices'. The USFTC has opined that independent repair businesses cannot compete if device manufacturers develop products that are not easily repaired or flat-out cannot be repaired economically. The USFTC has found that it is extremely difficult for independent repair businesses to obtain Apple's service manuals and spare parts and even when the same are made available, Apple utilises copyright infringement provisions and random audits to drive out competition.

This latest report is no-doubt another blow to Apple from the USFTC, which only recently started trial in the Apple v. EPIC anti-trust dispute concerning Apple's restrictive app store payments mechanism.

3. The European Union accuses Apple of anti-competitive conduct following allegations by online music streaming platform, Spotify

The European Union's ("**EU**") competition commission is likely to file formal charges against Apple for unfairly promoting Apple Music on its app store. A complaint in this regard has been filed by popular music streaming platform, Spotify, contending that Apple's app payment rules for music streaming services available on its iOS app store are anti-competitive as they force app developers selling digital content to use its in-house payment system, which charges a 30% commission on all subscriptions.

4. German regulator prohibits Facebook from processing WhatsApp user data

The German Data Protection Authority ("**DPA**") has taken cognizance of the highly controversial 2021 WhatsApp privacy policy update that makes it mandatory for users of the WhatsApp messenger App to accept sharing of their personal data with WhatsApp's parent entity, and social media giant, Facebook. The DPA has invoked extraordinary powers granted to it under European Union's ("**EU's**") General Data Protection Regulation ("**GDPR**") to impose a three month freeze on Facebook from processing any personal data belonging to WhatsApp users just a few days before the deadline for users to accept the new privacy policy.

GLOSSARY

- (i) Section 3 of the Act deals with Anti-Competitive Agreements – (a) Horizontal Agreements under sub-clause 3 (amongst direct competitors) and (b) Vertical Agreements under sub-clause 4 (amongst market participants at different levels of the production / supply chain);
- (ii) Section 4 of the Act deals with abuse of dominant position;
- (iii) Section 19 of the Act deals inquiries by CCI into cases pertaining to contravention of either Section 3 or Section 4;
- (iv) Section 26 lays down the procedure for inquiry under Section 19; and
- (v) Section 27 grants CCI the power to make orders once it has determined that an enterprise has acted in contravention of Section 3 or Section 4.

TEAM PROFILE



**L BADRI
NARAYANAN**

PARTNER
(Advisory, Corporate,
Competition and Regulatory)

Badri specialises in Corporate, Competition and Regulatory matters. He is qualified to practice as a lawyer in India and New York. He advises on various issues involving consortiums and joint ventures such as contract manufacturing scenarios, valuation, secondment, royalties and license fee arrangements. He has represented parties before various fora in tax and commercial disputes. He practiced as a patent attorney in the United States before moving to L&S.



**CHARANYA
LAKSHMIKUMARAN**

PARTNER
(Disputes, Competition and
Regulatory)

Charanya has over a decade of experience working in the fields of intellectual property, taxation and regulatory litigation. She is an Advocate-on-Record designated by the Supreme Court and was a former associate in the chambers of the Attorney General of India. Charanya regularly appears before the Supreme Court and focuses on competition and regulatory litigation before the NCLT and the NCLAT.



**NEELAMBERA
SANDEEPAN**

JOINT PARTNER
(Competition and Antitrust)

Neelambera advises on the full range of competition law matters including cartel enforcement, abuse of dominance, leniency applications, merger control, audits and compliance. She appears before the CCI, NCLAT and various High Courts. Neelambera has represented clients in high-profile, precedent setting behavioral cases (Cement Cartel case) and advised on complex M&A transactions. She has previously worked at the WTO in Geneva.



**ADITYA
BHATTACHARYA**

JOINT PARTNER
(Disputes, Competition and
Regulatory)

Aditya has worked with L&S since 2010 and regularly appears before the Supreme Court of India, various High Courts, the Competition Commission, NCLT and the NCLAT. His practice is focused on litigation emanating from the manufacturing sector, including matters of taxation, competition and regulatory issues.



**RISHABH
CHOPRA**

JOINT PARTNER
(Competition and Antitrust)

Rishabh advises companies across various sectors on competition law issues such as anti-competitive/restrictive practices, cartel investigations and market dominance. Along with the team, he is also adept in running bespoke competition compliance programs, audits and trainings for various clients. He also leads the firm's initiatives on business development, communication and account management.

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exceeding expectations
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