Competition News Bulletin

VAISH ASSOCIATES ADVOCATES ESTD. 1971

Corporate, Tax and Business Advisory Law

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I. CARTELS AND ANTICOMPETITIVE AGREEMENTS

INDIA

CCI closes investigation in the airline industry

The Competition Commission of India ("CCI/Commission") by way of an order dated 22 February 2021 has closed an investigation against Jet Airways, Indigo, Go Air, Spice Jet and Air India for alleged involvement in a price cartel. On finding a *prima facie* case, CCI directed an investigation by the Director General (DG).

The investigation *inter alia* focused on whether third party software(s) that helps determine, implement and dynamically change the fares offered to customers on a real time basis, have been implemented by the airlines by way of a common understanding or whether such software resulted in or facilitated price collusion in some other manner. Upon investigation, the CCI concluded that there was no pattern of stability or parallelism noticed between the airlines, and that rather a significant variance was seen in the market shares of the airlines. Further, no exchange of communication between the airlines could be established.

It was observed that although similar softwares are used by the airlines for the purpose of revenue management, manual intervention plays a pivotal role in the determination of final prices. The key role in the determination of airfares was played by revenue management personnel, whereas softwares are merely used to facilitate their decision making. Since there was no evidence on record to establish cartelization amongst the airlines during the period April 2012 to March 2014, the CCI agreed with the DG's findings and closed the case under Section 26(6) of the Competition Act, 2002 ("Act"). *(Source: CCI decision dated 22 February 2021; for full text see CCI website)*

CCI imposes penalty for bid-rigging in the procurement of sewing machines

By way of an order dated 17 March 2021, the CCI has imposed a penalty of INR 10,00,000/- (Ten lakh Rupees Only) on M/s Klassy Computers (OP-2), M/s Nayan Agencies (OP-3) and M/s Jawahar Brothers (OP-4), authorised dealers of Usha International Ltd. (OP-1), the authorised marketer of Usha-Jenome Sewing Machine, for rigging a tender floated by the Pune Zila Parishad (OP-5) for procurement of picofall-cum-sewing machine, as part of a social welfare scheme of the Government of

Maharashtra. On finding that a *prima facie* case existed, CCI directed an investigation by the Director General (DG) against OP-2, OP-3 and OP-4.

Based on the analysis, evidence, facts and circumstances discussed in the investigation report, the DG, however, 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 Section 3(3)(d) read with Section 3(1) of the Act. DG also relied upon additional evidence such as IP addresses, call data records, and close coordination in other tenders to establish bid-rigging.

On consideration of the objection to the finding of the DG against OP-1 that DG did not provide sufficient opportunity to OP-1 to respond to the queries raised by the Office of the DG and that the DG did not provide any opportunity to cross-examine the persons whose statements were recorded by the DG and relied upon to record finding of contravention against OP-1, CCI directed further investigation. Accordingly, the OPs were accorded opportunities of cross-examination and the Reply of OP-1 was also examined during the course of the investigation. The DG in its Supplementary Investigation report again concluded that there was a nexus and meeting of minds between the OPs, especially OP-1 and OP-2. DG also analysed the role of the PSU Buyer, the Pune Zilla Parishad (OP-5) in designing of tender and evaluation of the bids and noted that OP-5 did not follow the procedure laid down and as such did not exercise due diligence while evaluating the bids.

The Commission after considering the objections filed by the OPs to both DG investigation reports, observed that OP-2, OP-3 and OP-4 had quoted prices which were very close to each other. The CCI also relied on additional evidence such as same IP addresses, call data records, and close coordination in other tenders to establish bid-rigging, as "Plus Factors" to conclude active coordination between them, in addition to the evidence of parallel pricing.

With respect to the quantum of penalty, the CCI observed that the infringing OPs have rigged the bids in respect of procurement of sewing machines which were to be distributed for social welfare objectives. Accordingly, the CCI took serious note of the infringement. In addition to the penalty on the enterprises, the CCI also imposed a penalty of INR 10,000/- under Section 48 of the Act on each of the individuals of OP-4 identified as being responsible for the conduct.

Role of OP-1 & OP-5

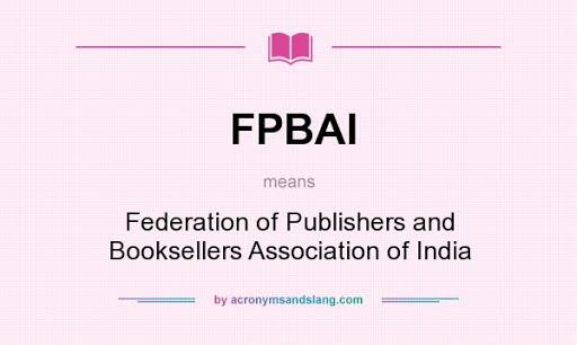
The CCI, however, did not find OP-1 as part of the cartel on considering its preliminary submission that it did not bid in the Impugned Tender floated by OP-5 in November 2015 and the second tender

floated by OP-5 in August 2016 (in which OP-1 submitted its bid) was cancelled without opening. Hence, OP-1 was not at the same level as that of other bidders, i.e. OP-2 to OP-4 and thus, there is no question of any cartel or bid rigging or collusive bidding by OP-1 within the meaning of the Act. Moreover, according to the Commission, no cogent evidence was procured during investigation to prove meeting of minds between OP-1 and OP-2, OP-3 and OP-4 and that mere issue of authorization letter by OP-1 as the OEM to its dealers or mere absence of proper due diligence and verification by a manufacturer before issuing authorisation letters, cannot, in itself, be a ground to hold OP-1 liable for contravention of the provisions of the Act. Further, the "personal" relationships between employee of OP-1 and proprietor of OP-2, as brought out by the DG to establish contravention, are wholly extraneous and unwarranted did not make them a part of cartel.

As regards the role of the public procurer, OP-5, the CCI observed that any agreement or understanding or arrangement of OP-5 with OP-1 to OP-4, cannot be the subject matter of scheme envisaged under Section 3(3) of the Act. The examination of the officials of the procurer can only supplement the investigation conducted by the DG and evidence collected against other opposite parties/ bidders in the matter. CCI was of the opinion that allegations of the Informant regarding the conduct of OP-5 as alleged in the Information do not fall within the purview of the Commission. *(Source: CCI decision dated 17 March 2021; for full text see CCI website)*

CCI imposes penalty on the Federation of Publishers and Booksellers Association of India for engaging in anti-competitive conduct

By way of an order dated 23 February 2021, the CCI imposed a penalty of INR 2,00,000/- on the Federation of Publishers and Booksellers Association of India (FPBAI) and its office bearers for



(i) Restricting the quantum of discounts that may be offered by its members who are booksellers/ publishers/subscription agents to various institutional buyers;

(ii) Directing members to refrain from participating in advertisements which did not meet the conditions prescribed by FPBAI.

The Commission observed that the practices of FPBAI were not merely recommendatory in nature, but rather FPBAI coerced its members to abide by the same by issuing notices/seeking explanations for violating such policy and advisories. The CCI further observed that FPBAI has been unable to

satisfactorily provide the Commission with reasonable justification for adopting such coercive practices.

The CCI held that

(i) The FPBAI, by restricting the quantum of discounts, which may be offered by its members booksellers, publishers, subscription agents to various institutional buyers, in its terms of supply for the booksellers and subscription agents, indirectly determined the sale prices of books, journals etc. sold by its members in India, in contravention of Section 3(3)(a) read with Section 3(1) of the Act;

(ii) FPBAI, by directing its members to refrain from participating in advertisements, which have conditions not in accord with the conditions expected by FPBAI, indirectly limited and controlled the supply of books, journals, etc. in the market for supply of books, e-resources and print journals in India, in contravention of Section 3(3)(b) read with Section 3(1) of the Act. The CCI also imposed penalty of Rs. One lakh each on the two office bearers of FBAI under Section 48 of the Act. *(Source: CCI decision dated 23 February 2021; for full text see CCI website)*

INTERNATIONAL

EC fines three EU railway companies for customer allocation cartel

The EC has fined railway companies Österreichische Bundesbahnen (ÖBB), Deutsche Bahn (DB) and Société Nationale des Chemins de fer belges/Nationale Maatschappij der Belgische Spoorwegen (SNCB) a total of €48 million for violating EU competition laws.

The infringement concerned cross-border rail cargo transport services in the EU provided by ÖBB, DB and SNCB under the freight sharing model and carried out in "blocktrains". Blocktrains are cargo trains shipping goods from one site, such as the production site of the vendor of the transported goods to another site, such us a warehouse, without being split up or stopped on the way.

Under the freight sharing model, which is a contract model foreseen in international railway law, railway companies performing cross-border rail services provide customers with a single overall price for the service required under a single multilateral contract.

The Commission's investigation revealed that the three railway companies coordinated by exchanging collusive information on customer requests for competitive offers and provided each other with higher quotes to protect their respective business. The companies thus participated in a customer allocation scheme, which is prohibited under EU competition rules.

The anti-competitive conduct lasted from 8 December 2008 to 30 April 2014, with SNCB participating only since 15 November 2011 and only for transports by ÖBB, DB and SNCB. The cartel concerned conventional cargo transport sectors (except automotive transports). (*Source: European Union press release dated 20 April 2021*)

EC penalizes investment banks for participating in bonds trading cartel

The European Commission has imposed a penalty of approximately € 28 million Euros on Bank of America Merrill Lynch, Crédit Agricole, and Credit Suisse for breaching EU competition laws. Deutsche Bank was not fined as it revealed the existence of the cartel to the Commission having filed a leniency application in August 2015.

The four banks took part in a cartel in the secondary trading market within the European Economic Area of Supra-sovereign, Sovereign and Agency (SSA) bonds denominated in US Dollars.

The bank's traders, who were in direct competition, typically logged into multilateral chatrooms or bilateral chatrooms on Bloomberg terminals. They knew each other on a personal basis, thus creating a closed circle of trust. They provided each other with recurring updates on their trading activities, exchanged commercially sensitive information, coordinated on prices shown to their customers, or to the market in general and aligned their trading activities on the secondary market for these bonds. The conduct took place during a five-year period and affected the trading of US denominated SSA bonds on the secondary market in the entire EEA.

The Commission's investigation revealed that, further to coordination on prices quoted to specific clients or the market in general, the traders at times agreed:

- to refrain from bidding or offering, or to remove (or "kill") a bid or offer from the market, when they might come into competition with one another; and
- to split trades between each other and combine or reduce their respective positions to meet a specific customer's demand, without the customer being aware that it was dealing with more than one trader which meant that in practice the customer had limited choice.

(*Source: European Union press release dated 28 April 2021*)

II. ABUSE OF DOMINANCE

INDIA

CCI directs investigation against Tata Motors Ltd for imposing unfair terms and conditions on its dealers for commercial vehicles

By way of an order dated 04 May 2021, the CCI has directed investigation against Tata Motors Ltd for abusing its dominant position in the market for '*manufacture and sale of commercial vehicles in India*'. The CCI particularly noted the allegation made by the Informants that Tata Motors coerced its dealers to order vehicles according to its own whims and fancies by compelling the dealers to copy-paste the list of vehicles provided by Tata Motors on dealer's letter head and sending the list back to Tata Motors.

It was observed that indulging in the practice of coercing dealers to bill vehicles as per its own needs and requirement, may result in swarming dealers with a stock of slow-moving vehicles, thereby impairing the financial health of the dealers. Such a practice was found to be in *prima facie* contravention of the provisions of Section 4(2)(a)(i) and Section 4(2)(d) of the Act. Secondly, the CCI noted the non-compete clause which restricted the dealer from starting, acquiring or indulging in any new business even if it is not related to automobile industry was unduly restrictive and expansive in coverage in violation of Section 4(2)(a)(i) and Section 4(2)(c) of the Act. Lastly, the CCI observed that allocating territory to dealers and restricting and confining their activities to the allocated territory, which territory could be extended or curtailed simply by oral instruction from Tata Motors may violate the provisions of Section 3(4)(c) of the Act. *(Source: CCI decision dated 17 March 2021; for full text see CCI website)*

CCI imposes penalty on Uttarakhand Agricultural Produce Marketing Board for abuse of dominant position

By way of an order dated 30 March 2021, the CCI imposed a penalty of INR 1 Crore (One Crore Rupees Only) on Uttarakhand Agricultural Produce Marketing Board ('**UAPMB**') for abusing its dominant position in violation of Section 4 of the Act. UAPMB was alleged to have abused its dominant position in the following relevant markets:

(i) market for wholesale procurement of branded alcoholic beverages in the State of Uttarakhand;

(ii) market for distribution of branded alcoholic beverages in the licensed area of OP-2 i.e., Garhwal Mandal Vikas Nigam Ltd in the State of Uttarakhand;

(iii) market for distribution of branded alcoholic beverages in the licensed area of OP-3 i.e., Kumaon Mandal Vikas Nigam Ltd. in the State of Uttarakhand.

The CCI had directed the DG to investigate the matter on allegations by the International Spirits and Wines Association of India (ISWAI) that UAPMB had imposed arbitrary and discriminatory conditions in the procurement of liquor from manufacturers. Further, the Informant alleged that UAPMB failed to comply with the requirement of maintaining minimum stock levels under the Liquor Wholesale Order, thereby impeding consumer choice.

On the issue of violation of the Liquor Wholesale Order, the CCI agreed with the DG's findings that UAPMB did not act in a manner which ensured availability of required brands to retailers. Further, UAPMB carried out procurement in a manner which adversely affected competition in the market and discriminated between different manufacturers and suppliers of IMFL.

On the issue of denial of market access in violation of Section 4(2)(c) of the Act, the CCI observed that UAPMB did not place any orders for the liquor brands owned by Pernod and USL for many months during the focal period despite existence of retailers' demand for IMFL. Since the OPs were the only route to access the market for alcohol manufacturers on account of the sole rights of procurement and distribution vested under the Liquor Wholesale Order, the OPs conduct amounted to a denial of market access to producers of certain brands of IMFL.

The CCI also took note of certain one-sided and unfair obligations in the agreement executed by UAPMB with Pernod and USL and held that such one-sided contractual clauses had contravened Section 4(2)(a)(i) of the Act. More importantly, it was held that the imposition of unfair and one-sided clauses by a dominant enterprise constituted an abuse of dominant position and that it is not necessary to prove any anti-competitive effect arising out of the imposition of such one-sided clauses.

In respect to OP-2 and OP-3, the CCI observed that they were entirely dependent upon UAPMB for obtaining supplies, and could not directly procure from the IMFL manufacturers. Accordingly, OP-2 and OP-3 were not held to be liable and complicit with UAPMB. *(Source: CCI decision dated 30 March 2021; for full text see CCI website)*

CCI dismisses allegation of leveraging of dominance against Google Meet Application

By way of an order dated 29 January 2021, the CCI dismissed allegations that Google LLC and its subsidiary, Google India Digital Services Private Limited (collectively, '**Google**') had abused its dominant position in the e-mailing and direct messaging market. The Informant alleged that Google by integrating Google Meet App (the video-conferencing app of

Google) into Gmail App has abused its dominant position by leveraging its dominant position in the email and direct messaging market to enter into the video-conferencing market, in violation of Section 4(2)(e) of the Act.

While defining the relevant market, the CCI disagreed with the Informant's delineation of the relevant market as the e-mailing and direct messaging market. The CCI relied on its analysis in *Harshita Chawla and Whatsapp Inc. & Ors,* Case No. 15/2020 to hold that emailing and direct messaging services did not form part of the same relevant market, on account of fundamental differences such as absence of network effects in e-mail services, formal nature of communications through e-mails, and added features available in the usage of direct messaging services. Accordingly, the CCI defined the primary relevant market as the '*market for providing e-mail services*.'

With respect to the secondary relevant market (in order to determine whether Google has leveraged its dominant position) the CCI rejected Google's argument that Google Meet was comparable to the video conferencing services offered by WhatsApp, Instagram etc. and held that a more appropriate relevant product market would be the '*market for providing specialized video conferencing services*.'

In respect to the allegations, the CCI observed that Gmail users are not necessarily coerced to use Google Meet, and that there were no adverse consequences for Gmail users for not using Google Meet. Further, it was observed that users were free to use any competing video-conferencing app such as Zoom, Skype, Microsoft Teams etc.

Further CCI also considered the allegation from the perspective of imposition of supplementary obligations as provided under Section 4(2)(d) of the Act. It reiterated that the users have the choice to use either of the Apps with all their functionalities without necessarily having to use the other. Even though Meet tab has been incorporated in the Gmail app, Gmail does not coerce users to use Meet exclusively as submitted by Google and the consumers are also at freewill to use either Meet or any other VC app for video conferencing.

Accordingly, the CCI did not find any *prima facie* case against Google and closed the case under Section 26(2) of the Act. *(Source: CCI decision dated 29 January 2021; for full text see CCI website)*

CCI closes investigation against Haryana Urban Development Authority ('HUDA') for abuse of dominant position

By way of an order dated 19 January 2021, the CCI closed an investigation against HUDA on allegations that HUDA imposed illegal and unfair terms and conditions in the conveyance/sale deed executed in favour of the allottees in relation to the allotment of institutional plots on a freehold basis. It was alleged

that the unfair and illegal conditions imposed by HUDA restricted the rights of the allottees to further sell, mortgage, or lease out the plots purchased, and buildings constructed by them.

The CCI by way of a *prima facie* order dated 31 October 2017 had directed investigation into the allegations made by the Informant. Upon investigation, the DG had concluded that HUDA's conduct of not permitting the transfer of institutional plots created entry barriers since it prevented subsequent buyers from dealing in these properties, thereby creating impediments in the development of the secondary market for resale of institutional plots. The condition was also considered exploitative since the only exit option available to HUDA was to return the plot to HUDA and receive 90% of the purchase price in return. The DG also concluded that the arbitration clause in conveyance clause was arbitrary since it effectively deprived the Informant of its right to appeal.

HUDA contested the DG's findings and argued that institutional plots are allotted for a specific purpose, at a price much below the prevailing market price. Therefore, the owners of such plots cannot be allowed to profit from the sale/transfer of such plots. HUDA never intended the said institutional plots to be sold, and it was for that reason that these plots were given to seekers satisfying the eligibility conditions at concessional rates. HUDA also raised preliminary objections that the Commission does not have jurisdiction against HUDA since it being a statutory authority under the HUDA/HSVP Act, 1977 mandated to perform certain statutory and regulatory functions. HUDA also claimed that it was not a dominant undertaking.

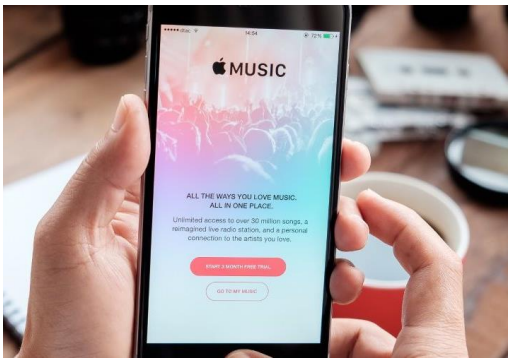
However, the CCI rejected the preliminary objections of HUDA by holding that all its functions may not be classifiable as statutory functions more so of a sovereign nature, especially when it allots various types of plots to third parties for a consideration. The Commission held that all statutory or regulatory functions performed by HUDA, within the mandate of the HUDA Act, cannot be classified as sovereign functions and therefore HUDA is an "enterprise" under section 2(h) of the Act. CCI also agreed with the DG finding that HUDA is in dominant position due to its position as the sole land-owning agency with power to allot institutional plots in the State of Haryana.

However, on the allegations of abuse of its dominant position, CCI accepted HUDA's submissions and noted that HUDA had not permitted the transfer of the institutional plots in public interest and as a matter of policy to prevent the unjust enrichment and profiteering by allottees of such plots. In regards to the arbitration clause, the CCI held that the aspects relating to the appointment of arbitrators etc. can be suitably dealt with under the provisions of the Arbitration and Conciliation Act, 1996. CCI also took cognizance of the fact that based on an application dated 10.12.2020, filed by the Informant, HUDA, post the final hearing in the matter, has issued a memo dated 26.11.2020, wherein it has permitted transfer of ownership of institutional plots, by specifying certain conditions therein.

Accordingly, the CCI concluded that HUDA has not contravened the provisions of the Act. *(Source: CCI decision dated 19 January 2021; for full text see CCI website)*

INTERNATIONAL

EC sends Statement of Objections to Apple on App Store rules for music streaming providers



Following a complaint by Spotify, the EC by way of a statement of objections has informed Apple of its preliminary view that it distorted competition in the music streaming market by abusing its dominant position in the distribution of music streaming apps through its app store.

The EC's preliminary investigation found that for app developers, the App Store is the sole gateway to consumers using Apple's smart mobile devices running on Apple's smart mobile operating system iOS. Apple's devices and software form a "closed ecosystem" in which Apple controls every aspect of the user experience for iPhones and iPads.

Apple's App Store is part of this ecosystem and the only app store that iPhone and iPad users can use to download apps for their mobile devices. The Commission found that users of Apple's devices are very loyal to the brand and they do not switch easily. As a consequence, in order to serve iOS users, app developers have to distribute their apps via the App Store, subject to Apple's mandatory and non-negotiable rules.

The Commission's concerns, as outlined in the Statement of Objections, relate to the combination of the following two rules that Apple imposes in its agreements with music streaming app developers:

- The mandatory use of Apple's proprietary in-app purchase system ("IAP") for the distribution of paid digital content. Apple charges app developers a 30% commission fee on all subscriptions bought through the mandatory IAP. The Commission's investigation showed that most streaming providers passed this fee on to end users by raising prices.
- "Anti-steering provisions" which limit the ability of app developers to inform users of alternative purchasing possibilities outside of apps. While Apple allows users to use music subscriptions purchased elsewhere, its rules prevent developers from informing users about such purchasing possibilities, which are usually cheaper. The Commission is concerned that users of Apple devices pay significantly higher prices for their music subscription services or they are prevented from buying certain subscriptions directly in their apps.

The Commission's preliminary view is that Apple's rules distort competition in the market for music streaming services by raising the costs of competing music streaming app developers. This, in turn, leads to higher prices for consumers for their in-app music subscriptions on iOS devices. In addition, Apple becomes the intermediary for all IAP transactions and takes over the billing relationship, as well as related communications for competitors.

Particularly, the EC takes issue with the mandatory use of Apple's own in-app purchase mechanism imposed on music streaming app developers to distribute their apps via Apple's app store. The EC was also concerned that Apple applies certain restrictions on app developers preventing them from informing iPad and iPhone users of alternative, cheaper purchasing possibilities. (*Source: European Union press release dated 30 April 2021*)

III. COMBINATIONS

A. INDIA

CCI approves acquisition of Grasim Industry Limited's fertilizer division by Indorama

By way of an order dated January 28, 2021, the CCI approved the acquisition of Indo Gulf Fertilizers, the fertilizer division of Grasim Industries Ltd by Indorama India Private Ltd (IIPL).

IIPL is primarily engaged in the business of phosphatic fertilizers, specialty plant nutrients and various grades of nitrogen, phosphorous and potassium based fertilizers. It was observed that the parties overlapped in the broad market of manufacturing and/or selling fertilizers, and in the narrower segments of primary nutrients, compound NPK fertilizers, and in the sub-segment of zinc sulphate, powdered boron, granulated boron, calcium nitrate and city compost.

However, the combined market share of the parties in the narrower range were in the range of 0-15%. Further, each overlapping segment was found to be highly fragmented and characterized by the presence of several players. Thus, it was found that the transaction was not likely to cause any appreciable adverse effect on competition. *(Source: CCI decision dated 28 January 2021; for full text see CCI website)*

CCI approves acquisition of minority shareholding of ATC TIPL by ATC APP under green channel route

The CCI granted deemed approval to the acquisition of additional 7.91 percent equity shareholding of ATC Telecom Infrastructure Pvt. Ltd by ATC Asia Pacific Pte. Ltd. Prior to the proposed transaction, the Acquirer held 92.09 per cent equity share capital in the Target. The Transaction was filed under the **Green Channel route** since there were no horizontal, vertical or complementary overlap between the activities of the parties in India. *(Source: For full text see CCI website)*

INTERNATIONAL

European Union: EC approves the acquisition of GrandVision by EssilorLuxottica, subject to conditions

Following an in-depth investigation, the EC has approved the acquisition of GrandVision by EssilorLuxottica. EssilorLuxottica is the largest supplier of ophthalmic lenses and eyewear, both worldwide and in Europe, and has a very large portfolio of well-known brands such as Ray-Ban and Oakley. Additionally, EssilorLuxottica is active in the retail sale of optical products, notably in Italy and the UK. GrandVision is a globally active eyewear retailer, which operates some of the largest optical chains throughout Europe, such as GrandOptical and Pearle. EssilorLuxottica sells its products to optical retailers, including GrandVision, which resell them to final consumers.

The Commission's in-depth investigation focused in particular on competition concerns that could arise from the combination of EssilorLuxottica's strong market position in the wholesale supply of optical products (i.e., lenses and eyewear) and GrandVision's leading presence in the retail distribution of these products.

Following its in-depth market investigation, the Commission had concerns that the transaction, as initially notified, could worsen rival opticians' access to EssilorLuxottica's products in Belgium, Italy and the Netherlands. In particular, the Commission found that:

- In all those countries the merged entity would have the ability and incentive to leverage its important position in the wholesale supply of frames to make it more difficult for competing retailers to access eyewear manufactured and distributed by the merged entity, for example by reducing choice or raising prices charged to retailers for frames. This would weaken the competition in these markets, and ultimately leading to higher prices or less choice for consumers.

- For Italy, the transaction would in addition bring together the two largest retailers operating in the market through chains, thus creating the largest player on the optical retail market, almost three times as large as the second player. This would considerably weaken competition in the Italian market, ultimately harming consumers.

To address the competition concerns identified by the Commission, EssilorLuxottica offered to divest part of its retail operations in each of the countries in which the Commission had concerns. In particular:

- In Belgium, the GrandOptical chain and its 35 stores will be sold but without the brand name. The purchaser will have a license while rebranding these stores to its own choice of name.
- In Italy, the merged entity will divest a total of 174 stores, which includes the whole of EssilorLuxottica's VistaSi chain together with 72 stores from the "GrandVision by" chain. The VistaSi brand will be transferred and the "GrandVision by" stores will either be rebranded to VistaSi or to the purchaser's own brand.
- In the Netherlands, 142 stores from the EyeWish chain will be sold, together with the brand name. The merged entity will keep some stores from this chain and will have to rebrand them under a new name.
- The remedy package also contains additional safeguards to ensure the smooth transfer of the divestment business to the purchaser, including transitional supply and support arrangements.

The Commission concluded that the proposed transaction, as modified by the commitments, would no longer raise competition concerns. In particular, the remedies limit the retail footprint of the merged entity and reduce its incentive to restrict competitors' access to optical frames in Belgium, Italy, and the Netherlands, while creating or strengthening a credible optical retail competitor at national level in these countries. The Commission's decision is conditional upon full compliance with the commitments. (*Source: European Union press release dated 23 March 2021; for full text see EC website*)

EC approves the acquisition of Eaton Hydraulics by Danfoss, subject to conditions

The European Commission has approved, under the EU Merger Regulation, the proposed acquisition of Eaton's hydraulics business ("Eaton Hydraulics") by Danfoss. The EC's decision follows an in-depth investigation of the proposed acquisition, which combines the activities of Danfoss and Eaton Hydraulics. Danfoss and Eaton Hydraulics are both leading manufacturers of hydraulic components that are used to make hydraulic systems for various kinds of machinery.

Following its investigation, the Commission had concerns that the transaction, as initially notified, would have harmed competition, due to the combination of both companies' hydraulic components businesses for mobile machinery, also known as "mobile applications" (for example, agricultural and construction machinery). In particular:

- The Commission found that the transaction would lead to a reduced choice in suppliers, as well as higher prices, for certain hydraulic components for mobile applications, including (i) hydraulic steering units (HSUs), (ii) electrohydraulic steering valves (ESVs), and (iii) orbital motors.
- For each of the above hydraulic components the transaction would lead to high combined market shares, in already concentrated markets, where limited credible alternative suppliers to the companies are present. Furthermore, strong entry barriers exist which would prevent the emergence of new entrants.
- The market investigation also suggested that customers faced strong difficulties in switching suppliers.

To address the Commission's competition concerns, Danfoss offered the following commitments:

- The divestment of parts of Danfoss' HSU, ESV and orbital motors businesses. These include Danfoss plants in Wroclaw (Poland), Parchim (Germany) and Hopkinsville (U.S.).
- The structural divestiture will be complemented by the transfer of Eaton's production lines for medium power orbital motors (HP and VIS models), Eaton's Series 10 production line for HSUs, and production assets for Eaton's ESV portfolio, to the Hopkinsville plant.
- In order to enhance the competitiveness of the divestment business, and in addition to structural divestitures, Danfoss also committed to transfer additional Danfoss and Eaton technology for HSUs.

The EC found that the commitments offered by Danfoss fully address the competition concerns raised by the proposed transaction. The Commission therefore concluded that the proposed transaction, as modified by the commitments, would no longer raise competition concerns. The Commission's decision is conditional upon full compliance with the commitments. (*Source: European Union press release dated 18 March 2021; for full text see EC website*)

IV. MISCELLANEOUS

INDIA

CCI issues interim directions in market for Online Travel Bookings of budget hotels

The CCI by way of an order dated 09 March 2021 has directed MMT-GO to relist Casa2 Stays Pvt. Ltd ('FabHotels'), and RubTub Solutions Pvt. Ltd. ('Treebo') on its online platform.

FabHotels and Treebo are both engaged in franchising of budget hotels in India. The CCI's intervention by way of the interim order comes in the background of allegations made by Treebo and FabHotels that they suffered competitive and business harm on account of the exclusive arrangement between MMT-Go and Oyo, in terms of which MMT-Go agreed not to list Oyo's closest competitors on its platform. CCI vide its earlier order dated 24 February 2020 had directed investigation against Make My Trip finding its prima facie dominant in the market for online intermediation services for booking of hotels in India.

The CCI justified its intervention by holding that a denial of access by a dominant online intermediation can be lethal to the functioning of businesses who rely on such intermediaries to reach end-consumers. Further, it was observed that a denial of market access need not to be absolute in nature, and that the Act envisages denial of market access '*in any manner*', i.e., even constructive denial of market access that takes away the freedom of a substitute to compete effectively and on the merits in the relevant market can amount to denial of market access under the provisions of the Act.

It was held that the three conditions laid by the Hon'ble Supreme Court of India in *CCI v. SAIL,* (2010) 10 SCC 744 was met, thereby warranting the CCI's intervention at the interim stage i.e.

(i) Existence of a strong *prima facie* case;

(ii) That it was necessary to issue an order of restraint and that the balance of convenience lies in favour of the Applicants because MMT-Go will not face any inconvenience, but would rather earn a commission if the Applicants are allowed access to the platform;

(iii) Thirdly, there was a definite apprehension that the competitive landscape, especially in the downstream market for budget hotels would be irreversibly altered. *(Source: CCI decision dated 09 March 2021; for full text see CCI website)*

Delhi High Court refuses to intervene in CCI's investigation against WhatsApp and Facebook

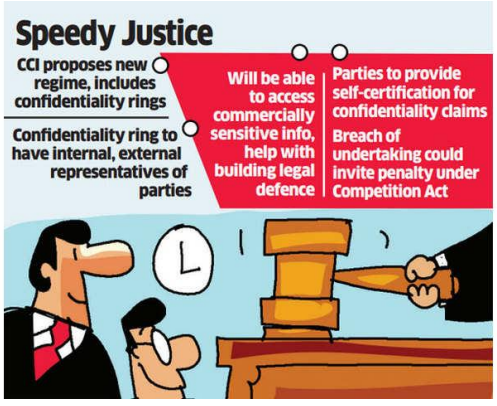
By way of its judgement dated 22 April 2021, the Delhi High Court dismissed the writ petitions filed by WhatsApp and Facebook challenging the order dated 24 March 2021 passed by the CCI under Section 26(1) of the Act ('Impugned Order'). By way of the Impugned Order, the CCI had directed the Director General (DG) to cause an investigation against the 2021 update made by WhatsApp to its terms and privacy policy.

The 2021 update had made it mandatory for WhatsApp users to share personalized user information with its parent company i.e., Facebook and its subsidiaries to continue using their WhatsApp account. In terms of the Impugned Order, such unilateral alteration to WhatsApp's terms and privacy policy amounted to any alleged abuse of dominant position.

The parties challenged the Impugned Order before the single judge bench of the High Court on *inter alia* the ground that the 2021 update has been challenged in several judicial fora, including the Delhi High Court and the Supreme Court of India.

The Delhi High Court dismissed the petitions on the ground that although it was prudent for the CCI to await the outcome of the proceedings before the High Court and the Supreme Court, merely because an issue may be pending before the Supreme Court or the High Court would not divest the CCI of the jurisdiction it would otherwise possess under the Act. The High Court agreed with the submission of the Ld ASG that the scope of inquiry before the CCI is not confined only to the issues raised before the Supreme Court or before this Court, but is much wider in nature. *(Source: Delhi High Court decision dated 22 April 2021; for full text see Delhi High Court website)*

CCI proposes review of confidentiality provisions



In April 2021, the CCI invited public comments on its draft amendments to the confidentiality provisions contained in the Competition Commission of India (General) Regulations, 2009 (General Regulations).

The major amendments proposed are as follows:

(a) Self-certification of confidential documents - Parties seeking confidentiality over pleadings filed before the CCI would have to self-certify that the confidential and non-confidential versions of their filings have been prepared in accordance

with the parameters for seeking confidentiality set out under the General Regulations. Such self-certification ought to be filed by a Company Secretary, Compliance Officer or any other senior officer authorized on behalf of the company.

(b) Confidentiality rings - A confidentiality ring comprising of the internal and external authorized representatives of the parties may be set up who would be able to review the entire case records in unredacted form.

(c) Disclosure of Informant's identity in certain cases - The existing position which enables the Informant to seek confidentiality over its identity merely by making a request in writing is proposed to be done away with. The confidentiality over the Informant's identity is to be assessed by the CCI on a case-by-case basis. *(Source: CCI draft General Regulations dated 13 April 2021; for full text see CCI website)*

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