Competition News Bulletin

VAISH ASSOCIATES ADVOCATES ESTD. 1971

Corporate, Tax and Business Advisory Law Firm

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India

European Union

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I. CARTELS AND ANTICOMPETITIVE AGREEMENTS

INDIA

CCI penalizes beer manufacturers for cartelization

The Competition Commission of India (CCI) by way of an order dated 24 September 2021 has found Carlsberg India Private Limited (Carlsberg), United Breweries India Private Limited (UBL), SABMiller India Private Limited (SABMiller), Anheuser Busch InBev SA/NV (AB InBev), and the All-India Brewery Association (AIBA) including their office bearers ('Opposite Parties' or 'OPs') guilty of cartelisation in relation to the sale and supply of beer in the states of Andhra Pradesh, Karnataka, Maharashtra, Odisha, Puducherry, Rajasthan, West Bengal, and the NCT of Delhi. Accordingly, a combined penalty of about INR 870 Crore was imposed on UBL and Carlsberg for the alleged price-fixing between UBL, Carlsberg and AB InBev in the market for the 'production, marketing, distribution and sale of beer in India' from May 2009 to October 2018, in contravention of Section 3(3) of the Competition Act, 2002 (Act). AB InBev, being the first leniency applicant, on whose disclosure the CCI first initiated the investigation, was given a 100% exemption from penalty.

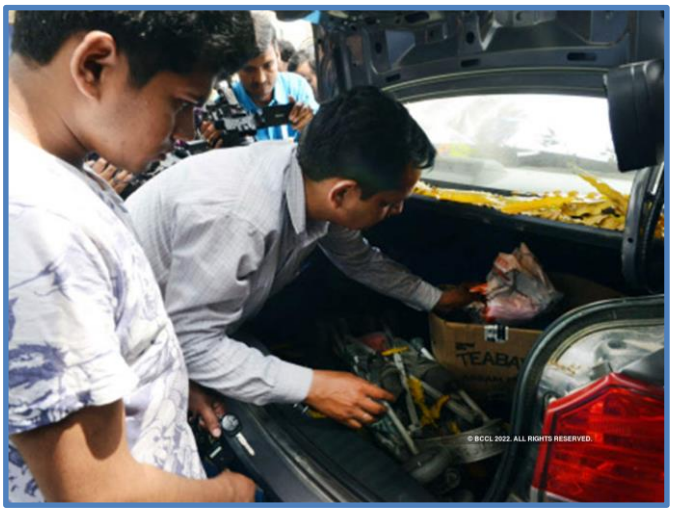
The leniency application filed by SABMiller/AB InBev disclosed that: a) the Opposite Parties shared Commercially Sensitive Information (CSI) regarding pricing, stock held and sold, revenue earned, production, individual communication with various Government agencies, etc., in relation to the various beer markets; and (b) UBL and SABMiller cartelized for purchase of second-hand beer bottles for reuse in their breweries. The disclosures made in the leniency application subsequently led to the CCI conducting dawn raids in the business premises of the OPs. Subsequently, UBL and Carlsberg also filed leniency applications with the CCI. However, they argued that the coordination did not result in any appreciable adverse effect on competition within India.

The CCI relied on evidence gathered by the DG as well as that provided by the Opposite Parties, comprising of official emails, personal emails, SMS messages, WhatsApp messages, etc. relating to sensitive price, revenue, stock and sales data to hold that the parties have contravened Section 3(3) of

the Act. Importantly, the CCI observed that the mere exchange of commercially sensitive information (CSI) between competitors is a contravention of the Act. It was held that the non-implementation/non-utilization of the CSI is not an essential condition for holding a contravention of the Act. In relation to the role of AIBA, the CCI observed that it provided a platform to the Opposite Parties for disseminating the CSI.

Accordingly, the CCI directed the Opposite Parties and its office bearers to cease and desist from engaging in anti-competitive conduct. It granted 100 per cent immunity to SABMiller, AB InBev and its office bearers for disclosing the existence of the cartel in the beer market. UBL and its officials were granted a 40 per cent reduction from penalty, being the second leniency applicant, and was fined approx. INR 751.83 crore (USD 101.90 million) and lastly, Carlsberg and its officials, were granted a 20 per cent reduction from penalty, being the third leniency applicant, and was fined INR approx. 111.39 crore (USD 15.18 million). AIBA was fined INR 0.63 crore (USD 8472) for facilitating the cartel. *(Source: CCI decision dated 24 September 2021; for full text see CCI website)*

CCI finds bid-rigging in tenders floated by the Food Corporation of India (FCI) for procurement of Low Density Poly Ethylene Covers



The CCI by way of an order dated 29 October 2021 has found Shivalik Agro Poly Products Ltd. (OP-1), Climax Synthetics Pvt. Ltd. (OP-2), Arun Manufacturing Services Pvt. Ltd. (OP-3) and Bag Poly International Pvt. Ltd. (OP-4) guilty of bid-rigging in the tenders floated by the Food Corporation of India (FDI) for procurement of Low Density Poly Ethylene covers (LDPE) during the period 2005 to 2017.

The investigation by the CCI was initiated on an information filed by the FCI that alleged that between 2005-2015, the OPs had quoted identical rates and rigged the seven tenders floated by the FCI for the procurement of LDPE covers.

The DG in its investigation found that in the year 2005, the OPs entered into an agreement wherein the quantities of LDPE covers in different tenders floated by FCI and other government agencies were shared among each other. It was further discovered that the OPs were part of a WhatsApp group wherein discussion regarding bid-rigging took place. The DG further noted that OPs also followed a compensatory mechanism by which they compensated each other. DG had also found other

incriminating documents like financial transactions among the OPs, emails exchanged among them showing the meeting of minds etc.

On the basis of the documents recovered during the investigation and the admissions made by the OPs during the deposition, the DG concluded that the OPs were involved in fixing the price of LDPE covers, limiting/restricting the supply of LDPE covers, sharing tender quantities, and thereby rigging the bids in respect of the tenders floated by FCI and other government agencies for procurement of LDPE covers.

During the pendency of the investigation, OP-1 to OP-4 had filed the leniency applications.

The CCI considered the DG Report, objection/suggestion to the DG Report filed by the OPs, and the leniency applications to hold that the OPs had contravened the provisions of Section 3(3) (d) read with Section 3(1) of the Act. Accordingly, the CCI directed the OPs and their respective officials to cease and desist in the future from indulging in practices that contravene the provisions of the Act.

On the issue of monetary penalty, the CCI observed that the OPs are small/medium enterprises and four out of six parties had already filed lesser penalty applications and admitted to their conduct. Further, the CCI noted that the MSME sector in India is already under stress and therefore the imposition of any monetary penalty on these parties may render these firm economically unviable and may even result in the firms exiting the market, which would further reduce competition in the market. *(Source: CCI decision dated 29 October 2021; for full text see CCI website)*

CCI finds 8 Companies guilty of bid rigging in the tenders floated by Eastern Railways for the procurement of axle bearing

By way of an order dated 12 October 2021, the CCI found M/s Chandra Brothers (OP-1), M/s Chandra Udyog (OP-2), M/s Sriguru Melters & Engineers (OP-3), M/s Rama Engineering Works (OP-4), M/s Krishna Engineering Works (OP5), M/s Janardan Engineering Industries (OP-6), M/s V.K. Engineering Industries (OP-7) and M/s Jai Bharat Industries (OP-8) guilty of bid rigging in the tenders floated by Eastern Railways for the procurement of Axle Bearings, more specifically, Plain Sleeve Bearing – Top and Bottom Halves. The investigation by the CCI was initiated on the basis of a reference received from the Eastern Railways that alleged that between 2012 to 2014, the Informant had floated three tenders for the procurement of axle bearings, and the OPs had quoted the same price in response to the three tenders.

On the basis of the reference, the CCI directed the DG to cause a detailed investigation into the matter.

The DG in its investigation found that there was an agreement/arrangement/understanding amongst the OPs to share the quantities of Axle Bearings offered in the Railway tenders. Furthermore, the OPs diligently maintained, updated and shared the records of the tenders allocated to each OP to monitor the quantity received by each party. Furthermore, it was also found that the OPs also assisted/compensated each other in case any OP received any quantity less than the agreed quantity. The DG also found that there was regular communications between the OPs through telephone, emails and SMS.

The CCI agreed with the findings of the DG that there was overwhelming evidence on record to conclude that there was an agreement/arrangement/understanding amongst the suppliers of Axle Bearings to share quantities offered in the railway tenders issued by different Railway zones. It was also noted that three of the OPs in their deposition had already admitted that there existed a cartel of Axle Bearing suppliers to the Railways, who were sharing Axle Bearing quantities in Railway tenders, including the three Eastern Railway tenders.

On the issue of penalty, the CCI noted that all the OPs are MSMEs having limited staff and small turnover. Further, the MSME sector in India is already under economic stress due to the outbreak of the pandemic. Further, the CCI also took into consideration other factors like such as market structure, role of Indian Railways as a monopsony buyer, nature of the firms, the staff employed by them and the quantum of their annual and relevant turnover to refrain from imposing any monetary penalty on the OPs and their respective officials. *(Source: CCI decision dated 12 October 2021; for full text see CCI website)*

CCI finds nine manufacturers of agro & recycled paper guilty of cartelization

By way of an order dated 17 November 2021 the CCI found nine paper manufacturers along with the Indian Agro and Recycled Paper Mills Association ('IARPMA') (together referred to as the 'OPs'), including their office bearers guilty of cartelization in relation to the sale and supply of non-wood-based paper in contravention of Section 3(3) of the Act.

The investigation was initiated suo moto against 20 paper manufacturers pursuant a note dated 28 April 2016 received from the Director General (DG) office stating that during the ongoing investigation into Case No. 30 of 2014 and Case No. 85 of 2015, certain incriminating emails were found, thereby indicating that the paper manufacturers might have indulged in price manipulation through concerted action.

Subsequently, Trident Limited, one of the Opposite Parties, filed a leniency application with the CCI disclosing the existence of a cartel amongst all paper manufacturers.

The DG had investigated 21 paper manufactuerers, out of which, the DG concluded that 10 paper manufacturers had contravened the provisions of Section 3(1) of the Act read with Section 3(3)(a) of the Act by using the platform of IARPMA to discuss and decide the prices to be increased in a concerted manner. Further, the simulataneous increase in prices of paper indicated price parallelism among the OPs and their office bearers. It was also noted that the representatives of OPs also admitted to attending meetings where the issue of collective price increase was discussed.

The CCI agreed with the findings of the DG and noted that four emails dated 19.09.2012, 19.11.2012, 19.12.2012 and 19.01.2013 recovered from the email box of Shri P. K. Vasist, Vice President (Marketing) of Seshasayee Paper and Boards Limited (SPBL), clearly show that meetings took place amongst 20 paper mills of North India under the aegis of IARPMA, where prices were discussed and a roadmap for future increase of prices was drawn, implemented, and monitored.

Further, the CCI also held that "*mere attendance in meetings where commercially sensitive information like prices, is discussed, influences and takes away the independent decision making ability of participant competitors and resultantly, they can no longer independently decide the price related policies in the market*".

On the issue of penalty CCI imposed a token penalty on of INR 5 lakh on each of the Opposite Parties and INR 2.5 lakh on the IARPMA for facilitating the cartel and granted 100 per cent reduction in penalty to Trident Limited for disclosing the existence of the cartel and its cooperation with the DG. *(Source: CCI decision dated 17 November 2021; for full text see CCI website)*

INTERNATIONAL

EC penalizes banks for participating in a foreign exchange spot trading cartel

The EC has imposed a penalty totalling € 261 million on Barclays, RBS and HSBC following a cartel investigation into the foreign exchange ('Forex') spot trading market. UBS, the leniency applicant, received full immunity for revealing the existence of the cartel.

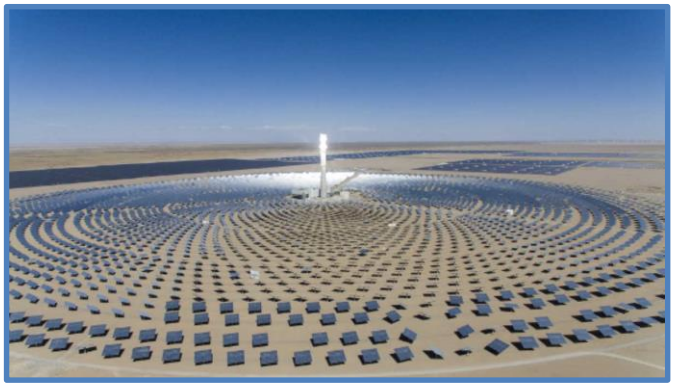
The EC's investigation focused on the trading of the G10 currencies, the most liquid and traded currencies worldwide. The investigation revealed that some traders in charge of the Forex spot trading of G10 currencies, acting on behalf of the fined banks, exchanged sensitive information and trading plans, and occasionally coordinated their trading strategies through an online professional chatroom called the *Sterling Lads*.

These information exchanges enabled the traders to make informed market decisions on whether and when to sell or buy the currencies they had in their portfolios, as opposed to a situation where traders acting independently from each other take an inherent risk in taking these decisions.

Occasionally, these information exchanges also allowed the traders to identify opportunities for coordination, for example through a practice called "standing down", whereby some of them would temporarily refrain from trading to avoid interfering with another trader.

While UBS received full immunity for revealing the existence of the cartel, Barclays, RBS, and HSBC benifitted from reductions to their fines for cooperating with the EC's investigation. (*Source: European Union press release dated 02 December 2021*)

EC penalizes ethanol producer € 20 million under the cartel settlement procedure



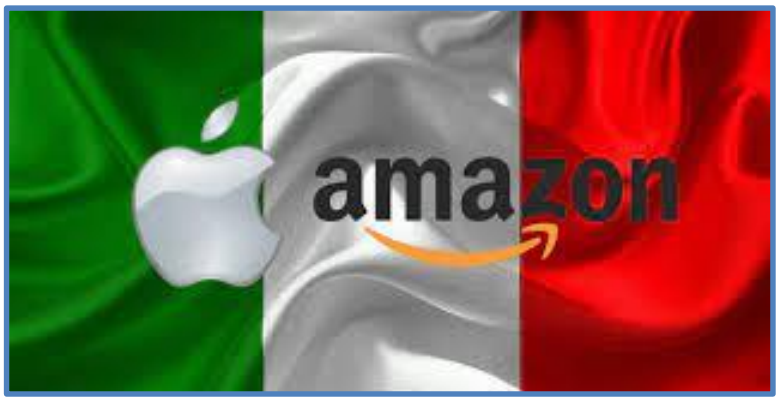
The EC has fined ethanol producer, Abengoa S.A and its subsidiary Abengoa Bionenergía S.A. (together, 'Agengoa'), € 20 million for participating in a cartel concerning the wholesale price formation mechanism in the EU ethanol market between 6 September 2011 and 16 May 2014. The decision was adopted under the settlement procedure.

The EC's investigation was centred around the activity of S&P Global Platts ("Platts"), a company that provides price assessments for different commodity markets, including bioethanol. Platts established ethanol benchmark prices, which are used as reference prices by the industry, on the basis of the trading activity at the port of Rotterdam and the Amsterdam-Rotterdam-Antwerp barge market – the most important trading locations in Europe. The benchmark prices were set by Platts based on a price assessment process during the so-called "Market on Close (MOC)" window, which is the period between 16:00 and 16:30 London time.

According to the EC, Abengoa artificially increased and maintained the levels of Platts' ethanol benchmarks. Abengoa also allegedly limited the supply of ethanol delivered to the Rotterdam area to reduce the volumes available for delivery in the MOC window. Finally, the Commission found that Abengoa's ethanol traders had illegal contacts with individuals at other companies, typically through chats, in order to coordinate ethanol trading activities with them before, during and after the MOC window.

In deciding the quantum of penalty, the EC granted Abengoa a fine reduction following a claim for inability to pay under point 35 of the Fining Guidelines and a 10% fine reduction under the Settlement Notice. (*Source: European Union press release dated 10 December 2021*)

Italian Competition Authority penalizes Amazon and Apple for restricting access to Amazon marketplace



On 23 November 2021, the Italian Competition Authority (ICA) imposed a penalty of € 68.7 million on Amazon and € 134.5 million on Apple for infringing Article 101 of the Treaty of the Functioning of the European Union (TFEU). The contravention concerned agreements that required Amazon's Italian affiliate to only grant access to its e-commerce platform, Amazon marketplace, to a limited list of twenty Apple re-sellers. According to the ICA, these twenty resellers (including Amazon itself) were handpicked by the parties without reference to any objective criteria. All other resellers (including official resellers) were prevented from selling Apple products over the Amazon marketplace.

The ICA found that the clauses in the Amazon-Apple agreements had the object of precluding access to marketplace services to undertakings that lawfully resell Amazon's products, thereby hindering their access to the market. Further, it was observed that the restriction did not pursue qualitative objectives, but that it was the parties' intention to introduce a quantitative restriction for the purpose of better controlling Amazon's resellers. Apple's selection of resellers also constituted a geographical restriction, insofar as the agreements explicitly excluded resellers based in certain EU Member States. It was also found that in practice, the parties only selected resellers that did not export to any significant effect, resulting in only Italian resellers on Amazon's Italian marketplace.

In its assessment of anti-competitive effects arising out of the agreement, the ICA found that the agreement led to a reduction in the number of resellers of Apple's products on Amazon's marketplace, as well as reduction in the volume of sales by the remaining retailers, and hence an increase in the prices. It was also observed that the cross-border sales of Apple's products on Amazon's marketplace had decreased. The practice also led to the exclusion of the best-performing resellers that had been active on the Amazon marketplace until then.

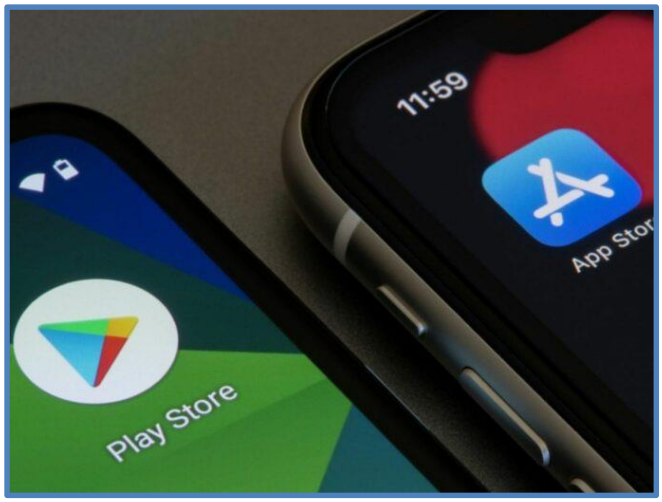
The ICA also concluded that the restrictions at issue did not meet the cumulative requirements of Article 101(3) of the TFEU. In particular, it was concluded that the restrictive conditions did not have

(i) any positive effect in terms of improved variety and availability in the supply of Apple products to Amazon ; and (ii) the parties had already introduced other (less restrictive) mechanisms to combat counterfeited products, which negated the argument that restrictions were necessary to limit counterfeited products. (*Source: ICA decision dated 09 December 2021*)

II. ABUSE OF DOMINANCE

INDIA

CCI directs investigation against Apple Inc. for alleged abuse of its dominant position in the market for app stores for iOS in India



By way of an order dated 31 December 2021, the CCI directed an investigation against Apple Inc. for the alleged abuse of its dominant position. The investigation was directed on allegations that Apple abused its dominant position.

It was alleged that Apple imposes unreasonable and unlawful restraints on app developers from reaching users of its mobile devices unless they go through the 'App Store' which is stated to be controlled by Apple. Adding to this, Apple required app developers who wish to sell digital in-app content to their consumers to use a single payment processing option offered by Apple, carrying a 30% commission which may also amount to a form of 'margin squeeze' in breach of the provisions of Section 4 of the Act.

It was further alleged that Apple through its Guidelines and policy restrict multi-platform apps to inform their users of the ability to make out- of-app purchases, and since Apple has a monopoly over the distribution of iOS apps, app developers have no choice but to assent to this anti-competitive tie-in- arrangement and such conduct on part of OPs is in violation of the provisions of Section 4(2)(d) and Section 4(2)(e) of the Act.

Further, through its In-app Purchase (IAP) Apple limits the ability of the app developers to offer payment processing solutions of their choice to the users for app purchases as well as IAPs and amounts to imposition of unfair terms and condition in the purchase or sale of goods or services and moreover, it amounts to denial of market access for the competing payment gateway in violation of the provisions of Section 4(2)(c) of the Act.

CCI's Findings

CCI firstly noted that Apple's ecosystem is tightly knit and vertically and exclusively integrated throughout the value chain wherein it offers apps, app store as well as smart devices.

Apple prohibits app developers to include a button/link in their apps which take/steer the user to third party payment processing solution other than Apple's IAP. While the App Store policies of Apple allows users to consume content such as music, e-books, etc. purchased elsewhere (e.g., on the website of the app developer) also in the app, its rules restrict the ability of app developers to inform users about other purchasing options through a notification in the app itself, which might be cheaper. This would result in higher price for the users of such apps.

Commission found that the lack of competitive constraint in the distribution of mobile apps affects the terms of which Apple provides access to its App Store including the commission rates and terms that thwart certain app developers from using other in-app payment systems.

CCI prima facie opined that mandatory use of Apple's IAP for paid apps & in-app purchases restrict the choice available to the app developers to select a payment processing system of their choice especially considering when it charges a commission of up to 30% for app purchases and in-app purchases.

Commission also observed that the intermediation by Apple between the app developer and the app user for payment-processing purposes, would also result in leveraging on the part of Apple as it is using its dominant position in the app store market to enter/protect its downstream market of various verticals in violation of Section 4(2)(e) of the Act.

The app developers have to agree to the usage of Apple's IAP payment processing service, if they want to distribute their apps to the iOS users through Apple's App Store. Apple conditions the provision of app distribution services on the app developer accepting supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of the contract for the provision of distribution services, which results in violation of Section 4(2)(d) of the Act.

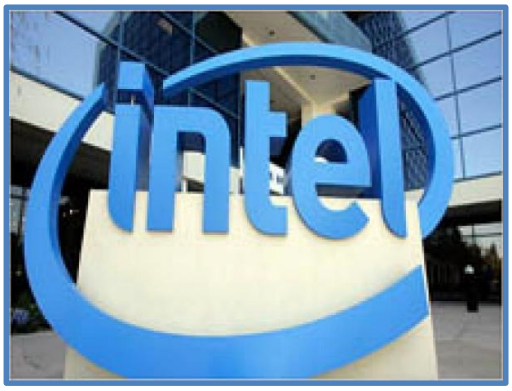
The above conduct, *prima facie* results in leveraging by Apple of its dominant position in App Store market to enter/protect its market for in-app purchase payment processing market, in violation of Section 4(2)(e) of the Act.

Therefore, the above conduct *prima facie* results in denial of market access for the potential app distributors/app store developers in violation of Section 4(2)(c) of the Act. The said also results in limiting/restricting the technical or scientific development of the services related to the app store for

iOS, due to reduced pressure of Apple to continuously innovate and improve its own app store, in violation of Section 4(2)(b) of the Act.

Based on the allegations and findings made by CCI, *prima facie* opined that Apple violated the provisions of Section 4(2)(a), 4(2)(b), 4(2)(d) and 4(2)(e) of the Act, and orders DG to carry out detailed investigation into the matter. *(Source: CCI decision dated 31 December 2021; for full text see CCI website)*

CCI dimisses allegations of abuse of dominant position against Intel



By way of an order dated 03 December 2021, the CCI closed an investigation against Intel Corporation for allegedly abusing its dominant position in the market for '*processors for servers in India*'.

The Informant, who was a manufacturer and designer of server systems, alleged that Intel had denied it access to the complete reference design and simulation files that is required by the Informant to design and manufacture its own server boards which are compatible with the micro-processors designed and manufactured by Intel. It was also alleged that the denial to the Informant is being made in a discriminatory manner, as access to such files is provided by Intel to other OEMs such as Dell, HP, Lenovo, etc.

Upon investigation, however, the CCI observed that there was no deliberate denial of any requisite file (reference design file or simulation file) by the OP to the Informant. The reference design files were found to have been provided by Intel to the Informant. The CCI concluded that since Intel had not denied access to the Informant to any requisite reference design files and/or simulation files, no abuse of dominant position can be attributed to the OP. *(Source: CCI decision dated 03 December 2021; for full text see CCI website)*

CCI directs investigation against Google for abusing its dominant position in the market for online search advertising services in India

By way of an order dated 07 January 2022, directed another investigation against Alphabet Inc., Google LLC, Google India Private Limited and Google Ireland Limited (collectively referred to as 'Google') for the alleged abuse of its dominant position in the Market for Online General Web Search Services in India and Market for Online Search Advertising Services in India.

The CCI directed the investigation on an information filed by the Digital News Publishers Association (Informant) who alleged that Google unilaterally decides the amount to be paid to the publishers for the content created by them, as well as the terms on which the aforesaid amounts have to be paid.

It was specifically alleged that the members of the Informant are not informed of or given any data pertaining to the amount of revenue earned by the OPs by providing advertisements on the websites/links of the members of the Informant. Further, the OPs give a small chunk of the revenue generated from the advertisements on the websites/links of the Informant in an arbitrary fashion, without disclosing any basis for the calculation of such revenue. It was also alleged that while OPs use snippets of the content created by the members of the Informant, they do not fairly compensate the use of such snippets. The terms of the agreements entered between the members of the Informant and the OPs for sharing the advertisement revenues are arbitrarily and unilaterally dictated by the OPs, and the members of the Informant have no other option but to accept the terms.

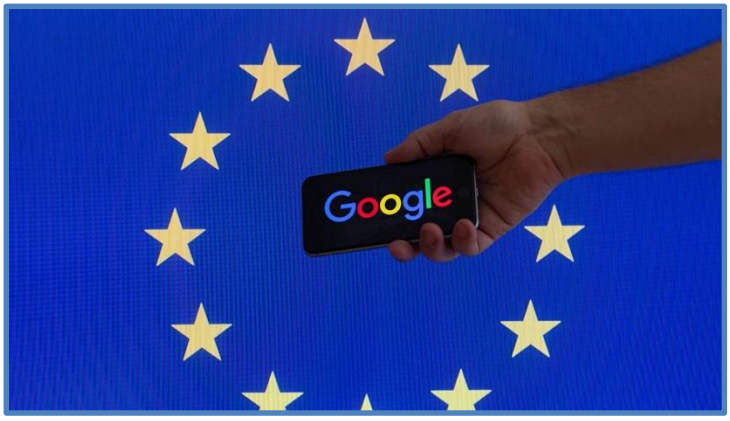
The CCI considered the allegations made by the Informant and noted that the Informant is primarily aggrieved by the denial of fair advertising revenue to its members resulting from the abuse of its dominant position by Google. The CCI observed that news publishers are dependent on Google for the majority of the traffic, and therefore Google is an indispensable trading partner for news publishers. This position is strengthened by the significant role played by Google in the ad-tech value chain. It was held that the alleged unilateral and non-transparent determination and sharing of ad revenues appears to be an imposition of unfair condition on publishers. Further, it was held that the alleged opacity on critical aspects such as audience management practices, or generation and sharing of revenue with publishers, exacerbates the information asymmetry and is prima facie prejudicial to the interests of publishers, which, in turn, may affect the quality of their services and innovation, to consumer detriment.

On the issue of news snipptes, the CCI held that it needs to be examined whether the use of snippets by Google is a result of bargaining power imbalance between Google on one hand and news publishers on the other, and whether it affects the referral traffic to news publisher websites, and thus, their monetization abilities. The CCI also held that the alleged issue of publishers being forced to build mirror-image websites using the AMP format, with Google caching all articles and serving the content directly to mobile users, can have revenue implications for the publishers.

Thus, the CCI held that Google has violated the provisions of Section 4(2)(a) of the Act, and that Google's conduct merited further investigation by the DG. *(Source: CCI decision dated 03 December 2021; for full text see CCI website)*

INTERNATIONAL

General Court upholds EC decision in Google Shopping case



By way of a judgment dated 10 November 2021, the General Court endorsed the EC's decision in the *Google Shopping Case* that Google abused its dominant position by favouring its own comparison-shopping service (CSS) over competing CSSs in search results. However, the General Court clarified that not every self-preferencing strategy by a dominant firm will necessarily be a competition law violation.

The appeal arises out of the EC's decision in the *Google Shopping case* in which the EC imposed a penalty of € 2.42 billion on Google for abusing its dominant position in national search markets. The EC found that Google had given an unfair advantage to its own CSS by prominently displaying the Google CSS in search results, while demoting competing providers of CSSs, a practice that the Commission considered to be at least capable of having the effect of restricting competition.

Google appealed the EC's decision on a number of grounds, including that its conduct amounted to competition on the merits, was not likely to have anti-competitive effects, and was objectively justified.

With respect to Google's argument that the said conduct amounted to 'competition on merits' and ought to be viewed as part of its efforts to improve the quality of its search services, the General Court held that in light of the universal nature of a general search engine, Google's promotion of its own, specialised results involved a "certain form of abnormality", as a search engine is in principle an "open" infrastructure. The Court also opined that limiting search results to its affiliated services was not consistent with what it considered as the intended purpose of a general search service. Such conduct could even be deemed irrational, save for Google's dominant position which made the entry of competing search engines in the short run impossible.

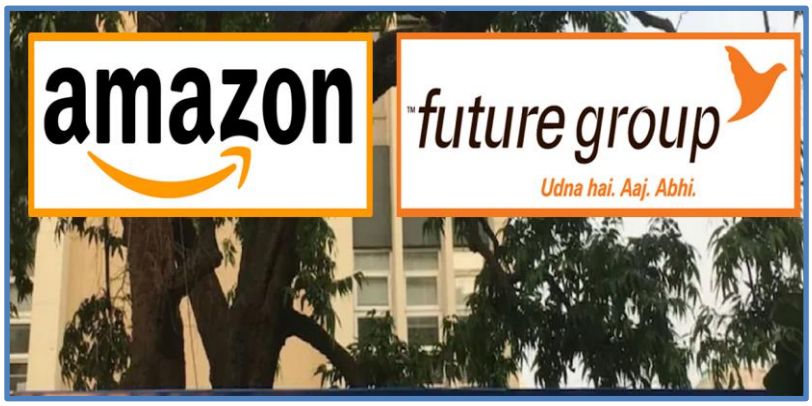
With respect to Google's argument that the EC failed to demonstrate that Google's conduct had anti-competitive effects, the General Court confirmed that it was sufficient for the EC to establish that the conduct was capable of having potential anti-competitive effects, and that there was no requirement of establishing the actual exclusionary effects under Article 102 TFEU. The Court found that the EC had correctly identified potential harmful effects, by finding that Google's conduct was capable of leading competing CSSs to cease their activities, reducing incentives to innovate, and limiting the ability of consumers to access the best-performing CSSs.

With respect to the alleged conduct being justified, the Court held that the alleged efficiency gains arising out of the conduct did not outweigh the harmful effects of Google's conduct and that Google had not demonstrated to the requsite level that it was infact prevented from applying the same processes and methods across all CSSs. (*Source: General Court judgment dated 10 November 2021*)

III. COMBINATIONS

INDIA

CCI suspends clearance for Amazon-Future deal, imposes ₹200 plus 2 crore penalty on Amazon



By way of an order dated 17 December 2021 the Competition Commission of India ("CCI/Commission") found Amazon NV Investment Holdings LLC (Amazon) guilty of contravening sections 43-A, 44 and 45 of the Competition Act, 2002. Accordingly, the CCI suspended the approval given to Amazon for acquiring 49% shareholding in Future Coupons Private Limited (FCPL) (order dated 28 November 2019) and has imposed a collective penalty of INR 202 crores on Amazon.

Background

According to Amazon's Notice under section 6(2) of the Act (Notice), three transactions were notified before the CCI.

1. Issue of Class A voting equity shares of FCPL to Future Coupons Resources Private Limited (FCRPL) (Transaction I);
2. Transfer of shares of FRL held by FCRPL representing 2.52% of the issued, subscribed and paid-up equity share capital of Future Retail Limited (FRL), on a fully diluted basis to FCPL (Transaction II) and;
3. Acquisition by Amazon of the Subscription Shares representing 49% of the total issued, subscribed and paid-up equity share capital of FCPL (on a Fully Diluted Basis) (Transaction III).

In pursuance of these transactions, Amazon also informed the CCI of a share-subscription agreement (FCPL SSA) that sets out the terms and conditions, and a shareholders agreement (FCPL SHA) which set out the rights and obligations of the shareholders.

Prior to Amazon's acquisition of shares, FCPL had acquired equity warrants of FRL, convertible into equity shares representing 7.30% of the share capital of FRL (Warrants Transaction) which was approved by the CCI through its order dated 15.04.2019. In furtherance of this Warrants Transaction, a shareholders agreement was entered into by the parties (FRL SHA). Interestingly, the FCPL SHA included the requirement of prior written consent of Amazon for FCPL to decide on or implement any matter under FRL SHA. Moreover, several commercial agreements (BCAs) were executed between Amazon and the Future Group to consolidate Amazon's presence in the retail market. However, neither the FRL SHA nor the BCAs were notified, as Amazon argued they were not independent of the combination.

Proceedings before the CCI

In its show-cause notice issued under regulation 14 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (Combination Regulations), the CCI had found several contradictions in the submissions of Amazon before other fora and the competition regulator regarding the strategic interest of Amazon in FRL. In fact, the CCI had previously raised similar queries in letters dated 9 October 2019 and 24 October 2019. However, Amazon had clarified in its submissions dated 15 November 2019 that it was interested in the 'corporate gift cards' business of FCPL and intended to expand its portfolio of investments in the payments landscape of India. It was also submitted that Amazon neither has direct nor indirect shareholding in FRL and that the rights conferred by the FCPL SHA were merely for the protection of its investments. However, these averments are essentially nullified in light of the following details.

Internal Correspondence

In light of the proceedings initiated by FCPL, fresh evidence was brought on record. This included (1) the internal note dated 24 May 2018 showed that the investment would help Amazon (a) expand coverage in top four cities and improve the merchant fee to 13.5%; (b) build a two-hour-delivery service in the next 20 cities; (c) exclusively carry their private label portfolio in grocery and value-fashion and; (d) obtain option value to increase its equity stake when laws change (2) the situation update dated 10 July 2018 elaborated the background and purpose with which the combination was contemplated between Amazon and Future Group. The situation update showed that Amazon viewed the arrangement as a means to utilize the FRL's pan-India store infrastructure to boost Amazon's ultra-fast delivery program, exclusively carry private label portfolio in grocery and value fashion (where Amazon was allegedly lagging behind its competitors), and drive higher fees for Amazon (3) an internal e-mail dated 18 July 2019 demonstrated that in light of the FDI restrictions, Amazon would

use a twin-entity investment structure to invest in FRL, i.e., Amazon would acquire 49% shareholding in FCPL, which in turn would hold 8 to 10% of the shareholding in FRL. Lastly, it also listed out several benefits provided by FRL to Amazon in pursuance to the BCAs.

False, incorrect and incomplete disclosure of information

Item 5.3 of Form I: The notifying party is required to disclose the economic and strategic purpose of the combination under this head. However, the internal correspondence clearly highlights how the true purpose of the combination was concealed.

Item 8.8 of Form I: The notifying party is to furnish documents and material considered by or presented to the board of directors or key managerial person of the parties to the combination or their relevant group entities, in relation to the proposed combination. Amazon had merely submitted a presentation highlighting the gift voucher business of FCPL, its business operating model, estimated five-year business size, organisation design, sales team and financial summary, without any reference to FRL. In fact, the entire internal correspondence was not disclosed and was actively concealed.

Regulation 9(4) read with Items 5.1.1, 5.1.2, 5.2 of Form I: This provision makes it mandatory for parties to the combination to give a notice covering all inter-connected steps of their proposed combination (being disclosures to be made against item 5.1.2). Moreover, item 5.2 requires the timelines of each inter-connected step to be disclosed. Amazon had only identified three transactions and the FCPL SHA and FCPL SSA as agreements that formed a part of the combination. The FRL SHA and BCAs were not disclosed against any of the abovementioned items.

Suspension & Penalty

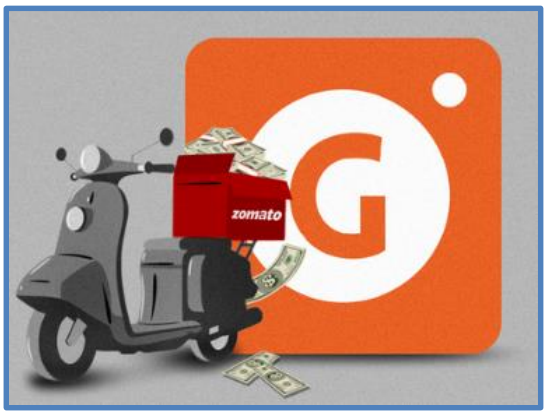
The CCI held that Amazon failed to notify FRL SHA and the BCAs as parts of the Combination between the parties, and suppressed the actual purpose and particulars of the combination, in contravention of the obligation contained in subsection (2) of section 6 of the Act read with regulation 9(4) of the Combination Regulations.

Further CCI under section 45(2) of the Act, directed Amazon to give notice in Form II within a period of 60 days, and, till disposal of such notice, the approval granted to the combination 'shall remain in abeyance'.

The CCI imposed a penalty of INR 202 crores under section 43-A of the Act. Moreover, in the absence of any mitigating factor, the CCI imposed the maximum penalty of INR 1 crore under sections

44 and 45 of the Act respectively, thereby, collectively amounting to a penalty of INR 202 crores. *(Source: CCI decision dated 17 December 2021; for full text see CCI website)*

CCI approves acquisition of minority shareholding of Grofers India by Zomato



By way of an order dated 13 August 2021 the CCI approved the acquisition of 9.3 per cent of the equity share capital of each of Grofers India Private Limited (Grofers India) and Hands on Trades Private Limited (HoT) by Zomato Limited (Zomato) (referred to as the 'Proposed Transaction').

It was noted by the CCI that the activities of the Parties overlap in terms of providing fruits, vegetables and other food-related products on a B2B level. Further it was noted that, both Parties operate e-platform that provided marketplace services for groceries, household items, general merchandise, personal hygiene products, fruits and vegetables.

Further for the purpose of assessment CCI delineated following relevant Markets:

a. The market for supply of groceries, household items, general merchandise, personal hygiene products, fruits and vegetables in India **(Broad Relevant Market);**

b. In the narrower segment of B2B supply of groceries, household items, general merchandise, personal hygiene products, fruits and vegetables in India **(Narrower Relevant Segment);**

c. Further narrower categories, i.e., market for supply of groceries, fruits and vegetable in India **(Narrowest Relevant Segment);** and

d. The market for services provided by online platforms for the sale of groceries, household items, general merchandise, personal hygiene products, fruits and vegetables in India **(Online Marketplace Market).**

However, given the low market share of the parties with presence of several significant players, the CCI noted that the Proposed Transaction is not likely to raise competition concerns. *(Source: CCI decision dated 13 August 2021; for full text see CCI website)*

CCI approves acquisition of Jaypee Infratech by Suraksha Group

By way of an order dated 09 August 2021 CCI approved the acquisition of 100 per cent equity share capital of Jaypee Infratech Limited (JIL/target) by Suraksha group under the Insolvency and Bankruptcy Code, 2016 (referred to as the 'Proposed Transaction')

It was noted by the CCI that there exist horizontal overlaps between the parties in the real estate business in India at a broader level. Within India, the Acquirers and their group entities are engaged in real estate development in residential and commercial spaces in Mumbai and Thane and have no operations outside the state of Maharashtra, and the Target is engaged in real estate development and construction in Uttar Pradesh.

However it was noted by the CCI that the presence of the Parties is not significant to result in any appreciable adverse effect on competition in any plausible narrowly defined market at the city/state level or broader pan-India market. *(Source: CCI decision dated 09 August 2021; for full text see CCI website)*

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