

Competition News Bulletin

May 2022



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I. CARTELS AND ANTICOMPETITIVE AGREEMENTS

INDIA

CCI orders investigation against Swiggy and Zomato.



The Competition Commission of India (“CCI/Commission”) vide its order dated 04 April 2022, after finding a prima facie case, has directed investigation against some market conducts of online food delivery platforms in India Zomato and Swiggy, to inquire whether the conducts have resulted in adverse effect on competition in the market, in contravention of the provisions of Section 3(1) read with Section 3(4) of the Competition Act, 2002 (the Act), through their agreements with the downstream restaurants partners (RP).

The information was filed by National Restaurant Association of India (“NRAI”/Informant) against Zomato Limited (‘Zomato’) and Bundl Technologies Private Limited (‘Swiggy’) (Zomato and Swiggy, hereinafter, collectively referred to as the ‘Opposite Parties’/ ‘OPs’) alleging that OPs have taken unfair advantage of their significant market power and compounding “network effects” by use of advanced algorithms to enforce vertical agreements and impose vertical restraints on the RPs, which are anti-competitive in nature, in violation of Section 3(4) read with Section 3(1) of the Act. The allegations in brief are summarized as under:

Coerced bundling of food delivery services with the core listing services –Allegedly, delivery services are not optional for the Restaurant Partners (RPs) who wish to avail the listing service, and they are forced to take the delivery service of the platform.

Data masking – The RPs receive no data or information about the end-consumers to whom the food is delivered. The effect of such data masking is that the RPs are not aware of where the food is being delivered, to whom and in how much time. The same creates lack of transparency from the perspective of RPs and they receive least information despite being accountable for the services offered by them.

“Cloud kitchen” leading to promotion of private labels and preferential treatment – OPs are engaging in a dual role on their platform where they list their own cloud kitchen brands exclusively on their platform,

akin to private labels, thereby creating an inherent conflict of interest in the platform's role as an intermediary on one hand and as a participant on the other hand.

One sided conditions of contracts with RPs- contractual agreement with RPs, creates a "locked in" effect on RPs who become dependent on the e platforms.

Exclusivity – Zomato and Swiggy often compel the RPs to commit exclusively to be listed on their respective platform through incentives, lower commissions etc. to maintain their competitive edge in the market, at the exclusion of other new entrants.

Use of MFN /Price parity clauses –The price parity clauses in the agreements are in the nature of Wide price parity restrictions, which restrict the restaurant from charging lower prices or providing better terms on their website or offline shop, as well as through any other sales channel, including other online food aggregator platforms.

Excessive commissions- commissions charged by the OPs from RPs are unviable and are to the tune of 20% to 30%, which are extremely exorbitant for the RPs.

Deep discounts forced on RPs- OP's, who together corner more than 95% of the market, have been engaging in the practice of deep discounting, through schemes and incentives offered by them to customers.

CCI Observations:

The Commission was of the view that prima facie a conflict-of-interest situation has arisen in the present case, both with regard to Swiggy as well as Zomato, because of the presence of commercial interest in the downstream market, which may come in the way of them acting as neutral platforms. This requires a detailed examination. Given that platforms are vertically related with the RPs, including their private brands and those operating through their respective cloud kitchens, such arrangements whereby preferential treatment is accorded to some entities can be looked as a potential contravention of Section 3(4) read with Section 3(1) of the Act.

The Commission, at the outset, observes that bundling of services has been alleged as a contravention under Section 3(4)(d), which mandates a rule of reason analysis-. CCI observed as under on each allegation.

RE: Coerced bundling of services – It emerges from the claims made by Zomato and Swiggy that bundling delivery with order enables them to control the time taken for delivery and qualitatively standardize such delivery for the end consumer. In that sense, apparently, 'delivery of the food' ordered through their

platform, seems to be an important characteristic feature of the business model as well an important parameter of competition that Zomato and Swiggy have adopted. As it appears, the competition between them is primarily a competition among bundles, where the time is taken for delivery of orders and the qualitative aspect of it constitute relevant parameters of competition between these online food ordering and delivery platforms. Thus, the bundling does not seem to raise any competition concern as such. Even otherwise, the Informant has not been able to substantiate its claim that bundling of delivery with the order, in itself, has led to or has the likelihood to cause AAEC either between restaurants or between hyperlocal delivery service providers.

Data masking – No specific finding. Clubbed with bundling of services as above.

Cloud Kitchens etc- Even if Zomato does not own the kitchen space as claimed by it, prima facie the Commission was satisfied that the revenue interest that exists in favor of Zomato, along with the minimum guarantee obligation, can act as an incentive to divert traffic to the RPs situated in those Access Kitchens. Thus, in the case of both Swiggy and Zomato, from an overall appreciation of the facts, prima facie there exists a conflict-of-interest situation, warranting detailed scrutiny into its impact on the overall competition between the RPs vis-à-vis the private brands/entities which the platforms may be incentivized to favour the aggregators.

Exclusivity – The Commission found merit in investigating the issue pertaining to platform neutrality and felt that it may also be seen during investigation whether exclusivity in conjunction with minimum guarantee obligation is further accentuating the structure which may come in the way of the platform operating in a neutral manner. Thus, the aforesaid conducts require a holistic examination to ascertain whether these intermediaries prevent competition on merits, creating an ecosystem causing or likely to cause an appreciable adverse effect on competition.

Price parity clauses- The price parity clauses mentioned in the agreements of Zomato and Swiggy appear to indicate wide restrictions where the RPs are not allowed to maintain lower prices or higher discounts on any of their own supply channel or on any other aggregator, so that the minimum price or maximum discounts can be maintained by the platform. Such price parity clause may discourage the platforms from competing on the commission basis as RPs need to maintain similar prices on all platforms and provide similar prices to the customers, regardless of the commission rates paid to the platform. Given that Zomato and Swiggy are the two biggest platforms present in the food delivery segment, their respective agreements with RPs of this nature are likely to have an AAEC on the market by way of creating entry barriers for new platforms, without accruing any benefits to the consumers. Thus, the Commission was of the view that an investigation under Section 3(4) read with Section 3(1) of the Act is made out on this aspect as well.

Deep discounts, excessive commissions and one-sided clause – On the allegations of the delayed payment cycle, imposition of one-sided clauses in the agreement, charging of exorbitant commission, etc. Zomato has submitted that lower commission rates resulting from exclusivity arrangements have the effect of reducing operational costs of RPs, which can be used by an RP to improve the quality of food. Swiggy also averred that the Commission is not a price regulator and cannot review the appropriateness of the commissions/discounts charged by Swiggy, more so because Swiggy does not hold a position of dominance. Concerning discount policies, Swiggy stated that it does not violate the Act as the RPs have the freedom to choose whether they would like to provide discounts on the platform, and the requirement to provide discounts is not a pre-requisite to be listed on the Swiggy platform. Moreover, discounting does not result in any favorable listing on the primary search results.

Thus, after a detailed analysis of the allegations made, the responses given by OPs and the rejoinder thereto by NRAI, CCI has found a prima facie case in respect of three out of eight allegations, i.e. cloud kitchen, exclusivity and price parity restrictions.

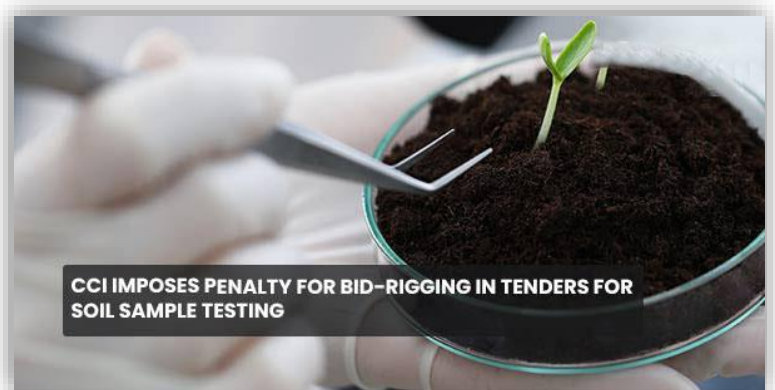
Based on the above findings CCI concluded that there exists a prima facie case with respect to some of the conduct of Zomato and Swiggy, which requires an investigation by the Director-General ('DG'), to determine whether the conduct of the OPs has resulted in contravention of the provisions of Section 3(1) of the Act read with Section 3(4) thereof, as detailed in this order. (Source: CCI decision dated 04 April 2022, for full text see CCI website)

CCI penalizes 9 Firms for bid rigging in the tender floated by the Department of Agriculture, Government of Uttar Pradesh for soil sample testing.

By way of an order 04 April 2022, CCI held 9 firms guilty and penalized them for bid rigging the tender floated by the Department of Agriculture, Government of Uttar Pradesh for soil sample testing.

Allegations-

It was alleged in the complaint that the Yash Solutions, Bareilly (OP-1), M/s Satish Kumar Agarwal, Bareilly (OP-2), M/s Siddhi Vinayak & Sons, Bareilly (OP-3), M/s Saraswati Sales Corporation, Bareilly (OP-4) and Austere System Pvt. Ltd., New Delhi (OP-5) acted in a concerted manner in respect of Tender No. 1 (dated 31.05.2018 for Moradabad region) and Tender No.2 (dated 18.06.2018 for Bareilly region) and resorted to bid-rigging in contravention of provisions of Section 3(1) read with Section 3(3)(d) of the Competition Act 2002 ('Act').



CCI IMPOSES PENALTY FOR BID-RIGGING IN TENDERS FOR SOIL SAMPLE TESTING

Further it was also alleged that there were numerous red flags in the documents submitted by the OPs, but the authorities preferred to ignore.

Prima Facie opinion

Based on the evidences provided in the information, the Commission was of the prima facie view that, despite being competitors, these entities appeared to have manipulated the process of bidding in the soil testing tenders in the state of Uttar Pradesh by indulging in bid-rigging, in contravention of provisions of Section 3(1) read with 3(3)(d) of the Act and accordingly, had directed DG to cause an investigation vide order dated 30.01.2020.

DG Investigation

DG in its investigation report concluded that OP-1 to OP-5 along with, Delicacy Continental Private Limited, Fimo Info Solutions Pvt. Ltd., M/s Toyfort and Chaitanya Business Outsourcing Pvt. Ltd. indulged in cartelization and bid-rigging in the 2017 and 2018 tenders pertaining to soil testing work issued by various divisions of the Department of Agriculture, Government of Uttar Pradesh.

CCI findings

For the purpose of analysis of the case, CCI decided to group the OPs in sets as under:

SET 1: Yash Solutions, M/s Saraswati Sales, M/s Satish Kumar, M/s Siddhi Vinayak, and Chaitanya Business Outsourcing

The Commission noted that Yash Solution, M/s Satish Kumar, M/s Siddhi Vinayak, M/s Saraswati Sales, Chaitanya Business Outsourcing did not have any experience in soil testing before submitting the bids in response to the tender.

The Commission also noted that the experience certificates issued by Yash Solutions to M/s Satish Kumar and M/s Siddhi Vinayak bore the same date and were issued even though those entities never had any soil testing experience or experience of working on ICP-OES machine, and these were fake.

The Commission further notes that Mr. Satish Kumar Agarwal and M/s Saraswati Sales had submitted invoices for the purchase of a soil testing machine, i.e., the ICP-OES machine, with an identical account number and serial number of the invoices submitted by other bidders such as Yash Solutions, M/s Siddhi Vinayak and M/s Saraswati Sales in the soil testing tenders.

Based on the above findings Commission concluded that Yash Solutions, M/s Satish Kumar, M/s Siddhi Vinayak, M/s Saraswati Sales, and Chaitanya Business Outsourcing have contravened the provisions of Section 3 (3)(d) read with Section 3(1) of the Act.

SET 2: Austere Systems, M/s Toyfort, Fimo Info Solutions, and Delicacy Continental

M/s Toyfort, Fimo Info Solutions, and Delicacy Continental had no experience in soil testing work and also found that the demand draft was submitted on behalf of Austere Systems' rival bidder Fimo Info Solutions, from their account. Further it was also noted that Austere Systems had formed a consortium with M/s Toyfort in which M/s Toyfort had undertaken the printing of soil health cards for Austere Systems in 2018. For the said purpose, an MOU between them was also entered into. The said MOU mentioned that M/s Toyfort and Austere Systems were sister concerns.

In view of the above, the Commission was of the view that Delicacy Continental colluded with Austere Systems to rig the soil testing tenders of 2018 for the Saharanpur and Meerut divisions.

SET 3 : Austere Systems and Yash Solutions

The Commission agreed with the DG that Austere Systems, under an arrangement/ understanding with rival company Yash Solutions, had geographically allocated the soil testing tenders issued by the Department of Agriculture, Government of Uttar Pradesh, in 2017 and 2018 by not bidding in each other's allocated regions and by submitting supporting bids in favor of each other.

Finally, the Commission held Yash Solutions, M/s Satish Kumar Agarwal, M/s Siddhi Vinayak, M/s Saraswati Sales Corporation, M/s Austere System Pvt. Ltd., Delicacy Continental Pvt. Ltd, Fimo Infosolutions Private Limited, M/s Toyfort, and Chaitanya Business Outsourcing Pvt. Ltd. Contravening the provisions of Section 3(1) of the Act read with Section 3(3)(c) and 3(3)(d) and imposed penalty upon the Opposite Parties @ 5 percent of the average of their turnover for the three financial years, i.e., 2017-18, 2018-19 and 2019-20.

The Commission also identified the role and responsibility of the key persons of the Opposite Parties, and imposed penalty under Section 48 of the Act at the rate of 5 percent of their average income of the financial years 2017-18, 2018-19 and 2019-20. (Source: CCI decision dated 04 April 2022, for full text see CCI website)

CCI penalizes Dumper Truck Union for cartelization

The Competition Commission of India by way of an order dated 07 February 2022 found Dumper Truck Union Sanu Mines area of Jaisalmer, Rajasthan guilty of violating the provisions of Section 3(3)(a) and 3(3)(b) of Competition Act, 2002 ("Act") but could pass only a cease-and-desist order as the key office bearer of the Union refused to respond to the notice issued by CCI asking for its turnover or assets. Therefore, the Commission had no choice left except to defer the imposition of penalty to a future date. This is quite strange and unprecedented.

The investigation by the CCI was initiated on an information filed by CJ Darcl Logistics Ltd. ("CJD Logistics/Informant") alleging that

1. Dumper Truck Union and its members restricted CJD Logistics by not letting it carry out transportation work through its own vehicles and by forcing it to use trucks of OP-2 at a higher rate for carrying out its contractual obligations of transportation of limestone.



2. Opposite Parties not only did not allow any other transporter or logistics company to ply their vehicles, but also made it mandatory to take vehicles along with drivers from the Dumper Truck Union and its members only, and that too, on a higher rate vis-à-vis the contracted rate.

DG in its investigation report dated 29.7.2021 found as under:

1. The interim arrangement dated 24.04.2019 made between CJD Logistics and the Union on behalf of its members is, per se, anti-competitive.
2. By deciding the rate of Rs.500/MT, the Union had directly or indirectly determined the purchase price for providing their services.
3. By not allowing CJD Logistics to carry the transportation of limestone through company vehicles and forcing CJD Logistics to use the trucks of their union at the rates arbitrarily fixed by them, which was much higher, the Opposite Parties have limited or controlled the provision of services.

Based on the above findings DG had concluded that agreement/understanding existed between the members of the Union to limit/control the provision of transportation services and to fix the transportation rate and not follow the commercially viable rate arrived at by an open tendering process, has violated the provisions of Section 3(3)(a) and Section 3(3)(b) of the Act.

With regard to the allegations regarding Abuse of Dominance, DG held that there is no conclusive evidence to prove that the Union qualified as an "enterprise" under the Act. However, regardless to this, considering the unique facts of the case, DG assumed that the Union was an enterprise and investigated

further and concluded that the Union abused its dominant position in the relevant market for “*provision of services of transportation of minerals/limestone by trucks operating in area of Sanu mines*” in terms of the provisions of Section 4(2)(a), Section 4(2)(b)(i) and Section 4(2)(c) read with Section 4(l) of the Act if it would have been termed to be an ‘enterprise’.

The Commission agreed with the DG regarding directly or indirectly determining the sale price and/or limiting or controlling provision of services and held that there is an understanding between members of the Union to limit/control the provision of transportation services and to fix the transportation rate at a rate higher than that determined through open tendering process, which is in violation of the provisions of Section 3(3)(a), i.e., directly or indirectly determining purchase/sale prices and Section 3(3)(b), i.e., limiting or controlling the provision of services.

Further CCI held that the trucks of the members of the Union were being used charged a uniform price rather than offering competition to each other. The prices that were charged were not independently arrived at, but in concert under the aegis of the said Union. The Commission was, thus, of the view that the Union has contravened Section 3(1) read with Sections 3(3)(a) and Section 3(3)(b) of the Act. Ironically, the Union did not bother to refute or defend its anti-competitive conduct in any manner either by offering their stance before the DG or even before the Commission, despite several opportunities being given.

On the issue of abuse of dominance, CCI held that DG has not given any categorical finding as to whether Union was involved in any economic activity by providing its trucks and drivers for transportation of goods and was collecting considerations received for provision of such services. Therefore, CCI did not determine whether Dumper Truck Union is an “enterprise” under provisions of Section 2(h) of the Act and left the question open. Consequently, no case was made out against the Union for abuse of dominance under Section 4 of the Act.

CCI also agreed with the finding of the DG regarding the individual responsibility for the contravention and held that despite the opportunity, Mr. Kunwar Raj Singh, failed to appear either in the investigation or the inquiry, and his conduct remains unrefuted in any manner.

Accordingly, CCI, in terms of Section 27(a) of the Act, directed the Dumper Truck Union and Mr. Kunwar Raj Singh, its former chairman, who was held liable in terms of the provisions of Section 48 of the Act, to cease and desist in the future from indulging in practices which have been found in the present order to be in contravention of the provisions of Section 3 of the Act.

On the issue of penalty, since neither the Union nor Mr. Kunwar Raj Singh had submitted their financial details as directed by CCI, it was held that *a separate order regarding the imposition of monetary penalty may be appropriately passed.* (Source: CCI decision dated 07 February 2022, for full text see CCI website)

CCI penalizes shipping lines for cartelization



The Competition Commission of India (CCI) by way of an order dated 20 January 2022 has found NYK-LINE, K-LINE, MOL, NMCC including their office bearers ('Opposite Parties' or OP) guilty of cartelization in relation to exchange of commercially sensitive information to co-ordinate, inter alia, the price quoted in the matter of provision of maritime motor vehicle transport services on Pure Car Carrier (PCC) vessels to automobile OEMs. Accordingly, a combined penalty of about INR 64 Crore was imposed on K-Line, MOL and NMCC for the

alleged exchange of commercially sensitive information, limit supply, collusive bidding between the Ops in the market for the 'provision of services for transportation of vehicles across countries', in contravention of Section 3(3) of the Competition Act. NYK Line, being the first leniency applicant, on whose disclosure the CCI initiated the investigation, was given 100% exemption from penalty.

The leniency application filed by NYK Line disclosed the collusive actions with its competitors along with documents of evidence in support. With full disclosure of information, in relation to exchange of commercially sensitive information, freight charges, restricting supply subsequently lead to the CCI to order an investigation in the matter. Subsequently, MOL and NMCC filed lesser penalty applications with detailed submissions as to why they should be traded jointly and not as separate entities. Both were granted the second and third priority status maker respectively.

The CCI relied on evidence gathered by the DG as well as that provided by the Opposite Parties comprising in form of memos, e-mails, Affidavits and depositions etc. relating to freight rates, respectively, prices, restricting supply to hold that the parties had contravened Section 3(3) of the Act. Importantly, the CCI observed that the *mere exchange of commercially sensitive information between competitors was a contravention of the Act*. In the present matter, the OP's were not held to be the exporters, instead they were providing the maritime transport services to OEMs who were actually exporters, and hence were not accorded any protection to the anti-competitive agreement entered by the OPs in terms of Section 3(5)(ii) of the Act;

Accordingly, the CCI directed the Opposite Parties and its office bearers to cease and desist in future from engaging in anti-competitive conduct. It granted 100 percent immunity to NYK Line and its individuals for disclosing the existence of cartel in the maritime motor vehicle market. MOL and its individuals were

granted up to 50% reduction from penalty, being the second leniency applicant, was fined INR 10,12,97,243 and lastly, NMCC and its individuals, were granted upto 30% reduction from penalty, being the third leniency applicant, and was fined INR 28,69,44,134. (Source: CCI order dated 20 January 2022, for full text see CCI website)

CCI finds NECC guilty of distorting the egg market in India



The CCI by way of an order dated 14 January 2022 found National Egg Co-ordination Committee (NECC) (referred as 'OPs'), including its office bearers guilty of cartelization in relation to the determination of price of eggs and restricting, limiting the supply of eggs in contravention of Section 3 of the Act. Accordingly, the CCI held the impugned conduct of NECC in enforcing/seeking to enforce its declared prices of eggs was in violation of the provisions of Section 3(3)(a) read with Section 3(1) of the Act.

The investigation was initiated on the basis of information filed in two cases, Case No. 09/2017 and Case No. 36/2017. CCI vide its order dated 25.01.2018 clubbed both the matters. The informants had alleged that there was deliberate limitation on the supply of egg to customers by NECC, to manipulate prices.

The DG in its investigation, relied upon certain WhatsApp messages, deposition, and emails, while finding NECC to be contravening the provisions of the Act. Teleconferences were held amongst various Zonal Chairmen of NECC on a weekly basis, which played a significant role in egg price determination and declaration process of various zones. Further, NECC indulged in limiting and controlling production and supply of eggs by facilitating and directing early bird culling.

The CCI agreed with the findings of DG and found through minutes of meetings, deposition, statement of oaths etc. that NECC had been determining and declaring price of eggs on daily basis. CCI also noticed the active role played by NECC's Central Executive Committee, which controlled the process of determination and declaration of prices of eggs by active intervention at annual meetings. However, the Commission negated the argument that any facility of storage or subsidy made available to farmers would be anti-competitive.

Further, the CCI held that wanting to control the price of eggs without giving freedom to farmers to decide their own prices and force them to sell at a NECC's declared price was clearly anti-competitive and a result of concentrated action.

The Commission in terms of Section 27 of the Act, held the conduct of NECC in contravention of the Act and directed to cease and desist from issuing threats that nonadherence to the declared egg prices shall have any penal consequences upon any of its members. Also, it should always give sufficient and prominent disclaimers that the prices so declared were only suggestive and not mandatory. CCI, however, did not impose any monetary penalty on NECC. (Source: CCI decision dated 14 January 2022; for full text see CCI website)

INTERNATIONAL

EU opens investigation against Pierre Cardin for alleged anti-competitive behavior



The European Commission (EC) had launched a formal antitrust investigation to assess whether Pierre Cardin and its licensee the Ahlers Group may have breached EU Competition rules by restricting cross-border and online sales of Pierre Cardin-licensed products, as well as sales of such products to specific customer groups.

The EC was concerned that Pierre Cardin and Ahlers may have breached EU competition rules by restricting the ability of Pierre Cardin's licensees to sell Pierre Cardin-licensed

products cross-border, including offline and online, as well as to specific customer groups. More specifically, the EC would investigate whether Pierre Cardin and Ahlers have developed a strategy against parallel imports and sales to specific customer groups of Pierre Cardin-branded products by enforcing certain restrictions in the licensing agreements.

The EC had informed the companies and the competition authorities of the Member States that it had opened proceedings in this case. (Source: European Commission press release dated 31 January 2022)

II. ABUSE OF DOMINANT POSITION/ MARKET POWER

CCI directs investigation against Star India and its subsidiaries for alleged abuse of dominant position

Competition Commission of India ("CCI") vide its order dated 28 February 2022 directed investigation against Star India Private Limited ("SIPL"), including its subsidiaries and Group Company, Disney Broadcasting (India) Limited, and Asianet Star Communications Private Limited (Collectively referred to as 'the OPs') for alleged abuse of dominant position by extending discriminatory discounts.



The information was filed by Asianet Digital Network (P) Ltd ("ADNPL"/Informant), a Multi System Operator (MSO) engaged in the business of providing digital TV services, predominantly in Kerala and also operates in Karnataka, Andhra Pradesh, Telangana, and Odisha

Allegations

It was alleged by the informant that OPs are discriminating ADNPL in not extending the discounts, which are offered to its competitors and such discriminatory discounts being unfair violates

the provision of Section 4(2)(a)(ii) of the Act. Further it was alleged that OPs are denying market access to the Informant as due to the Discriminatory discounts Informant is unable to compete in the downstream market of distribution of TV channels given the unfair advantage OPs has conferred upon the Informant's competitors.

It was further alleged by the informants that in contravention to the new regulation, Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017 (Interconnection Regulations 2017) and the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017 which cap the total discount (15% of MRP) and distribution fees (20% of MRP) payable to distributors at 35% of MRP and mandate that broadcasters offer discounts based on fair, transparent, and non-discriminatory terms, Star India is offering special discounts of up to 50% (instead of 15% as per Interconnections Regulations 2017) to Kerala Communicators Cable Limited (KCCL) because of which the informants is losing its customers

Informant further alleged that OPs chose an indirect way to provide these discounts to circumvent the New Regulatory Framework of TRAI by way of promotion and advertisement payments to the main competitor of ADNPL in Kerala viz. KCCL, through high valued advertising deals, the complaint alleged.

CCI Observations

CCI delineated the relevant market as '*market for provision of broadcasting services in the State of Kerala*'. CCI noted that Asianet Channel has more than four times more viewership than the nearest competitor channel. OP-1 is a part of Disney (OP-2) which has global revenue of USD 65.3 billion and having total assets of USD 201.5 billion. Further, as per OP-1's financial statements, revenue was Rs. 14,337.46 crores in the financial year ending 31.03.2020. Being part of the Disney group, SIPL and its group companies are

present across the entire value chain of the media industry from content generation to Over the Top (OTT) platform.

Thus, based on market share, the dependence of consumers, Size and resources of the enterprise (being part of a global media conglomerate), vertical integration of the enterprise, and countervailing power, the Commission, prima facie, concluded that Star India enjoys a position of dominance in the relevant market.

CCI noted that KCCL (Competitor of the Informant) was getting the channels at about 30% of the MRP with about 70% discount (special discounts of up to 50% added with distribution fee of 20%) whereas the maximum permissible discount under the New Regulatory Framework is capped at 35% i.e., a minimum of 20% distribution fee and other marketing discounts of maximum 15% (combined, both capped at 35%).

The impact of such discount discrimination was that ADNPL, the informant, was constrained to price its channels at a higher price than that of KCCL and ultimately pay the price by losing consumers consistently whereas KCCL has gained new consumers. The Informant was ultimately offering its services at a loss-making price just to prevent the subscriber base from migrating to KCCL's services but in vain. It was further noted that ADNPL's subscriber base fell from about 14.5 lakh in April 2019 to about 11.76 lakh in September 2021 while the subscriber base of KCCL went up from 21.3 lakh in April 2019 to 29.35 lakh in September 2021.

Based on the above findings CCI concluded that, the discriminatory pricing through discriminatory discounting enforced by the OPs between different MSOs of SIPL has resulted in a significant loss in the consumer base of the Informant and this, prima facie, appears to be violating the provisions of Section 4(2)(a)(ii) and 4(2)(c) of the Act. Accordingly, CCI directs the Director General (DG) to cause a detailed investigation into the matter.: (Source: CCI order dated 28 February 2022; for full text see CCI website)

CCI dismisses allegations of abuse of dominant position against Tata Motors & Tata Motors Finance Ltd.

By way of an order dated 03 February 2022, the CCI closed the case against Tata Motors (OP-1) & Tata Motors Finance Ltd (OP-2). (collectively referred as OPs) for the alleged abuse of its dominant position in the market of “*market for manufacture and sale of passenger vehicles in India*”.

The information was filed by M/s Samaleshwari Automobiles (‘the Informant’) an authorised dealer of OP-1 alleging that Dealership Agreements dated 01.05.2005, 31.07.2008 and 26.12.2012 entered into between the parties are violative of provisions of Section 4 of the Act. Further it was alleged that OPs have indulged in a tie-in arrangement amongst themselves, thereby exercising abusive and anti-competitive practices which put the Informant’s entity in financial jeopardy.



The Informant has also alleged that the Dealership Agreements, expressly mandated the Informant to deal only with the OPs, which meant that the OPs were its sole business partners and the sale of passenger/utility vehicles, including their spare parts and after sales service was at the mercy of OP-1.

For the purpose of the investigation CCI delineated the relevant market as “market for manufacture and sale of passenger vehicles in India” and noted that as per the annual

report of the year 2020–2021 of OP-1, OP-1 commanded a market share of a mere 8.2% in passenger vehicles segment. Thus, OP-1 does not appear to be dominant in the delineated relevant market. In the absence of dominance in the relevant markets defined supra, the question of abuse of dominant position does not arise.

Therefore based on the above finding CCI was of the view that no case of Abuse of Dominance is made out and accordingly directed the case to be closed under Section 26(2) of the Act. (Source: CCI decision dated 03 February, 2022; for full text see CCI website)

CCI directs investigation against Chandigarh housing board for alleged abuse of dominance in allocating residential flats.

Competition Commission of India (CCI) by way of an order dated 13 January 2022 directed the Director General (‘DG’) to cause an investigation against Chandigarh housing board(CHB) for the alleged abuse of dominance.

The Informant has alleged CHB has abused its dominant position by way of imposing unfair terms and clauses on the allottees. The allegations in this regard have been summarized as under:

- A. Interest charged at the rate of 12% p.a. by CHB towards payment of instalments even during construction period is unfair and arbitrary.
- B. Non-disclosure of date of possession by the CHB purportedly to avoid liability in case of any delay.



- C. Requirement to pay interest @ 18% p.a. for the 1st month, @ 21% p.a. for the 2nd month and @24% p.a. for the 3rd month and 30% p.a. thereafter for revival of registration in case of delayed payment of registration money or the subsequent instalments in conjunction with the fact that no corresponding liability has been placed on CHB for delay in handing over possession of the flats to the allottees.
- D. Levy of interest @ 18% p.a. for the delay of one day in payment of two instalments due on 24.10.2012 and 24.04.2013 which were paid before the due dates *i.e.* on 22.10.2012 and 22.04.2013 which got credited in the account of the CHB on 25.10.2012 and 25.04.2013.

CCI delineated relevant market as the “*market for the provision of services for development and sale of residential flats in the Union Territory of Chandigarh*”. The Commission found CHB to be dominant in the relevant market. With respect to the allegations levied by the Informant, the CCI holds CHB guilty on two fronts, Firstly by not disclosing the date of handing over of possession to the allottee, though at the same time subjecting them to terms, which in the *prima facie* view of the Commission is unfair qua the consumers of CHB and merits an investigation and secondly the stipulation of interest and charging of the same by CHB was *prima facie* found to be grossly unfair, warranting an investigation. (Source : CCI decision dated 13 January 2022, for full text see CCI website)

CCI directs investigation against Google for alleged abuse of its dominant position in the market or online search advertising services in India.

CCI vide its order dated 07 January, 2022 has directed yet 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 information was filed by Digital News Publishers Association (Informant) a private nonprofit company, engaged in to promote, aid, help, encourage, develop, protect and secure the interest of digital news publishers.



Relevant markets suggested and specific allegations

The informant delineated four relevant markets and averred that Google enjoys a dominant position in each of these relevant markets i.e. Market for online search advertising services in India, Market for online general web search services in India, Market for publishing of news content in India and Market for online advertisement in India.

The informant had made specific allegations under the following heads:

Imposing unfair and arbitrary conditions

It was alleged that Google impose direct/indirect unfair conditions on the members of the Informant, while allowing website links of the members of the Informant on their search engine results. Further it has been alleged that members of the Informant are not informed of or given any data pertaining to the amount of revenue earned by the Google by providing advertisements on the websites/links of the members of the Informant and only a small chunk of revenue generated from the advertisements on the websites/links of the members of the Informant in an arbitrary manner, without disclosing any basis for calculation of such revenue.

Further it was also alleged that while Google uses snippets of the content created by members of the Informant, but does not fairly compensate the members of the informant for use of the content. The agreements entered between the members of the Informant and the OPs for sharing the advertisement revenues are unilaterally and arbitrarily dictated by the Google, and the members of the Informant have no other option but to accept the terms, as they are, with no bargaining power whatsoever.

Restricting technical development

It was alleged that the Google, by depriving the members of the Informant of the fair value of the content, discourage innovation and technical development of the services provided by the members of the Informant and other media companies, to the detriment of consumers.

Denial of market access

The Informant alleged that Google holds a dominant position in the relevant markets and have used such position to restrict the members of the Informant in the market of news content and advertising and further because of the unilateral, arbitrary and unfair decisions of the Google, the members of the Informant have to suffer a loss of advertising revenues and the inability to bargain a fair share in the value chain of news dissemination, despite working and generating credible news. Therefore, Google is guilty of using their dominant position in the relevant market(s) to deny market access to members of the Informant in the digital advertising space.

Leveraging

The Informant has averred that the Google have entered into the news aggregation genre by launching Google News, Google News Showcase, etc. It is further averred that Google do not produce any news of their own; however, they have steadily grown their influence in the news space by effectively using their dominance in the relevant markets. This has been enabled by Google's ability to dictate what a viewer sees first, thereafter using advanced algorithmic tools to cater tailormade news as per the viewing history of each viewer.

Further it has been alleged that Google gives publishers no choice but to implement Accelerated Mobile Pages (AMP) standard or lose critical placement in mobile search, resulting in reduced traffic therefore, publishers were forced to build mirror-image websites using this format, with Google caching all articles in the AMP format and serving the content directly to mobile users.

Based on the above conduct of Google informant alleged that it amounts to violation of Section 4(2)(e) of the Act.

CCI Analysis

Relevant market

For the purpose of investigation CCI delineated two relevant markets: *Market for Online General Web Search Services in India* and *Market for Online Search Advertising Services in India*.

On the issue of Dominance CCI considered its previous Google Search Bias case wherein it held Google to be Dominant in both the markets. Further CCI considered the data from *gs.statcounter.com*, and *www.statista.com*, and the other factors mentioned in section 19(4) and was of the *prima facie* view that Google is dominant in both the relevant markets, i.e., market for online general web search services and market for online search advertising services in India.

Abuse of Dominance

CCI firstly noted that Google displays news content in a variety of ways through hyperlinks, thumbnails, extracts, etc. and through this links user get the access to the publishers original website which allows news publishers to monetize their content by offering advertising space on their websites to potential advertisers. Further in this digital advertising ecosystem news publishers operate as sellers of advertising space on their websites and, in the process, interact with various intermediaries in the digital advertising value chain (ad-tech) to reach out to the demand side of the market, i.e., advertisers. CCI further noted that Google occupies a significant position in the ad-tech intermediary services globally.

CCI noted that news publishers are dependent on Google for the majority of the traffic, which makes Google an indispensable trading partner for news publishers. This is exacerbated by the significant role played by Google in the ad-tech value chain and makes considering the vertical integration of Google, news publishers have no choice but to accept the terms and conditions imposed by Google. CCI also noted that with increasing access to news content online, advertiser expenditure on digital advertising has grown significantly, which can be seen from the growing share of digital ad revenues in total ad revenues earned by news publishers. Further considering Google's market position in the online digital advertising intermediation services, the alleged unilateral and non-transparent determination and sharing of ad revenues appears to be an imposition of unfair condition on publishers. The alleged opacity on critical aspects such as data and audience management practices, or generation and sharing of revenue with publishers, exacerbates the information asymmetry and is prima facie prejudicial to the interest of publishers, which, in turn, may affect the quality of their services and innovation, to consumer detriment which is prima facie violation of Section 4(2)(a) of the Act.

On the allegation that that Google has unilaterally decided not to pay the publishers of news for the snippets used by them in search engine results CCI noted that Google continues to earn revenue directly/indirectly in such cases even though news publishers may not be able to do so until the user clicks on the search links. It needs to be examined whether the use of snippets by Google is a result of bargaining power imbalance between Google on the one hand and news publishers on the other, and whether it affects the referral traffic to news publisher websites, and thus, their monetization abilities and the alleged conduct of Google appears to be an imposition of unfair conditions and price which, prima facie, is a violation of Section 4(2)(a) of the Act.

Further on the allegation that publishers are 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 also needs to be investigated.

CCI also held that it needs to be investigation whether Google imposes any discriminatory condition or price on various news publishers, which would violate Section 4(2)(a) of the Act.

Based on the above, the CCI was of prima facie view that Google has violated the provisions of Section 4(2)(a) of the Act, which merits investigation. Further, the allegation that abovementioned conduct of Google results in violation of the provisions of Section 4(2)(b)(ii) as well as Section 4(2)(c) of the Act also needs to be investigated.

Lastly CCI held that, it appears that Google is using its dominant position in the relevant markets to enter/protect its position in the market for news aggregation services in violation of Section 4(2)(e) of the

Act, which again merits detailed investigation. (Source: CCI decision dated 7 January 2022, for full text see CCI website)

CCI directs investigation against IREL for abusing its dominant position in the market for mining and supply of beach sand Sillimanite in India.

Vide its order dated 03 January 2022, CCI directed an investigation against IREL (India) Limited (Formally Indian Rare Earths Limited), a government-owned, Mini-Ratna company owned by the Government of India (OP) for the alleged abuse of its dominant position in the market for mining and supply of beach sand sillimanite in India.



The investigation was directed upon an information filed by Mr Kalpit Sultania (Informant) who alleged that OP had abused its dominant position by indulging into prohibitive increase in the Sillimanite prices and

following discriminatory pricing against the interests of the Micro, Small & Medium Enterprises (MSMEs) in the domestic market, while favoring multinationals and/or foreign parties. It was further alleged that OP is fixing the supply of Sillimanite as per its whims and fancies and forcing its customer to accept arbitrary quantity thus violating the provisions of Section 4 (2)(a)(i) and Section 4(2)(b)(i) of the Act.

On the issue of the averment made by the OP that it is not an “enterprise” within the meaning of the Act, CCI held that the product in question is Sillimanite, which is being extracted and sold, both in the country and abroad. Further from the submission of Informant as well as from the website of OP is clear that Sillimanite is used in production of refractories that is used in metal and alloy making industry as well as in ceramic and foundry industry and keeping in mind the nature of the function performed by the OP, it is clear that OP is an enterprise within Section 2(h) of the Act.

Further commission agreed with the relevant market delineated by the informant i.e. ‘*mining and supply of beach sand Sillimanite in India*’. On the issue of dominance of IREL, CCI noted that e OP has acquired a dominant position by virtue of being a corporation which has exclusive right to undertake mining and supply of beach sand minerals in India.

Further on the issue of the abuse of Dominance CCI noted that OP increased the price of Sillimanite substantially from Rs. 9000/- Per Metric Ton in 2016-17 to Rs. 14000/- Per Metric Ton in 2020-21. Further OP allegedly supplied Sillimanite to foreign entity viz. Krosaki Refractories limited at a rate of Rs. 11,000/- Per Metric Ton while the same was sold to domestic MSMEs at the rate of Rs. 14,000/- Per Metric Ton.

Further it was also not refuted by the OP that it had not responded to the Expression of Interest (EoI) issued by domestic MSME consumers and has supplied lower amounts of Sillimanite to domestic MSMEs, whereas OP is stated to have supplied adequate quantity to foreign companies/ MNCs, which was significantly higher than what was being supplied to domestic MSME consumers resulting in restricted supply of Sillimanite to domestic MSME.

Therefore, based on the above findings CCI noted that *prima facie* there was substance in such allegations which points towards violation of Section 4 (2) of the Act and accordingly directed the Director General (DG) to cause an investigation to be made into the matter under the provisions of Section 26(1) of the Act. (Source: CCI decision dated 03 January 2022; for full text see CCI website)

III. COMBINATIONS

INTERNATIONAL

European Commission prohibits the acquisition of Daewoo Shipbuilding & Marine Engineering CO., Ltd by Hyundai Heavy Industries Holdings.



The EC has prohibited, under the EU Merger Regulation, the acquisition of Daewoo Shipbuilding & Marine Engineering CO., Ltd (DSME) by Hyundai Heavy Industries Holdings (HHIH). The merger between the two South Korean shipbuilders would have created a dominant position by the new merged company and reduced competition in the worldwide market for the construction of large, liquefied gas carriers.

The EC carried an in-depth investigation on the proposed merger. During the investigation the EC received feedback from a large number of customers, competitors and other third parties. These companies were concerned that the transaction would create a company with a dominant position in the worldwide market for the construction large LNG carriers, reduce competition and increase prices for these vessels.

The decision of prohibiting the proposed transaction by the Commission was based upon all these considerations - The combined market shares of the parties would have been very large, it would have left very few alternatives for customers, limited capacity in the market i.e. capacity of the remaining competitors would not have covered the projected market demand., very high barriers to entry and no

buyer power and finally there had been no impact of the coronavirus pandemic on the market for LNG. (Source : European Union press release dated 13 January 2022)

Department of Justice sues to block UnitedHealth Group's Acquisition of Change Healthcare



The United States of America's Department of Justice (DOJ), together with Attorneys General in Minnesota and New York, filed a civil lawsuit on February 24, 2022 to stop UnitedHealth Group Incorporated (United) from acquiring Change Healthcare Inc. (Change). The complaint, filed in the U.S. District Court for the District of Columbia, alleged that the proposed \$13 billion transaction would harm competition in commercial health insurance markets, as well as in the market for a vital technology used by health insurers to process health insurance claims

and reduce health care costs.

It was alleged that the proposed transaction would give United, a massive company, that owns the largest health insurer in the United States, access to a vast amount of its rival health insurers' competitively sensitive information. Post-acquisition, United would be able to use its rivals' information to gain an unfair advantage and harm competition in health insurance markets. Further, it would eliminate an independent and innovative firm, Change, that provided a variety of participants in the health care ecosystem, including United's major health insurance competitors, with vital software and services. United's acquisition of this neutral player would allow United to tilt the playing field in its favor, harming current competition and allowing United to control and distort the course of innovation in this industry for the foreseeable future.

Thus, the DOJ's lawsuit made it clear that they would not hesitate to challenge those transactions that would harm competition by giving power to a single firm. (Source: Department of Justice Press Release dated 24 February 2022).



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We may be contacted at: www.vaishlaw.com

NEW DELHI

1st, 9th & 11th Floor, Mohan Dev Bldg.
13 Tolstoy Marg
New Delhi - 110001, India
Phone: +91-11-4249 2525
Fax: +91-11-23320484
delhi@vaishlaw.com

MUMBAI

106, Peninsula Centre Dr. S. S. Rao Road,
Parel Mumbai - 400012, India
Phone: +91-22-4213 4101
Fax: +91-22-4213 4102
mumbai@vaishlaw.com

BENGALURU

105-106, Raheja Chambers,
#12 Museum Road,
Bengaluru 560001, India
Tel: +91 80 4090 3588/ 89
Fax: +91 80 4090 3584
E-mail: bangalore@vaishlaw.com

Editor: M M Sharma

Editorial Team: Vinay Vaish, Sudhanshu Prakash

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