

ERGO

Analysing developments impacting business

COMPETITION LAW

31 January 2019

1. Competition Commission of India v Bharti Airtel Limited and Others (Civil Appeal No 11843 of 2018)

The Supreme Court dismissed an appeal by the CCI challenging an order of the High Court of Bombay (High Court) in a matter alleging cartelisation by telecom companies Bharti Airtel Limited, Vodafone India and Idea Cellular Limited (collectively, IDOs). The IDOs and the Cellular Operators Association of India (COAI) had filed writ petitions before the High Court, praying for quashing of the order of investigation against them, on grounds that the CCI did not have jurisdiction, considering that the TRAI was already seized of the matter.

The Supreme Court noted that while the CCI has exclusive jurisdiction to adjudicate upon issues governed by the Competition Act, 2002 (Competition Act) the issue of denial of points of inter-connects is a technical issue pending before the TRAI, which is the more appropriate authority and best suited to consider these issues. Further, it held that only when the jurisdictional facts are determined by the TRAI against the IDOs, would the issue of any concerted agreement between the IDOs and COAI arise. Separately, the Supreme Court also held that the Competition Act is a special statute and if there is anti-competitive conduct it is within the exclusive domain of the CCI to rule upon it. Therefore, even if TRAI finds anti-competitive conduct, its powers would be limited to the action under the TRAI Act alone. As such, the jurisdiction of the CCI is not barred, but simply pushed to a later stage.

Accordingly, the CCI dismissed the appeal.

[Click Here](#) to access the order passed by the Supreme Court.

2. Competition Commission of India v JCB India Limited & Others (CRA Nos 76 and 77 of 2019)

The Supreme Court allowed an appeal challenging the order of the High Court of Delhi (High Court) which restrained the DG from utilising evidence seized during investigation into an alleged abuse of dominant position by JCB India Limited (JCB). The order of the High Court had held that Chief Metropolitan Magistrate (Magistrate) had merely authorised the DG to search the premises of JCB and not specifically to seize any material during the search operation. Accordingly, the seizure of material by the DG in absence of explicit authorisation by the Magistrate was beyond the powers of the DG, and the DG was restrained from utilising any of the seized material. The CCI filed an appeal against this order before the Supreme Court. The Supreme Court observed that the provisions of the Companies Act, 2013

which enabled the DG to conduct investigation were designed to authorise the DG to conduct both, searches and seizures. It was further observed that unless a seizure was authorised, a mere search would not be sufficient for the purposes of investigation in terms of the Competition Act. Therefore, any interpretation imposing a restraint on seizure where the Magistrate had already granted a warrant for searches would be inappropriate. In view of the above, the Supreme Court held that the High Court should be circumspect when imposing restraints on investigative powers and the matter was remitted back to the High Court for determination of the other outstanding issues.

[Click Here](#) to access the order passed by the Supreme Court.

3. Mahyco Monsanto Biotech (India) Private Limited and Another v Competition Commission of India and Others (CM Nos 47926 of 2018 and 47927 of 2018)

The High Court of Delhi (High Court) set aside a petition filed by Mahyco Monsanto Biotech (India) Private Limited (Mahyco Monsanto) where the decision of the CCI ordering an investigation was challenged. The CCI had directed the DG to investigate inter alia, the alleged abuse of dominant position by Mahyco Monsanto, Monsanto Incorporated USA, Maharashtra Hybrid Seeds Company and Monsanto Holdings Private Limited (collectively - the Monsanto Group) in the relevant market of "provision for Bt cotton technology in India". Further, the CCI also directed the DG to investigate persons who at the time of the alleged contravention were in-charge of and responsible for the conduct of the companies comprising the Monsanto Group.

The High Court decided predominantly on two issues, that is, whether directors and persons in-charge of a company could be investigated before the company had been found liable for contravention of the Competition Act; and whether vicarious liability (and penalties) on the persons in-charge and responsible for the conduct of a company could be imposed for entering into anti-competitive agreements and abuse of dominance.

On the first issue, the High Court held that the conduct of the directors and persons in-charge of a company could be investigated in parallel with the investigation of the conduct of the company, since two separate proceedings would be inefficacious and inexpedient. With regards to the second issue, the High Court observed that the penal provision of the Competition Act uses the words "persons" which includes the persons responsible for the company. Further, the High Court relied upon another provision which states that the person in-charge and responsible for the conduct of the company, would be held liable for contravention of "any of the provisions of the Act" to hold that such persons could be held liable for engaging in anti-competitive conduct. Accordingly, the High Court set aside the petition.

[Click Here](#) to access the order passed by the Delhi High Court.

4. In Re: Alleged Cartelisation in Flashlights Market in India (Suo Motu Case No 01 of 2017)

Eveready Industries India Limited (Eveready) had filed a leniency application stating that Eveready along with its competitors, Panasonic Energy India Co. Limited, Indo National Limited and Geep Industries (India) Private Limited had participated in a cartel facilitated by the Association of Indian Dry Cell Manufacturers. The cartel was established for the exchange of information pertaining to "*the sale and production of flashlights*" in India. However, the CCI closed the matter, observing that while the leniency application evidenced the exchange of price sensitive information between Eveready and its competitors, there was not enough evidence to suggest that the cartel was finally implemented

by the members of the cartel. Further, the CCI did not find definitive evidence to show that there was any increase in the prices of flashlights due to the alleged cartel.

Khaitan & Co Competition/Antitrust Team represented Eveready Industries India Limited before the CCI.

[Click Here](#) to access the order passed by the CCI.

5. **Rico Auto Industries Limited and Others v GAIL (India) Limited (Case Nos 16 to 20 and 45 of 2016; 02, 59, 62 and 63 of 2017)**

The CCI passed a common order to dispose of 10 (ten) sets of Information (Under Section 19 of the Competition Act, the CCI may initiate an inquiry into an alleged contravention upon the receipt of a complaint or 'Information'. In terms of the Competition Act, the person filing the Information is referred to as an 'Informant'.) filed against GAIL (India) Limited (GAIL) by buyers of liquified natural gas (Informants (Supra note 1)). The CCI exonerated GAIL from allegations that it had abused its position of dominance in the relevant market for "*supply and distribution of natural gas to industrial consumers*". The allegations broadly pertained to (i) the terms of the Long-Term Gas Supply Agreement (GSA) entered into between GAIL and the Informants, and (ii) the manner in which the GAIL had performed its obligations under the GSA.

With respect to the terms of the GSA, it was averred that the duration of 20 (twenty) years resulted in the foreclosure of the relevant market. The CCI held that the duration was justified to guarantee GAIL a steady stream of revenue, necessary to sustain the significant and continuous up-front investments made by sellers of energy. In any case, the CCI observed that the clause had not resulted in the denial of market access since competitors such as Indian Oil Corporation Limited and Bharat Petroleum Corporation Limited were active in the market. However, the CCI also directed GAIL to facilitate informed choices by apprising customers of all available alternatives.

Thereafter, the CCI assessed the "*Take or Pay*" liability on the Informant which is an obligation on buyers to pay for the contracted quantity of gas, irrespective of the actual offtake. The GSA required parties to make certain "*nominations*" to assist in the calculation of "*Take or Pay*" liability, however, neither party had made such nomination. The CCI held that when determining abuse arising out of a contract, the conduct of the party raising the concern was to be examined. Since neither GAIL nor the Informants had made the requisite nominations, no abuse could be attributed to GAIL.

The CCI adopted a similar line of reasoning with respect to the remaining issues. For these reasons, the CCI held that no case of contravention of the Competition Act could be made against GAIL.

Khaitan & Co Competition/Antitrust Team represented GAIL (India) Limited before the CCI.

[Click Here](#) to access the order passed by the CCI.

6. **Velankani Electronics Private Limited v Intel Corporation (Case No 16 of 2018)**

The CCI initiated an investigation against Intel Corporation (Intel) pursuant to allegations that Intel had abused its position of dominance in the market for "*processors for servers*". Velankani Electronics Private Limited (Velankani), a

manufacturer of servers, stated that manufacturing of servers required assembling various components such as, processors, server-boards and chassis.

It was averred that for manufacturing servers, the processors of Intel were essential as they were the industry standard. In effect, there could be no marketable server unless the server-board and chassis of the Velankani were compatible with the processors of Intel. However, Intel had refused to provide Velankani with access to reference design files of their processor. This allegedly inhibited the ability of Velankani to design server-boards compatible with the processors of Intel.

In its *prima facie* assessment, the CCI found that the relevant market would be the market for "*processors for servers in India*". The CCI relied on a previous order (SYS Information Technologies Private Limited v. Intel Corporation and Others, Case No. 48 of 2011.) wherein it was *prima facie* found that Intel was dominant in the market for micro-processors. With respect to abuse, it was observed that the denial of access to reference files *prima facie*, limited and restricted the production of servers. Accordingly, the CCI directed the DG to further investigate the allegations against Intel.

[Click Here](#) to access the order passed by the CCI.

7. All India Online Vendors Association v Flipkart India Private Limited and Another (Case No. 20 of 2018)

The CCI disposed of an Information (Supra note 1) which alleged that Flipkart India Private Limited (Flipkart India) and Flipkart Internet Private Limited (Flipkart Internet) had abused their position of dominance.

The allegations pertained to the sale of goods by Flipkart Internet at discounted rates. It was stated that the practice resulted in the denial of market access to individual sellers and amounted to the imposition of discriminatory or unfair pricing on goods. Separately, it was averred that Flipkart Internet had leveraged its dominance in the market for "*services provided by online marketplaces for selling of goods in India*" to enter into another market for "*manufacture of products under private labels*".

In its assessment, the CCI defined the relevant market as "*services provided by online marketplaces for selling of goods in India*" and found that Flipkart Internet was not dominant in the relevant market owing to the presence of several competing players in the market. The CCI also observed that marketplace-based e-commerce models were still in their nascent stage, therefore, intervention in such markets ought to be carefully crafted to avoid stifling innovation.

[Click Here](#) to access the order passed by the CCI.

8. Northern TK Venture Pte Limited and Fortis Healthcare Limited (Combination Registration No. C-2018/09/601)

The CCI approved the acquisition of Fortis Healthcare Limited (FHL), a company which operates multi-specialty, super-specialty and diagnostic centers in India, by Northern TK Venture Pte Limited (NTK/Acquirer). NTK is an investment holding company and an indirect wholly-owned subsidiary of IHH Healthcare Berhad (IHH). NTK belongs to the IHH group which is a global provider of integrated healthcare services. IHH is present in India in major cities such as Bangalore, Chennai, Mumbai, Hyderabad and Kolkata through multi-specialty tertiary hospitals and feeder centres.

NTK had submitted that the hospitals operated and/or owned by FHL and itself, were active in the market for "*private tertiary hospitals*" and provided primary,

secondary, tertiary and quaternary services. The CCI assessed market power on the basis of the number of hospitals, operational beds, and volume of procedures for secondary, tertiary and quaternary procedures. While for most overlapping markets the CCI observed that the parties would face significant competitive pressure from Apollo Hospitals, Narayana Health, Manipal Hospitals etc; with regard to the city of Kolkata, the CCI voiced certain concerns.

The CCI assessed the impact of the joint venture, Apollo Gleneagles Hospital in Kolkata entered between a subsidiary of IHH, Gleneagles Development Pte. Limited (GDPL) and Apollo Hospitals. The CCI expressed concern that FHL, Apollo Hospitals and GDPL were competitors in the field of healthcare and that the Joint Venture (JV) could act as a platform to facilitate collusion. In order to alleviate the concerns of the CCI, NTK gave voluntary commitments which would ensure that the JV and the entity created post transaction would operate as *"separate, independent and competitive businesses"*. These included ensuring no common directors were appointed by IHH or GDPL on the board of the JV or the entity created post transaction; no sharing of *"commercially sensitive information"*; and such other commitments to prevent information sharing.

The commitments were accepted by the CCI and the transaction stood approved.

The Khaitan & Co Competition/Antitrust Team represented Northern TK Venture Pte. Limited before the CCI.

[Click Here](#) to access the order passed by the CCI.

9. Penalty imposed on Adani Transmission Limited for Gun-Jumping (Combination Registration No. C-2018/01/547)

The CCI passed a penalty order under the Competition Act against Adani Transmission Limited (Adani) in relation to the acquisition of Reliance Electric Generation and Supply Limited (Reliance) from Reliance Infrastructure Limited (Seller).

The CCI observed that the Share Purchase Agreement (SPA) entered into between Adani and the Seller required Adani to advance loans to the Seller before the approval of the CCI. Further, the SPA provided that Adani could adjust the loan advanced against the consideration payable for the acquisition. The CCI observed that the loan was in the nature of advance consideration for the combination. Accordingly, the CCI found a contravention of the Competition Act and imposed a penalty of INR 1 million (approximately USD 14,000) on Adani.

[Click Here](#) to access the order passed by the CCI.

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