



COMPETITION/ANTITRUST

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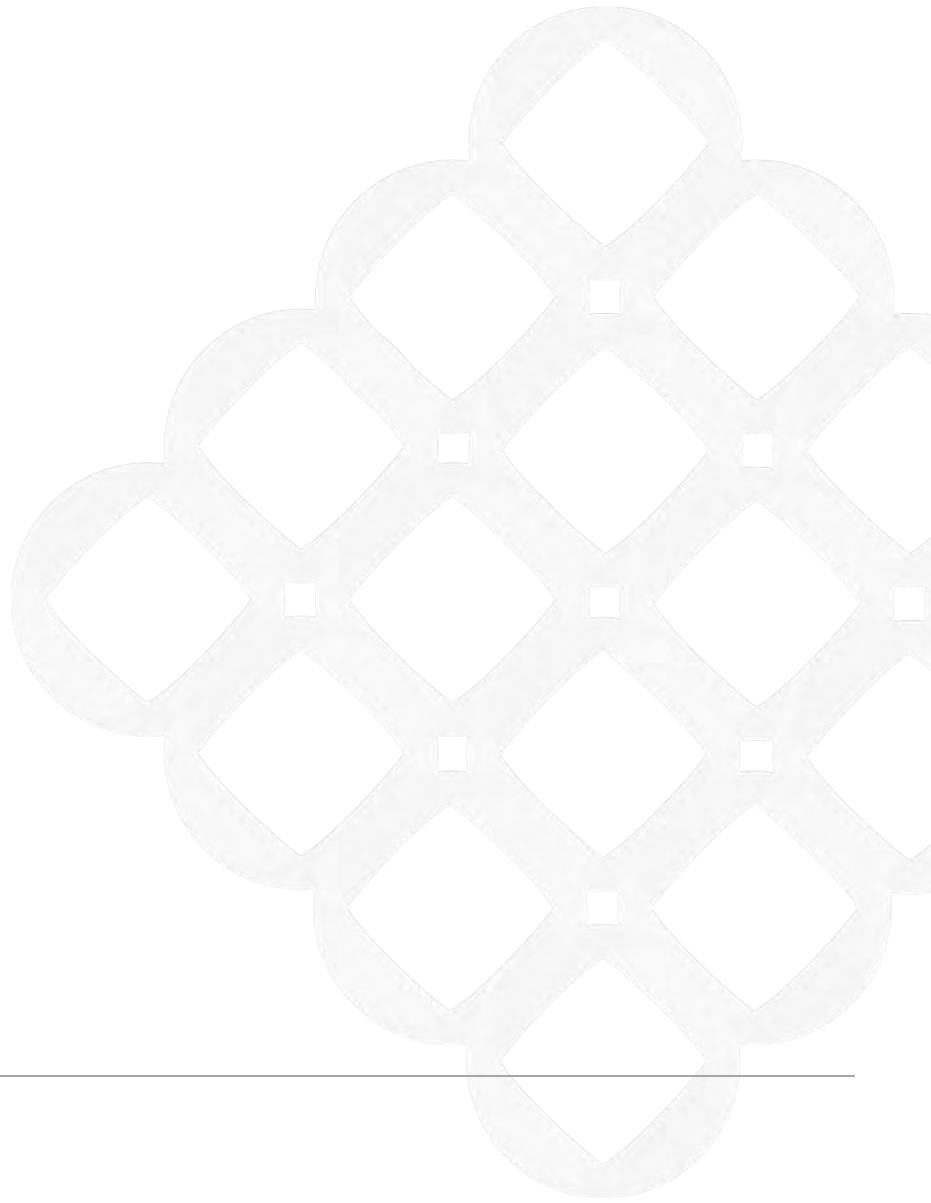
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Dear Readers

As we bid goodbye to 2020 and enter 2021, the KhaitanCo Competition / Antitrust Team (KCAT) presents the January 2021 edition of the newsletter.

We showcase significant updates on enforcement and merger control precedents between October and December 2020.

The enforcement section discusses two recent cartel cases and the Supreme Court's judgment on *locus standi* (standing) in Indian competition law.

The merger review / control section discusses the Competition Commission's observations on net neutrality and data-sharing issues in the digital economy.

This edition has insights on the evidentiary aspects of cartel enforcement and the Competition Commission's evolving jurisprudence on the use of econometric tools.

We hope that you enjoy reading this edition of the newsletter as much as we relished putting it together. As always, should you have any questions or comments, please feel free to contact any KCAT member.

01.

HORIZONTAL RESTRAINTS / AGREEMENTS

Post-investigation, the CCI finds no evidence of cartelisation in the market for sale of phenol in India.

In the context of sale of phenol – a raw material used in plywood and laminates, the Competition Commission of India (CCI) had directed a Director General's (DG) investigation after a tentative (technically, *prima facie*) infringement.¹

While the DG's investigation found a correlation in prices and evidence of communication among several suppliers of phenol - there was no evidence to suggest a "meeting of minds". The CCI agreed with the DG's investigation report and dismissed the allegations.²

Facts and background to the case

A complaint was filed by the Indian Laminate Manufacturers Association (ILMA) against 19 importers and sellers of phenol (Suppliers). ILMA alleged that the Suppliers had colluded to increase phenol prices during the first half of 2016.³ As evidence, ILMA submitted the marginal differential in prices quoted by the Suppliers, near simultaneous price increase by the Suppliers, and the low import prices (relative to high domestic prices) of phenol.

The CCI found that the Suppliers' conduct raised suspicions of cartelisation and ordered an investigation by the DG.

Investigation

Although not required to define a "relevant market" when investigating cartels, the DG delineated the market for assessment as "liquid bulk phenol for sale in India". The period of alleged cartel contravention (i.e., assessment period) was determined to be January to June 2016. The scope of assessment was also limited to the conduct of



the top 12 Suppliers (accounting for 95% of the market in terms of sales).⁴

The DG employed economic tools such as the Herfindahl – Hirschman Index (HHI)⁵, price-correlation⁶, and First-in First-Out (FIFO)⁷ analysis to examine the market. Through the HHI analysis, the DG found that the market had low concentrations and was hence, highly competitive.

The price-correlation analysis revealed a low degree of price parallelism in the six months prior to the assessment period. Price-correlation increased during the first half of the assessment period and weakened drastically during the second half. Thereafter, it remained low in the six months after the assessment period. Interestingly, the Suppliers made profits within the assessment period and losses both, prior to and post the assessment period.⁸

The DG noted certain exogenous factors for price volatility including - the international prices of benzene and crude oil (input for manufacture of phenol), fluctuating exchange rates, and demand-supply and stock positions.

In any event, the DG sought emails, call records, depositions, etc. of the Suppliers to corroborate the "economic evidence" gathered. However, no material to support the averment of a collusive agreement / arrangement was unearthed. Absent

¹ *Prima facie* opinion here refers to the CCI's tentative, preliminary view of a contravention which warrants investigation by the DG.

² *In Re: Indian Laminate Manufacturers Association v Sachin Chemicals & Others* (Case No. 61/2016) of 08 October 2020.

³ The complaint also alleged an abuse of dominant position by the Suppliers in the entire phenol market in India, however, the CCI did not form a preliminary view on abuse for lack of evidence.

⁴ Among other reasons, the DG excluded certain Suppliers from assessment since, one was under liquidation, some did not import phenol during the period of assessment, etc.

⁵ HHI measures the level of concentration in a market. The United States Department of Justice considers markets with HHI: i) less than 1500 to have low concentration; ii) between 1500 to 2500 to be moderately concentrated; and iii) greater than 2500 to be highly concentrated. The CCI is guided by the same metric in its own assessment of market concentration.

⁶ Correlation analysis is a statistical tool to ascertain the degree of linear association between two variables and varies from -1 and +1. A coefficient value of 1 represents perfect correlation and closer to +1 represents a higher degree of positive correlation between variables.

⁷ FIFO is a method of inventory valuation and can be used in profitability analysis, by matching the cost of goods sold with the value of goods sold.

⁸ Profitability assessment based on data collected using FIFO method of inventory evaluation.



any evidence to prove a cartel between the Suppliers, the DG did not find a contravention.

CCI's observation and decision on merits

ILMA raised objections to the DG's investigative methodology as well as the degree of appreciation of evidence. However, the CCI agreed with the threadbare approach adopted by the DG and even reaffirmed the exclusion of certain Suppliers from the scope of investigation.

As for the DG's finding, the CCI noted that there was in fact a steep rise in the domestic phenol prices relative to international prices. Further, there existed a high correlation in the domestic prices during the period between January and March 2016 and profits earned during said period, which raised suspicion of cartelisation.

However, the CCI found that the prices of domestic phenol were not entirely dependent on its international prices. Pricing was also influenced by, among other factors, inventory build-up. Therefore, sole reliance on international prices to determine appropriateness of domestic prices may not be adequate. Moreover, the high correlation in pricing was because of strong market competition between Suppliers and similar demand-supply conditions.

Against these findings, the CCI highlighted that mere evidence of conscious parallelism

(determined by price correlation) was insufficient to conclude cartelisation, particularly since the parallelism could merely be reflective of the Suppliers' individual response to the market. Given the lack of "plus factors" to corroborate the price correlation (which too, was justifiable), the CCI dismissed allegations and closed the matter.

Click [here](#) to access the order.

Key Takeaways

During the investigation, the DG proceeded against two Suppliers for "non-cooperation". The CCI even levied a fine of INR 100,000 on each of them. The imposition of a monetary penalty is a cautionary tale - it reinforces that non-cooperation with the investigative process can attract monetary penalties.

Further, while the case demonstrates the use of several economic tools to investigate and analyse potential cartel activity, it suggests that evidence to expose a meeting of minds / operation of collusive behaviour is key in establishing cartel contravention.

Interestingly, even in the absence of a statutory mandate "plus factors" remain important in the CCI's analytical toolkit.

CCI refuses to initiate cartel investigation against copper suppliers

Pursuant to insufficiency of evidence, the CCI dismissed allegations of collusive behaviour in the market for copper-based products.

Background and allegations

Claiming anonymity of identity, an advocate filed a complaint against Hindalco Industries Limited (Hindalco) and Vedanta Limited (Vedanta).⁹ The complaint alleged price-fixing, customer allocation, and collusive bidding in relation to refined copper products (such as, copper rods and cathodes).

Both, Hindalco and Vedanta, control approximately 75-80% of the supply of copper products in India. Allegedly, they attempted to soften competition by charging identical

"premiums", "additional charges", and "freight charges" to customers.¹⁰



Per the complaint, this identity in pricing could not be explained due to differences in capacities, cost of input, factory locations, etc. Instead, the identity in pricing was supposedly a result of frequent communications between the competitors.

Hindalco and Vedanta were also alleged to have i) entered into a verbal agreement to make purchases from each other to maintain similarity

⁹ Hindalco and Vedanta are primary importers of copper ore, which they process in their smelters and refining facilities.

¹⁰ Freight charges were alleged to be identical except for in Eastern India.

in sales volumes; ii) undertaken anticompetitive market allocation; and iii) indulged in bid rigging in the defense sector

CCI's observations and decision

The CCI observed that while the complaint made several averments, there was no evidence. There was no material to support the assertion that the premium, additional charges, and freight rates¹¹ were fixed or bid rigging took place.

Further, the credibility of sources for competitor communication was doubtful due to the absence of their identities.

Lamenting the insufficiency of evidence, the CCI noted that mere price parallelism did not give rise to a preliminary finding of anticompetitive activity and a probe into "*bald-faced allegations*" was neither feasible nor desirable.

The CCI did not initiate any investigation and closed the matter.

Click [here](#) to access the order.

Key Takeaways

Although the case relates to the CCI's decision-making at a tentative (technically, *prima facie*) stage, it is interesting to note that the CCI has highlighted the fundamental role of material evidence in substantiating complaints. In the absence of evidence, claims for initiation of DG investigation may not be entertained.

The CCI also reiterated how the existence of price parallelism, in and of itself, does not merit the initiation of an investigation. This means that the complainant continues to bear the primary onus to substantiate any allegation with evidence.

The Supreme Court clarifies on "standing"; agrees with the CCI & NCLAT findings on hub and spoke cartel allegations against Uber and Ola

Ruling in favour of Uber India Systems Private Limited¹² (Uber) and ANI Technologies Private Limited (Ola), the Supreme Court (SC) brought to rest allegations of anticompetitive conduct by the ride-hailing platforms.¹³

The decision is a triple whammy for the informant - who had failed to prove antitrust contravention at the CCI and the National Company Law Appellate Tribunal (NCLAT).

While welcome news for the ride-hailing platforms, the lack of detailed reasons may mean that the issues related to hub-and-spoke cartels remain alive. A takeaway from the SC judgment relates to the procedural aspect of appeals - standing or "*locus standi*"¹⁴.



Background to the case

In 2018, the informant - an independent law practitioner - had alleged "hub-and-spoke" cartels¹⁵ between the drivers, orchestrated by the ride-hailing platforms. *Per* the informant, drivers entered identical pricing terms with ride-hailing platforms and were therefore, aware of the pricing terms of other drivers. This translated into a "meeting of minds" - implying the existence of a price-fixing arrangement. Since Ola and Uber facilitated the "information exchange" between drivers, they formed part of the "hub-and-spoke" cartel.

The CCI found no competition infringement and dismissed the complaint at the preliminary stage.

¹¹ For freight rates, the CCI also noted that in any case, buyers were free to choose their own vehicles for transport.

¹² Uber India Systems Private Limited's group companies (i.e., Uber B.V. and Uber Technologies Inc.) were also party to the case.

¹³ *Samir Agrawal v Competition Commission of India and Others* (Civil Appeal No. 3100/2020) of 15 December 2020.

¹⁴ The right or the ability of a party to bring an action / claim before a legal forum.

¹⁵ Hub-and-spoke cartels refer to situations where information exchange between competitors is facilitated by a third-party operational at a different level of the supply / distribution chain. In other words, "spokes" are the competitors, and the "hub" is the common link among the competitors (i.e., the third-party facilitator).



Earlier this year, the NCLAT¹⁶ confirmed the CCI's decision noting the informant's failure to prove an "agreement" among the drivers to cartelise and fix cab fares.¹⁷

Interestingly, the NCLAT had dealt with the issue of the informant's "locus standi". The NCLAT noted that only a person who suffers the invasion of a legal right either "as a consumer or beneficiary of healthy competitive practices", could move the CCI. Given that the informant was neither a consumer nor directly aggrieved by Uber and / or Ola's actions - it could not have filed a complaint before the CCI.

The informant appealed the NCLAT's findings on merits and in relation to its "locus standi".

Findings and decision of the SC

The SC disagreed with the NCLAT's finding that the informant could not have approached the CCI. The SC noted that under the Competition Act, 2002 (Competition Act) a "person" may file an information (i.e., complaint) before the CCI. The term "person" would have to be interpreted broadly since proceedings under the Competition Act are "in rem"¹⁸ and it is the duty of CCI to act in public interest. Therefore, any "person" including those who are not personally affected by anticompetitive conduct, may approach the CCI.

The SC also addressed a challenge to the informant's right to file appeals before the NCLAT and the SC. The ride-hailing platforms argued that only a "person aggrieved" could exercise the right

to appeal under the Competition Act. Since the informant wasn't a person aggrieved - the appeal would not be maintainable.

The submission did not find favour with the SC. Upholding the informant's "locus standi" to file an appeal, the SC noted that i) the Competition Act explicitly allowed "any" person aggrieved to file an appeal, and ii) in any case, the term "person aggrieved" would need construed broadly owing to the "in rem" nature of the Competition Act.

While the SC held that the informant could have filed an information before the CCI and approached the SC and NCLAT in appeal - the SC did not find the informant's submission on allegations of cartelisation tenable. The SC, while dismissing the appeal, succinctly notes that reasons for not finding a hub-and-spoke cartel is "obvious" from the observations of the NCLAT and the CCI.

Click [here](#) to access the order.

Key Takeaways

The SC's decision introduces a modicum of clarity on the contentious issue of "locus standi" and offers insightful jurisprudence on the scope of the Competition Act. It clarifies that the Competition Act serves a high public purpose and therefore, the CCI's doors need to be left wide open in the interest of public at large.

Even so, the jury is still out on the emerging jurisprudence on hub-and-spoke cartels in India.

02. MERGER REVIEW / CONTROL

Carlyle Group pumps USD 325 million in the lucrative data centre services market

The CCI approved the acquisition of compulsorily convertible preference shares and equity shares of Nxtra Data Limited (Nxtra), a wholly owned subsidiary of Bharti Airtel Limited (Airtel), by Comfort Investments II (Comfort).¹⁹

Parties' Activities

Comfort is an investment vehicle incorporated for the purpose of the acquisition and is part of the Carlyle Group Inc. (Carlyle Group). Carlyle Group is engaged in alternative asset management across investment disciplines including, private equity and real assets²⁰.

Nxtra is an Indian entity engaged in information technology (IT) services such as hardware supply, installation, support, and provision of data center colocation services.

¹⁶ Samir Agrawal v Competition Commission of India and Others (Competition Appeal (AT) No. 11/2019) of 29 May 2020.

¹⁷ Readers may click [here](#) to access our detailed analysis of the NCLAT's findings.

¹⁸ Simply put, a right "in rem" is a right available against any third-party. This is opposed to rights enforceable against specific persons.

¹⁹ Comfort will reportedly acquire a 25% stake in Nxtra for USD 325 million. Available at: <https://www.livemint.com/companies/news/carlyle-to-acquire-25-stake-in-airtel-s-data-centre-business-11593578637816.html>.

²⁰ Real assets include, real estate, infrastructure, and energy and renewable resources.



Overlaps

Only vertical overlaps were found to exist between the parties. Nxtra has existing vertical relationships with two entities belonging to the Carlyle Group namely, Veritas Technologies India Private Limited (Veritas) and Syniverse Technology Services India Private Limited (Syniverse).

The vertical relationships exist on account of the provision of data center colocation services by Nxtra (Upstream Segment) to:

- Veritas for its back-up and recovery software in India (Downstream Segment I); and
- Syniverse for its mobile network services and solutions in India (Downstream Segment II).

The CCI noted that the Upstream Segment could be divided based on the type of colocation service²¹ and the geographic sub-segmentation could be made on a regional, state, or city level basis.

Regardless, the exact delineations of the relevant markets for the Upstream and Downstream Segments were left open due to the absence of

potential appreciable adverse effect on competition (AAEC) in any plausible market.

Market Assessment

No likelihood of an AAEC was observed by the CCI despite the relatively significant market shares of the parties, ranging between 15% - 25%, in their respective segments²². Notable players like STT GDC, NTT, and Sify would continue to impose competitive constraints in the Upstream Segment. Further, players like Dell and IBM would remain active in the Downstream Segment I and Ericsson and Tata would remain active in the Downstream Segment II. For this reason, among others, the CCI found that foreclosure (or any other AAEC concern) would be unlikely in each segment.

Key Takeaway

As is practice, the CCI requests parties to provide the narrowest possible alternative market segmentation in their merger notifications. This order, too, evaluates the possibility of various narrower market segmentations and discusses the market share range of the parties - a testament to the detailed information required from transacting parties.

CCI's spotlight on net neutrality and data-sharing in Facebook-Jio deal

The CCI approved the acquisition of 9.99% equity share capital in Jio Platforms Limited (Jio Platforms) by Facebook, Inc. (Facebook), through its indirect wholly owned subsidiary Jaadhu Holdings LLC (Jaadhu).²³ Valued at ~ USD 5.7 billion,²⁴ the mega-deal is positioned to drive synergies in the Indian digital economy.

As a result of the acquisition, Jaadhu will secure certain rights conferring it control over Jio Platforms.²⁵

Jio Platform and its sister company Reliance Retail Limited (Reliance Retail) also acquired a go-ahead for their commercial arrangement with WhatsApp Inc. (WhatsApp), another subsidiary of Facebook.²⁶ The commercial arrangement

concerns the development of an electronic chat feature by WhatsApp to connect its users with "JioMart", a new e-commerce marketplace of Reliance Retail.

The acquisition and commercial arrangement are collectively, Proposed Combination



²¹ Examples of "types" of colocation services include, managed hosting services, and cloud and disaster management. Cloud management services could be narrowed even further depending on whether they were public, private, or back-up cloud services.

²² Nxtra Data has a market share in the range of 20-25% in the Upstream Segment; Veritas has a market share in the range of 10-15% in the Downstream Segment I; and Syniverse has a market share in the range of 15-20% in the Downstream Segment II.

²³ The acquisition is being entered pursuant to the Investment Agreement dated 21 April 2020.

²⁴ Available at: <https://www.businesstoday.in/current/corporate/facebook-reliance-jio-deal-social-media-giant-pumps-in-rs-43574-crore-in-mukesh-ambani-telco-10-points/story/401654.html>.

²⁵ The CCI has found that certain rights, including the right to appoint a director, and affirmative rights in relation to investment into a new line of business, confer "control" in terms of the Competition Act.

²⁶ The commercial arrangement will be entered pursuant to a Master Services Agreement.



Parties' Activities

Recently incorporated under US laws, Jaadhu is not engaged in any business in India. Its parent, Facebook, is present globally in the markets for social networking and advertisement. Facebook generates nearly all its revenue by selling advertising placements on its platforms (such as, "Instagram").

A subsidiary of Reliance Industries Limited (RIL), Jio Platforms owns and operates digital applications and holds investments in technology related entities. Its wholly owned subsidiary, Reliance Jio Infocomm Limited (Jio Infocomm), is a telecommunication operator providing services across India.

Market Assessment - Horizontal Overlaps

Market for consumer communication

applications: Facebook (through Facebook Messenger and WhatsApp Instant Messaging (IM)) and Jio Platforms (through JioChat) are active in the market for applications enabling interactions between users i.e., the market for consumer communication applications.

The CCI noted that traditionally, the market for consumer communication applications could be narrowed based on i) functionality²⁷, ii) compatible platforms²⁸, and iii) compatible operating systems²⁹. The observation is in consonance with an earlier case, where the CCI assessed allegations of abuse by WhatsApp in "the market for instant messaging services using consumer communication apps through smartphones"³⁰

However, since the WhatsApp case, there has been a convergence in functionalities³¹ and platform operability of consumer communication applications. Therefore, segmentation along these lines may no longer be appropriate. Further, while segmentation based on operating systems was not discounted, the CCI did not narrow the market on this criterion either.

As for competition analysis, the CCI did not find the likelihood of an AAEC despite the significant

combined market share of the WhatsApp IM, Facebook Messenger, and JioChat (in the range of 45-55%). The CCI reasoned that market shares based on monthly active users was not an accurate metric to determine market power in new age digital markets.

Instead, it noted that the presence of comparable innovators with capabilities to offer similar applications free of cost (including, Microsoft and Google) and low entry barriers (exhibited by the sudden rise of applications like Hike and Houseparty) made potential for an AAEC unlikely in the market for consumer communication applications.

Market for advertising services: Both, Facebook and Jio Platforms, provide advertisement services on their own platforms.³² The CCI left the delineation of the relevant market open due to absence of AAEC concerns in any of the plausible markets.³³ No AAEC concerns were identified owing to significant competition from Google and the low market share of Jio Platforms.³⁴

Market Assessment - The Commercial Arrangement

The commercial arrangement would allow users of WhatsApp IM to i) shop for products on JioMart, and ii) make payments for purchases on JioMart, through WhatsApp Pay. For context, WhatsApp Pay is a unified payment interface³⁵ based payment feature within WhatsApp IM.

Accordingly, the CCI examined the impact of the commercial arrangement in the markets where JioMart and WhatsApp Pay, operate.

E-commerce: For the reasons stated below, no competition concerns were identified in any of the plausible markets for e-commerce:

- JioMart is a new entrant in the e-commerce space entrenched by big techs like, Amazon and Flipkart;
- WhatsApp IM is one of the many channels through which a user may access JioMart³⁶;

²⁷ Functionality refers to different features, including messaging, voice call or video call.

²⁸ Platform refers to desktop, laptops, smartphones, tablets, etc.

²⁹ Operating system refers to the proprietary application on which the consumer communication application runs (for e.g., iMessage operates on Apple Inc.'s "iOS").

³⁰ Case No. 99/2016 of 1 June 2016.

³¹ Most applications now provide free messaging, video-chat and voice calling services.

³² Facebook provides advertising services on its own platforms WhatsApp, Facebook, Instagram, etc. Jio Platform, too, provides advertising services on its own platforms JioSaavn, JioTV, JioNews, JioChat, etc. Facebook also provides advertising services on third party mobile applications through Facebook Audience Network, albeit to a limited extent.

³³ Separately, the CCI also rejected Jaadhu's submission that online and offline advertising constitute one relevant market. Factors such as the ability to undertake target advertising, monitor customer engagement, and difference in pricing mechanism, distinguished online advertising from offline advertising.

³⁴ For perspective, advertisement services constituted less than 1% of Jio Platform's total revenue in FY 2018-19.

³⁵ Unified Payment Interface (UPI) is an instant real-time payment system designed by National Payment Corporation of India (NPCI) to facilitate inter-bank transactions on mobile platforms.

³⁶ Among other channels, consumers may access JioMart through, JioMart's website, JioMart's mobile application, merchant's physical store, e-mail and telephonic communications.



- IM applications (such as WhatsApp IM), are not the primary tool to connect users to e-commerce businesses; and
- WhatsApp remains free to enter similar collaborations with other e-commerce businesses.

Digital Payments: The commercial arrangement was not found likely to cause an AAEC in any plausible relevant market for UPI based digital payment applications, either:

- customers of JioMart are free to make payments through other UPI based payment features or alternative payment methods (e.g., cash);
- being a new entrant, JioMart will not be incentivised to restrict its payment network to WhatsApp Pay as such a move would limit transaction volumes of JioMart's network;
- the digital payments market is a dynamic new-age market with several considerable competitors including, Google Pay, PayTM, and PhonePe; and
- certain players in the segment are backed by deep-pocketed parents who have presence in complementary businesses such as, e-commerce and consumer search engines.

Market Assessment - Complementary overlap

Net Neutrality: The CCI noted that Facebook operates as an over-the-top (OTT) service provider.³⁷ OTT service providers rely on seamless data connectivity for content delivery to consumers. Therefore, their services are complementary to the voice, video and data services offered by telecommunication service providers (TSPs). Accordingly, the CCI examined whether Jio Infocomm (a TSP) was likely to provide Facebook (an OTT provide) preferential treatment by granting, faster internet access speeds, lower costs of access, etc.

The Indian telecom regulator (i.e., Telecom Regulatory Authority of India (TRAI)) prohibits TSPs' discriminatory treatment to OTT service providers.³⁸ The penalties for infringement of TRAI's regulations, in the CCI's view, would deter Jio Infocomm from granting preferential treatment to Facebook, and thereby lead Jio Infocomm to maintain "net neutrality".

Data Sharing: Merger control assessment for transactions with entities that have access to user data may be analysed from the perspective of "data backed market power". The assessment entails an examination of the parties' incentive to share and monetise the accumulated data.

Both, Jio Infocomm (prominent TSP) and Facebook (key player in the online advertising space), have access to consumer data. Jio Infocomm uses consumer data to tailor services to its user's interests, verify user identity, facilitate payments, etc. Facebook uses consumer data for, among other things, targeted online advertising. Data accumulated by both companies are complementary because of the symbiotic relationship between the TSPs and OTT providers.



However, the Proposed Combination would not facilitate unrestricted access between data collected by the transacting parties. Data sharing would be restricted to facilitation of e-commerce transactions on JioMart. Further, the commercial arrangement safeguards data-sharing concerns by stating that the use of data would be limited, proportionate and solely for implementing the commercial arrangement.

Therefore, while parties could hypothetically undertake mutually beneficial data sharing, any anticompetitive conduct arising from such practice could be assessed under the "enforcement" provisions of the Competition Act.³⁹ For these reasons, the Proposed Combination was approved.

Key Takeaway

The case instantiates a growing synergy between the telecommunication industry and the digital technology space. Globally, telcos are in a phase of rapid technological advancement, best evidenced by an uptick in their collaborations / investments with digital technology companies. Consider for example, Microsoft's announcement

³⁷ Provider of electronic communications services such as voice telephony, video and messaging services over the internet.

³⁸ See for example: Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016.

³⁹ Enforcement provisions refers to Section 3 (prevention of anticompetitive arrangements) and Section 4 (prevention of abuse of dominant position) under the Competition Act.



of a strategic alliance with AT&T Inc., Google International LLC's investment in Jio Platforms, and of course, Facebook's investment in Jio Platforms.

The outcome of the case on data-sharing is interesting to note. The order is the first to acknowledge the complementary relationship between data accumulated by companies operating in different markets.

Further, it clarifies that in data-driven markets, the CCI's focus is on unearthing the incentives of parties to share and monetize data. Absent

demonstrable (dis)incentive, the CCI is unlikely to delve into the question of AAEC concerns.

Lastly, we note that the CCI's net neutrality concerns were assuaged by the presence of a sector-specific regulator – TRAI. With the Personal Data Protection Bill in the pipeline and the recent publication of the Draft Non-Personal Data Governance Framework, India's data laws are at the cusp of a massive overhaul. These laws are likely to play an important role in the CCI's determination of a parties' incentive to engage in data-sharing, with an impact on the CCI's assessment of anticompetitive effects.

03. SPOTLIGHT

Cartel enforcement: What evidence is enough?

Cartels are commonly seen as the most egregious of all competition law violations; motivating regulators to devise mechanisms to curb and penalise cartels. The most important element of a cartel investigation is proof indicating the presence of an 'agreement' (very broadly defined in the Competition Act) amounting to cartel conduct.

However, direct evidence to indicate a "cartel agreement" may be difficult to unearth.⁴⁰ Therefore, enforcers (such as the CCI) broaden their search to deduce the existence of cartels through circumstantial evidence. Distinct from direct evidence, circumstantial evidence does not specifically describe the terms of an agreement or the parties to the agreement.⁴¹ Instead, it includes evidence of communication / meetings among suspected cartel members and economic evidence concerning the market that suggests concerted action.⁴²

The CCI is increasingly circumspect when establishing cartels based on circumstantial evidence.⁴³ For instance, conscious parallelism (a type of circumstantial evidence) may involve

nothing more than identical pricing or other parallel behaviour derived from independent observation.



Per the CCI's decision in a recent case,⁴⁴ conscious parallelism is not enough to establish cartel conduct and plus factors such as meetings between competitors, email exchanges, etc. to show a meeting of minds or collusive action are required. This is because the conscious parallelism may be attributable to the market structure (think an oligopsony!)⁴⁵.

A case in point is the allegations of cartelisation against 19 suppliers of phenol.⁴⁶ The DG employed statistical and econometric tools such as, the HHI⁴⁷ test and FIFO⁴⁸ analysis and noted certain price fluctuations that raised suspicions toward cartel conduct. However, the CCI held that while the price fluctuations raised suspicions, in the absence of evidence to indicate the meeting of minds – no cartel could be established. In other

⁴⁰ To prove a cartelisation / bid rigging under the Competition Act, the existence of an "agreement" must be proved. That is to say, it must be shown that there is a "meeting of minds" toward a common goal or result, or in other words a "...conscious commitment to a common scheme". See: the United States Supreme Court judgment in *Monsanto Co. v Spray-Rite Service Corp.*

⁴¹ It goes without saying, in the absence of either direct or circumstantial evidence, the CCI will dismiss complaints alleging cartel activity. Take for example the case against Hindalco and Vedanta where the CCI refused to initiate investigation into alleged collusion in the copper sector. The CCI's decision, in this case, was based on a lack of evidence against Hindalco and Vedanta to show any concerted action.

⁴² Certain characteristics of markets make them more susceptible to cartel conduct such as, homogenous product, lesser number of suppliers, etc.

⁴³ See for example: *Shailesh Kumar v M/s Tata Chemicals Ltd*, Case No 66/2011 of 16 April 2013.

⁴⁴ *In Re: Indian Laminate Manufacturers Association v Sachin Chemicals and Others*, Case No. 61/2016 of 8 October 2020.

⁴⁵ Oligopsonies are markets characterised by the presence of a few buyers and a large number of sellers.

⁴⁶ Phenol an organic chemical compound, is a primary input in the manufacturing of decorative laminates.

⁴⁷ HHI or the Herfindahl - Hirschman Index is a measure of concentration in markets.

⁴⁸ FIFO or First-In First-Out is a method of inventory valuation, often used in profitability analysis.



words, the CCI did not find any plus factors to connect / draw a linkage between the pricing fluctuations with cartel conduct.

While evidence of conscious parallelism can be identified by using economic and statistical tools, collection of evidence to conclude on the existence of a cartel often involves intrusive action.⁴⁹

The DG while investigating allegations of bid rigging against manufacturers of brake blocks⁵⁰, relied on email, SMS, and WhatsApp exchanges to evidence that the manufacturers decided the prices and quantities to be quoted by them in various tenders. These exchanges also uncovered screenshots and other documentary evidence to show an exchange of pricing data and strategies.

Interestingly, the CCI specifically noted that *"nothing could be more incriminating than these"* to conclude presence of a cartel.

In many cases, the DG must apply its might to unearth evidence of cartel activity. However, in some cases, the task of the DG is simplified by way of information provided to it by a cartel member. A member of a cartel is incentivized to provide such disclosures by the CCI's leniency program⁵¹. Such incentives go a long way in allowing the CCI to adjudicate more cartel cases and increasing overall deterrence.

While we bid goodbye to a tumultuous 2020, it is safe to assume that the CCI and the DG will continue to employ economic / statistical tools, and other investigative methods to unearth cartels. That variety of "new normal" would certainly be welcome.

We hope the KCAT Newsletter enables you to assess internal practices and procedures in view of recent legal developments and emerging industry trends in the competition / antitrust landscape.

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⁴⁹ Among other things, the DG may also conduct dawn raids and depositions, direct parties to furnish testimonies, statements, call data records, etc. during its investigation.

⁵⁰ *Chief Materials Manager, South Eastern Railway v Hindustan Composites Limited and Others*, Case No. 03/2016 of 10 July 2020.

⁵¹ Leniency program is a type of whistle-blower protection, which offers an official lenient treatment to a cartel member who comes forward with honest information about the cartel. In India, the leniency program is governed by Section 46 of the Competition Act along with the Competition Commission of India (Lesser Penalty) Regulations, 2009.



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