



**COMPETITION/ANTITRUST**

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Dear Readers

As we enter a new financial year, the KhaitanCo Competition / Antitrust Team (KCAT) presents the April 2021 edition of our newsletter.

We showcase significant updates on enforcement and merger control precedents between January and March 2021.

The enforcement section discusses the outcome of four recent cartel and bid-rigging cases.

The merger review / control section deals with the Competition Commission's emphasis upon "self-regulation" in the digital economy.

This edition also provides insights on the Competition Commission's telecom market study.

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

### CCI penalises India's publishers' and booksellers' association for imposing anticompetitive diktats

The Competition Commission of India (CCI) held the Federation of Publishers' and Booksellers' Associations in India (FPBAI), a nation-wide federation of prominent publishers, booksellers, and subscription agents, liable for anticompetitive collusion.

The CCI imposed a nominal penalty of INR 2,00,000 (approximately USD 2,705) on FPBAI for contravention of the Competition Act, 2002 (Competition Act).<sup>1</sup>

#### **Facts and background to the case**

The complainant (a subscription agent) alleged that the Good Offices Committee (GOC) of the FPBAI<sup>2</sup> directed FPBAI's members to restrict discounts to purchasers. Coercive action was taken against members who refused compliance with FPBAI's directions.

In the CCI's preliminary view, FPBAI's directions reduced price competition in the market for the supply of books. It ordered a Director General (DG) investigation into FPBAI's conduct.

#### **DG's findings**

The DG's appreciation of several documents, including FPBAI's minutes of meetings, advisory letters issued by the GOC, FPBAI's membership forms, etc. revealed the following:

- FPBAI's "Terms of Supply for the Booksellers and Subscription Agents" restricted members from offering discounts over 10% to institutional buyers (Discount Control Policy); and
- FPBAI advised members against responding to procurement advertisements if the



conditions of the procurement were not aligned with FPBAI's expectations.

The DG also unearthed notices / letters issued by FPBAI to members who had refused compliance with the Discount Control Policy and advisories on procurement advertisements.

#### **CCI's observations and findings on merit**

FPBAI had argued that the Discount Control Policy and procurement advisories were not anticompetitive because they were "recommendatory". The CCI rejected FPBAI's submission since the notices / letters discovered by the DG proved otherwise. In the absence of any proof, the CCI also rejected FPBAI's contention that the Discount Control Policy curbed malpractices.

Further, the CCI dismissed FPBAI's submission that its conduct was incapable of causing an appreciable adverse effect on competition (AAEC). Per the CCI, due to FPBAI's all-India presence and wide network of prominent publishers, sellers, and subscription agents, its conduct could very well cause an AAEC. Further, the eligibility criteria of several procurement contracts required participants to be members of FPBAI.

The CCI concluded that the Discount Control Policy amounted to anticompetitive price-fixing because it indirectly determined the sale prices of books, journals, etc. Further, FPBAI's "advisories" against participation in procurement contracts was found to be anticompetitive given that it limited the supply of books, journals, etc. in India.

The CCI highlighted the responsibility of FPBAI to ensure that its practices were competition

<sup>1</sup> In Re: M/s International Subscription Agency v Federation of Publishers' and Booksellers' Associations in India (Case No. 33/2019) of 23 February 2021.

<sup>2</sup> The GOC had been constituted by the FPBAI, among other things, to establish uniform terms for the supply of books and journals to libraries.

compliant and its platform did not facilitate anticompetitive behaviour.

The CCI imposed a lump-sum penalty of INR 2,00,000 on FPBAI (approximately USD 2,705) and INR 1,00,000 (approximately USD 1,352) on the individuals responsible for FPBAI's conduct.

This is contrary to the legal mandate and the usual practice of turnover-based penalty.

### Key Takeaways

The CCI's determination of the quantum of penalty considered certain mitigating factors, such as:

- FPBAI's amendment to its membership forms removing the Discount Control Policy; and
- its commitment to not issue advisories that restrict participation in procurement advertisements.

Evidently, the CCI continues to recognise co-operation during enforcement proceedings. This re-emphasises the importance of adopting timely corrective measures for companies being proceeded against.

The CCI's penalty imposition is also interesting from the perspective of "individual liability":

- Typically, the penalty imposed on a company is calculated based on its "relevant turnover". That is, the turnover generated from the product / service segment in which anticompetitive conduct was carried out. However, for individuals, penalties may be imposed based on "total income", regardless of the percentage of income generated from the anticompetitive conduct. In this case too, individual liability was imposed on the total income of the individuals responsible for FPBAI's conduct - despite them having generated no income from FPBAI.
- FPBAI argued that the CCI should mitigate the penalty on the responsible individuals given that they were "senior citizens" / "honorary members" of society. While the CCI does not explicitly clarify whether the age of the individuals was considered when determining penalty, the CCI does aver to accounting for the "facts and circumstances" of the case.

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

## CCI finds close links between parties insufficient to determine involvement in bid-rigging

The CCI dismissed allegations of collusive bidding in relation to the printing, packaging, and dispatch of confidential documents. No evidence was found indicating such violation despite the DG's investigation report indicating a close link among the parties and the consequent possibility of conspiracy.

### Facts and background to the case

The CCI received complaints that Chandra Prabhu Offset Printing Works Pvt Ltd (Chandra Prabhu), Saraswati Offset Printers Pvt Ltd (Saraswati Offset) and United India Tradex Pvt Ltd (United India) were collectively involved in rigging bids for three tenders issued by government departments, namely, the Department of Printing, Ministry of Urban Development and the Directorate General

of Training, Ministry of Skill Development and Entrepreneurship for printing, packaging, and dispatching documents.<sup>3</sup>

It was alleged that Chandra Prabhu, Saraswati Offset and United India (collectively, the Bidders) had, prior to submission, decided to fix the bid rates that they would submit even though they were competitors. It was also alleged that the Bidders decided to let Chandra Prabhu submit the lowest bid, and funds had also been transferred to the other two Bidders for this purpose. Observing that similar bid-prices had been quoted by the Bidders, who were owned / managed by the same set of people, the CCI was *prima facie*<sup>4</sup> convinced that there existed close links between the parties such that they could use it to steer the bidding process.

### DG's Investigation

Upon the DG's investigation, it was found that, of the three bids that were alleged to have been

<sup>3</sup> *In Re: Alleged bid-rigging in tenders invited by department of printing for printing, packaging, and dispatch of confidential documents* (Suo Motu Case No. 03/2019) of 12 February 2021.

<sup>4</sup> *Prima facie* opinion here refers to the CCI's tentative, preliminary view of a contravention which warrants investigation by the DG.



rigged, United India had attempted to participate in just one, from which it was also disqualified. Chandra Prabhu and Saraswati Offset were part of all three bids with Chandra Prabhu having the lowest and Saraswati Offset having the second lowest bid. Further, an analysis of bank statements revealed monetary exchanges among the Bidders on different occasions. As such, these included interest-free loans and other commercial transactions such as sale of paper and printing assignments. However, the DG's examination of associated bills, ledgers, etc. did not bring out any discrepancy in relation to these transactions. The Bidders had also argued that such transactions were in the ordinary course of business and any links between them were business relationships developed over a period of time.

The investigation also revealed that two directors who held 60% and 40% of shareholding in United India were also directors on the board of Chandra Prabhu, each holding 25% shareholding. Accordingly, per Indian statutes governing companies, United India and Chandra Prabhu are related parties. It was apparent that the parties had professional as well as personal links with each other, however, no persuasive evidence was found to prove a contravention in relation to bid-rigging and anticompetitive agreements.

### **CCI's observations and findings on merit**

Contrary to its initial opinion, the CCI concurred with DG's finding that there was no well-founded evidence indicating anticompetitive behaviour in the form of bid-rigging or collusion by the Bidders. While the links between them are well established, the CCI acknowledged that such links were indeed historic and business-related. Therefore, in consonance with DG's findings, the CCI dismissed the allegations and closed the matter.

### **Key Takeaways**

Similar to the CCI's stand in previous cases relating to allegations of bid-rigging, the CCI in this case reiterates the requirement of providing convincing evidence from the facts and circumstances of the case to prove contravention of the Competition Act.

Interestingly, the CCI noted close links between the parties - on account of common directorships / shareholdings they were considered "related parties" under the Indian Company Law.

Emphasising the centrality of quality of evidence, the CCI observed that common control between competing parties was not sufficient to prove collusive bid-rigging.

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

## Identical prices in itself were not conclusive proof - CCI dismisses allegations of bid-rigging against Romsons and Essity pursuant to investigation

The CCI dismissed allegations of bid-rigging in relation to a tender for certain surgical tapes.<sup>5</sup> No evidence indicating collusive bidding was found by the CCI despite the DG's investigation report concluding that the parties had indulged in anticompetitive conduct.

### **Facts and background to the case**

The Assistant Store Officer of the All India Institute of Medical Sciences (AIIMS) alleged cartel-like behaviour by Romsons Scientific & Industrial Private Ltd (Romsons) and BSN Medical

Private Ltd (Essity) (Bidders) in respect of a tender invited by AIIMS for surgical tapes.<sup>6</sup> The CCI observed that the parties operated from different regions and had separate costs in respect of labour, raw material, transportation, etc. In this light, the CCI noted the improbability of coincidental quoting of identical prices. The CCI took a *prima facie*<sup>7</sup> view that the product was homogenous in character. In the presence of other facilitating conditions conducive to bid-rigging like limited number of players, the CCI was disposed to order an investigation by the DG.

### **DG's investigation**

The DG noted that out of eight different categories of surgical tapes listed in the tender, the rates quoted by Romsons and Essity were identical up to at least two decimal points for four of these categories. As per the DG's investigative report, the quoting of prices in different patterns

<sup>5</sup> *In Re: Alleged Cartelization by Two Bidders / Firms in Procurement / Tender for Purchase of Surgical Disposal Items on Two-Year Contract Basis by AIIMS (Suo Moto Case No. 01/2018) of 14 February 2021.*

<sup>6</sup> The tender was invited for surgical tape (non-woven and with viscose rayon porous backing) with dispenser and without dispenser in four different sizes.

<sup>7</sup> *Supra* n 4.



in the respective bids submitted by the parties, despite the mandate by AIIMS to submit quotes in a particular manner, was indicative of their intent to indulge in collusive bidding.



Further, a significant aspect considered by the DG was that while Romsons manufactured surgical tapes, Essity imported them. The DG highlighted that the nature of costs involved in the manufacture and import of surgical tapes was so varied<sup>8</sup> that pricing could not have been unintentionally identical.

After examining certain other plus factors such as the parties' different geographical locations, their non-participation in the fresh tender floated by AIIMS and "evasive justifications" by the parties' personnel, the DG determined that Romsons and Essity had indulged in bid-rigging and had contravened the Competition Act.

#### **CCI's observation and decision on merits**

Romsons and Essity claimed that their quotes were not identical as they had quoted prices on different bases. The CCI rejected the claims, holding that the manner of quoting was immaterial, and pricing could not be considered different merely because the quotes were not in comparable terms or were presented on different bases.

On the other hand, and in line with the contentions of the parties, the CCI noted that though pricing was identical, no evidence was found by the DG to establish collusive behaviour. The parties had not quoted identical prices in any other tender. They had also provided reasonable justifications

for quoting such prices based on the rates quoted and surgical tapes supplied in other tenders. Contrary to its tentative view, the CCI concluded that surgical tapes were non-homogenous in nature. It further observed that there was a lack of barriers to entry in the market. These factors pointed towards a market that was not conducive to cartelisation.

The CCI accepted the submissions of the parties that during the tender period, Romsons' cost of production and the Essity's landing cost was similar. The CCI also determined that the prices charged by the parties were uniform across India irrespective of the geographical location of their distributors and buyers. In view of this, the CCI rejected the DG's finding that coincidentally identical pricing was not plausible. The CCI found merit in the parties' claim that the four categories of surgical tapes in question were in essence a single product with mere difference in sizes. Accordingly, the CCI held that similarity of price bids in respect of a single product could be an outcome of coincidence rather than action in concert.

The CCI emphasised that there was no evidence of any communications or meetings between Romsons and Essity that indicated any collusion in fixing the bid prices for the tender. The CCI highlighted that the mere existence of price parallelism in the absence of so-called "plus factors" (in the CCI's context, physical meetings for instance) was insufficient to conclude bid-rigging by the parties. Hence, the CCI dismissed the allegations and closed the matter.

#### **Key Takeaways**

The CCI reiterated that price parallelism in and of itself, is insufficient to conclude bid-rigging and reaffirms the importance of so-called "plus factors".

Further, the case demonstrates the importance of corroborative evidence that exposes collusive conduct in establishing that parties have indulged in bid-rigging.

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

<sup>8</sup> Production costs for manufacturers include material costs, packing material costs, labour and manufacturing costs and logistics costs. Landing costs for importers include exchange rates, clearance charges, customs duty, and freight charges.



## Post-Investigation, the CCI finds no evidence of cartelisation in the airline industry

The CCI directed an investigation in the airline industry after finding *prima facie*<sup>9</sup> infringement regarding the price-fixing behaviour of certain airlines.

While investigating the alleged cartel, the DG examined factors like market share stability, air fare, the role of algorithms in air fare pricing, and found no evidence of foul-play. The CCI confirmed the DG's findings and dismissed the allegations.<sup>10</sup>

### Facts and background to the case

The Lok Sabha Secretariat requested the CCI to investigate cartelisation in the airline industry. The CCI observed a degree of stability in the market shares of Jet Airways, Indigo, SpiceJet, GoAir and Air India (collectively, Airlines), and substantial similarities in the air fares charged by the Airlines.

The observations lent to suspicion of anticompetitive conduct - resulting in an investigation by the DG.

### DG's investigation

Initially, the DG's investigation was limited to an assessment of i) the market shares of the Airlines in four major routes<sup>11</sup> between April 2012 and March 2014 and ii) the pricing mechanism adopted by the Airlines.

As a first step, the DG identified the Airlines' market share based on several parameters.<sup>12</sup> The DG employed economic tools such as the Herfindahl-Hirschman Index (HHI)<sup>13</sup> and analysis of variance (ANOVA) single factor tests<sup>14</sup> to ascertain market share stability. The DG concluded that there were significant fluctuations in the Airlines' market shares, and their shares did not exhibit any stability or parallelism.

On pricing, the Airlines followed a dynamic pricing mechanism facilitated by software programs. The mechanism updated airfares based on factors such as, actual number of bookings, competitor

prices, seasonality, and time gaps between booking and departure.

The DG observed that price parallelism had become the natural outcome owing to factors such as the real-time monitoring of pricing of competitors and the importance of pricing to attract passengers. Therefore, the parallelism was not the result of any agreement or action in concert. The DG highlighted the entry of new players and the exit of established ones as an indicator of a high degree of competition in the airline industry.

Interestingly, pursuant to a review of the DG's report, the CCI directed a re-investigation into the matter. The DG was directed to provide in-depth findings on, among other things, the algorithms deployed by the Airlines, capacity utilisations, allocations of seats to a "fare bucket".

However, the DG's analysis of the additional factors confirmed its earlier finding on the absence of "concerted action".

### CCI's observation and decision on merits

The CCI agreed with the DG's findings and found no pattern of stability or parallelism, and significant variance in the Airlines' market shares.

The CCI observed that software programs could not be modified to capture unforeseen events which have a significant bearing on price fluctuations. It accordingly noted that revenue management personnel played a pivotal role in the manual determination of airfares and software programs merely facilitated such decision making.

The CCI also observed that the Airlines followed different bucket systems and there was no fixed inventory allocated to each fare bucket. The price / inventory allocated to fare buckets continuously changed due to change in demand and competition prices, but only one fare was available to customers at a given point.

The CCI emphasised that parallel conduct was only actionable under the Competition Act when such conduct was not carried out independently and attributable to information exchange between competitors or other such collusive

<sup>9</sup> *Supra* n 4.

<sup>10</sup> *In Re: Alleged Cartelization in the Airlines Industry* (Suo Motu Case No. 03/2015) of 22 February 2021.

<sup>11</sup> The routes selected by the DG were Delhi-Bombay-Delhi, Delhi-Bangalore-Delhi, Delhi-Hyderabad-Delhi and Delhi-Pune-Delhi.

<sup>12</sup> Market share calculated based on i) number of passengers on a month-on-month basis in the four major routes, and ii) number of passengers on a year-on-year basis in the four major routes. The DG also calculated market share based on the number of passengers on a year-on-year basis across India.

<sup>13</sup> 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.

<sup>14</sup> ANOVA is a statistical technique used to check if the means of two or more groups are significantly different from each other. The DG used different ANOVA test including Levene's Test, Welch F Test and Games Howel Post-hoc Test.



behaviour. The CCI noted that an exchange of communication between the Airlines could not be established.



Finding no evidence to establish a cartel among the Airlines, the CCI dismissed the allegations and closed the matter.

#### Key Takeaways

The case demonstrates the use of numerous economic tools for investigation and analysis of cartelisation amongst competitors, while also emphasising on the importance of evidence of “meeting of minds” or collusive conduct to establish cartel-like behaviour.

The CCI reiterated that parallel conduct, in and of itself, cannot be considered as conclusive evidence of an anticompetitive agreement under the Competition Act.

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

## 02.

### MERGER REVIEW / CONTROL

#### CCI approves Flipkart’s INR 1500 crore investment in Aditya Birla Fashion and Retail

The CCI approved Flipkart Private Limited’s (Flipkart) indirect minority acquisition in lifestyle heavyweight - Aditya Birla Fashion and Retail Limited (Aditya Birla).<sup>15</sup> The transaction bears witness to the increasing synergies between offline and online retail in India.<sup>16</sup>

#### Parties’ Activities

Flipkart Investments, a special purpose vehicle, is part of the Walmart Group (Walmart). Walmart’s India operations include B2B Sales,<sup>17</sup> several marketplace-based e-commerce platforms, online payment applications, and various ancillary services.<sup>18</sup>

Homegrown Aditya Birla (part of the Aditya Birla conglomerate) is a manufacturer and retailer of branded apparels, footwear, and accessories through offline and online mediums, across India.



#### Overlaps

Horizontal, vertical, and complementary overlaps were identified by the parties.

Walmart competes with Aditya Birla in the broad market for the B2B Sales in India (Broad Market) and the narrow market for the B2B sales of apparels, footwear, and accessories in India (Narrow Market).

The identified existing and potential vertical / complementary relationships between the parties are set out below:

- Walmart (a trader of goods in the B2B segment) is a customer of Aditya Birla (a seller of goods to B2B traders like Walmart);
- Aditya Birla is a seller on Walmart’s e-commerce marketplace. Walmart also offers

<sup>15</sup> Combination Registration No. No.C-2020/12/792 of 20 January 2021.

<sup>16</sup> Flipkart, through its wholly owned subsidiary Flipkart Investments Private Limited (Flipkart Investments), will acquire a 7.8% stake in Aditya Birla for INR 1500 crore (approximately USD 205 million). Available at: <https://www.livemint.com/companies/news/flipkart-to-acquire-7-8-stake-in-aditya-birla-fashion-11603430003405.html>

<sup>17</sup> Walmart is involved in the B2B Sales of mobiles, electronics, lifestyle, books and general merchandise, home furnishing and furniture.

<sup>18</sup> Ancillary services include advertising services, logistics and courier services, installation and repair services, technology-based services, information technology product related issues and payment gateways.



integrated logistics services to Aditya Birla since it is listed on Walmart's marketplace;

- Online payment services provided by Walmart (through PhonePe) are utilised by Aditya Birla to make B2B and B2C sales; and
- A potential vertical relationship exists given that Walmart makes B2B sales of apparel, footwear, and accessories and Aditya Birla could act as a wholesaler or retailer of these goods.

The exact delineation of the relevant markets was left open due to the absence of any potential AAEC in India.

#### **Market Assessment**

The parties' combined market shares were between 0-5% and 5-10% in the Broad Market and Narrow Market, respectively. The post-transaction increment in market shares were also insignificant. The CCI noted that the transaction would not give rise to AAEC due to the low market shares and imposition of competitive constraints by players like Amazon Wholesale, Reliance Retail, in the Broad Market and Page Industries, Raymond, in the Narrow Market.

The CCI also noted that the existing and potential vertical / complementary relationships between the parties' activities were too insignificant to raise any foreclosure concerns.

#### **Commercial Arrangement**

The parties disclosed a strategic commercial arrangement proposed to be entered between Flipkart India Private Limited<sup>19</sup> and Aditya Birla<sup>20</sup> (Arrangement). Per the Arrangement, certain products of Aditya Birla would be prevented from being marketed, sold, or distributed through certain competitors of Walmart in the e-commerce marketplace segment, for a limited period.

The CCI was of the preliminary view that the Arrangement raised potential competition concerns. The Arrangement could result in the preferential treatment of Aditya Birla's products by Walmart - thereby affecting intra-platform competition. Therefore, the CCI issued an advisory to Walmart not to indulge in conduct which would favour Aditya Birla to the disadvantage of other sellers on its platform.

The CCI also noted that any anticompetitive conduct arising from such exclusive arrangements could be assessed under the enforcement provisions<sup>21</sup> of the Competition Act.

#### **Key Takeaways**

The issuance of a broadly worded advisory despite preliminary findings that the Arrangement could give rise to competition concerns suggests that the CCI continues to prefer "self-regulation" by e-commerce platforms. This is consistent with the CCI's observations in its 2020 market study on e-commerce (Study)<sup>22</sup> urging e-commerce players to adopt self-regulatory measures to preserve platform neutrality. Examples of measures proposed were:

- setting out search-ranking parameters in clear and intelligible terms in their terms and conditions, including the impact of remuneration by retailers (if any); and
- adopt transparent policies for discounting with details of, amongst other things, the implications of non-participation in discounting schemes and basis of discount rates being offered.

Interestingly, the CCI has emphasised that merger control approval does not imply an automatic immunity from enforcement or conduct related provisions. Whilst there isn't any precedent, it will be interesting to see if any instance arises in either digital economy or other sectors.

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

<sup>19</sup> Flipkart India Private Limited is the Indian subsidiary of Flipkart and therefore a part of the Walmart Group.

<sup>20</sup> Parties to a notifiable combination are obligated to disclose all inter-connected steps and transactions in the merger notification form as per the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.

<sup>21</sup> Enforcement provisions refers to Section 3 (prevention of anticompetitive agreements) and Section 4 (prevention of abuse of dominant position) under the Competition Act.

<sup>22</sup> "Market Study on E-commerce in India: Key Findings and Observations"



# 03.

## SPOTLIGHT

### CCI releases a market study on the Indian Telecom Sector

The CCI released its findings and observations for the telecom sector in India through a market study (Market Study) jointly conducted by the CCI and the Indian Council for Research on International Economic Relations (ICRIER).

The Market Study employed qualitative as well as quantitative methods, where the key findings are based on secondary data analysis as well as survey responses and one-on-one meetings with stakeholders.

The Market Study emphasises the role of the Indian telecom regulator (i.e., Telecom Regulatory Authority of India (TRAI)) and how its two decisions, that is (i) the 2018 decision of defining significant market power;<sup>23</sup> and (ii) the 2017 decision of downward revision of mobile termination charges<sup>24</sup>, have shaped the competitive landscape of the industry. It also analysed competition challenges in the wake of increasing technological advancements and regulatory changes in the sector.

Key findings of the Market Study are set out below:

#### **A shift towards non-price factors**

The Market Study notes that while telecom tariffs remain a competitive factor in this price-sensitive market, there appears to be a shift in user behaviour due to increased reach of smartphones that offer a range of Over-the-Top (OTT) services such as, voice and video calling, social media, banking, entertainment, etc. Given the shift, non-price factors such as, quality of service (QoS), bundled offerings, and data speeds are now becoming the product-differentiators and competition drivers in this sector.

#### **Net-neutrality**

The discussion on net-neutrality which was kicked off by the CCI through its market study on e-commerce<sup>25</sup> in India, continues to take the centre

stage here as well. In this Market Study, the CCI observes that the key principles of net-neutrality and the extant regulation of TRAI which prohibits discriminatory treatment based on content, protocols, or user equipment, will continue to strengthen and ensure a level playing field in this sector. CCI notes that the reason behind this is an overwhelming increase in (i) bundled offerings; and (ii) strategic vertical integration across the value chain which includes telecom service providers (TSPs) as well as OTT service providers.

Given the increasing vertical integration, the CCI believes that competition vigilance will be required to ensure that (i) the vertical service providers do not indulge in anticompetitive practices; and (ii) search neutrality is maintained.

#### **Increasing network traffic**

The CCI notes that the internet service providers (ISPs) are challenged with managing their network capacity due to an upsurge in internet traffic and data-heavy content. In order to maximise their efficiencies, the ISPs exchange traffic through private<sup>26</sup> as well as public<sup>27</sup> peering systems.

However, given the increase in network traffic and consolidation of significant portions of such traffic towards limited players and lack of any regulations, there is a growing likelihood that ISPs, TSPs, internet companies and other content delivery networks may enter anticompetitive arrangements to leverage their position in the market with respect to peering systems.

#### **Infrastructure sharing**

At present, the unified licence (UL) regime<sup>28</sup> does not differentiate between infrastructure, network, and service layers, except in cases of limited unbundling of infrastructure layer. Owing to the above, licensees are required to establish, maintain, and manage network, manage traffic, and provide customer services simultaneously.

The CCI supported the view taken by the industry to suggest that licenses should be unbundled as this will bolster competition by enabling players to focus on their competitive advantage.

#### **Vertical Integration and data privacy**

The CCI noted that the competition assessment of vertically integrated entities in this market must

<sup>23</sup> The Telecommunication Tariff (Sixty Third Amendment) order, 2018.

<sup>24</sup> The Telecommunication Interconnection Usage Charges (Thirteenth Amendment) Regulations, 2017.

<sup>25</sup> Click [here](#) to access the summary of CCI's market study on e-commerce.

<sup>26</sup> Private peering is the exchange of traffic between ISPs at privately owned facilities.

<sup>27</sup> Public peering is the exchange of traffic through an internet exchange point.

<sup>28</sup> Under the unified licensing regime, service providers are able to offer any or all services using technology of their choice within the area of operation, in order to promote greater participation in the market.



consider the combined data power of such entities to establish dominance, as data is increasingly being seen as an important consideration to ascertain market power (given network and high switching costs).

The CCI also recognised data privacy as a non-price competition factor, where degradations in privacy standards or free consent may point towards an abuse of dominant position and other exclusionary practices.

Pertinently, while the CCI acknowledged the need for inter-regulatory consultations and alignment among the Department of Telecommunications, the TRAI, the CCI and the envisaged Data Protection Authority, the CCI also pointed out that, as far as competition law is concerned, the CCI continues to be the relevant body to correct market failures.



### Key Takeaways

Highlighting that the moniker of being the “lowest priced telecom market in the world” is not without

a trade-off, the CCI observed that any exit from India’s telecom sector would virtually result in a duopoly<sup>29</sup>. Therefore, survival of players in the market is in the long-term interest of competition.

CCI appreciated the growing co-dependence between the OTT players and TSPs, which is now transforming into a full-fledged strategic alliance, away from a purely contractual relationship. CCI’s identification of non-price competition parameters will assist it better while examining cases in this sector.

With COVID-19 forcing business entities as well as individuals to rely heavily on communications and data, and with rolling out of the 5G spectrum under works, the Market Study comes at an interesting time to discuss and enumerate CCI’s take on the challenges grappling the sector and the nuances of competition in the sector. While the CCI recognised various procompetitive factors in this sector, it did caution toward few anticompetitive concerns regarding net neutrality, price and non-price discrimination, etc.

The CCI also reiterated that the Competition Act is broad enough to encapsulate the demands of changing market dynamics and allows the CCI to include new factors for determining relevant markets.

It is safe to presume that the sector remains a priority for the CCI, and it shows inclination towards establishing its regulatory oversight in the sector while maintaining mutually beneficial relationships with other regulators in this sector.

Click [here](#) to access the Market Study.

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.

*The contributors to this edition of the KCAT Newsletter are Rahul Singh (Partner), Radhika Seth (Senior Associate), Mayuka Sah (Associate), Vasudhaa Ahuja (Associate), Alisha Mehra (Associate), Arahant Jain (Associate), and Armaan Gupta (Associate).*

<sup>29</sup> The Indian telecom sector, at present has only a handful of major players considering there have been several exits from the market in the recent past due to financial distress that surrounds the sector.



## AMBITION STATEMENT

*"Our ambition is to be a respectable law firm providing efficient and courteous service, to act with fairness, integrity and diligence, to be socially responsible and to enjoy life. We should put greater emphasis on working in consonance with our aforesaid values than on maximizing earnings. Earn we should but with dignity and pleasure."*

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