ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS

Competition Law Update

Volume 1 of 2016

CONTENTS

PREFACE

Dear Reader,

*Functioning within a broad regulatory mandate ascribed by the Competition Act, 2002 (**Competition Act**), the Competition Commission of India (**CCI**) has, within a few years of commencing its enforcement mandate, arguably become one of India's most active regulators. Since 2009, the CCI has imposed a total penalty of approximately INR 13,900 crores on companies that have been found to have breached the provisions of the Competition Act. The CCI, during this period, has passed approximately 73 final contravention orders under Section 27 of the Competition Act. The CCI has flexed its powers across various sectors, including pharmaceutical, media and entertainment sector, real estate, infrastructure, banking, finance, mining, etc., with the pharmaceuticals, film exhibition, coal and real estate sectors, being heavily investigated. However, antitrust jurisprudence in India is still evolving and the orders of the CCI are subject to strict scrutiny at the appellate stage.*

On January 11, 2016, Mr. Devender Kumar Sikri was appointed as the new chairperson of the CCI succeeding Mr. Ashok Chawla, whose four-year tenure ended in January 2016. Mr. Sikri has previously held various positions in the Central Government as well as in the Gujarat Government. He has been the Secretary in Ministry of Women and Child Development, Registrar General of Census and Collector of Rajkot and Jamnagar, among others.

Our Achievements

Competition & Antitrust Law Firm of the Year - *India Business Law Journal's Indian Law Firm Awards 2013 to 2015*

Highly Recommended for Competition/Antitrust - *Chambers Asia-Pacific 2013 to 2016*

Highly Recommended for Dispute Resolution - *Asialaw Profiles 2014 to 2016*

*By way of this update, Economic Laws Practice (**ELP**) attempts to summarize some critical recent developments in the sphere of competition law in India. We hope you find this update useful.*

Warm Regards,

Competition Law and Policy Team

ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS

MERGER CONTROL UPDATE

AMENDMENTS TO THE MERGER CONTROL REGULATIONS

In an effort to keep India's merger control regime in line with international best practices and constantly evolving M&A scenario, the CCI in the last 9 months has brought into effect certain changes to the Competition Commission of India (Procedure in Regard to the Transactions of Business Relating to Combinations) Regulations, 2011 (***Combination Regulations***), the principal regulation governing merger control regime under the Competition Act. The following analysis provides the key components of the amendments brought in July 2015 and January 2016:

Key components of the July 2015 amendments

- Flexibility regarding signing of merger notification – Earlier a Managing Director or a company secretary duly authorized by the board of director could only sign and verify the contents of the merger notification filed with the CCI. Now, any person duly authorized by the board of directors of the company may sign the notice. Further, it is now required to file only one copy of the notice as opposed to three copies;
- Scope of '*other documents*' under Section 6 of the Competition Act and Regulation 5 (8) of the Combination Regulations – Previously, any agreement or document conveying the intention to acquire to the Central Government or State Government or Statutory authority would trigger a filing. With these amendments, only a communication conveying the intention to make an acquisition to a Statutory Authority would constitute an '*other document'*;
- Confidentiality over submissions – if the parties to the combination are seeking confidentiality over the information/ documents then the same must be accompanied by an affidavit;
- Revision of Form I and introduction of guidance notes – Form I, perceived as a short form, has become more detailed and now requires the parties to provide additional information relating to value of the transaction, non-compete clauses, details about the parties, sector overview, etc.;
- Timelines for review under Phase I – The amendment has revised the review period from thirty calendar days to thirty working days, including a '*clock – stop*' of fifteen working days to seek comments from third parties;
- Invalidation of notice – the CCI may now, after recording reasons, invalidate a notice where the notice and the information contained therein are not in compliance with the Combination Regulations;
- Summary of the combination – Departing from its previous stand, with the amendments a 500-word summary regarding the proposed combination under review will be published on the CCI's website to ensure public visibility.

Key components of the January 2016 amendments

- Clarity regarding trigger for filing notice – a public announcement made in terms of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (as amended) (Takeover Code), for the acquisition of shares, voting rights or control, would be considered as the trigger for filing a notice with the CCI;
- Hearing prior to invalidation of notice – the CCI may grant the parties to the combination an opportunity to be heard before deciding to invalidate a notice;
- '*Solely as an investment'* explained – an acquisition of less than 10% equity share capital or voting rights of an enterprise would be considered to be made *'solely as an investment*' subject to certain conditions.

- No requirement for 'verification' – the verification has now been termed as a 'declaration', confirming that the information/ documents supplied by the parties is true and complete to the best of their knowledge.

JURISDICTIONAL THRESHOLDS REVISED

On March 4, 2016, the Government of India, through the Ministry of Corporate Affairs (***MCA***), by way of a notification has revised the merger control thresholds required to be met by the parties for filing a notification with the CCI by 100% as provided in Section 5 of the Competition Act. These revised thresholds are valid for period of 5 years, ending on March 4, 2021 (***Notification***). Set out below are the revised thresholds:

Companies party to M&A or Acquisition *In India*		**Groups (2 or more enterprises) party to M&A or Acquisition** *In India*	
Assets	**Turnover**	**Assets**	**Turnover**
> INR 20 Billion *(INR 2000 Crores)*	> INR 60 Billion *(INR 6000 Crores)*	> INR 80 Billion *(INR 8000 Crores)*	> INR 240 Billion *(INR 24,000 Crores)*
In India & Outside India (aggregate)		***In India & Outside India (aggregate)***	
Assets (USD)	**Turnover (USD)**	**Assets (USD)**	**Turnover (USD)**
> 1 Billion *(Including minimum INR 1000 Crores in India)*	> 3 Billion *(Including minimum INR 3000 Crores in India)*	> 3 Billion *(Including minimum INR 1000 Crores in India)*	> 12 billion (Including minimum INR 3000 Crores in India)

For the purposes of calculating jurisdictional thresholds, enterprises that exercise more than 50% control over another enterprise will constitute a *'group'*. In this regard, the Notification has extended the exemption of enterprises exercising less than 50% of voting rights in another enterprise from filing a notification by 5 years, i.e., till March 4, 2021.

TARGET BASED OR *DE MINIMUS* EXEMPTION ENHANCED AND EXTENDED

In 2011, the MCA had exempted any enterprise whose shares, control, voting rights or assets are being acquired from filing a notification with the CCI, if it had assets less than INR 250 crores (INR 2.5 billion) or turnover less than INR 750 crores (INR 7.5 billion), in India, for a period of 5 years. The MCA *vide* the Notification has extended the applicability of the target based exemption by 5 years, i.e. till March 4, 2021. Additionally, the exemption thresholds have now been enhanced to INR 350 crores (INR 3.5 billion) in assets and INR 1000 crores (INR 10 billion) in turnover belonging to the target entity.

CCI AMENDS HOLCIM/ LAFARGE ORDER; APPROVES ALTERNATIVE DIVESTMENT PROPOSAL

On February 2, 2016, the CCI cleared an alternative proposal submitted by Holcim Ltd. (***Holcim***) and Lafarge S.A. (***Lafarge***) for clearance of the proposed combination, which was notified to the CCI on 14 July 2014. The alternative proposal envisaged sale of 100% of the share capital of Lafarge India in the form of a share sale option to one strategic and/or one or more financial investors.

By way of a background, earlier on March 30, 2015, the CCI had cleared the proposed combination between and Holcim and Lafarge with certain modifications, which required divestment of Lafarge's Jojobera plant in Jharkhand and

integrated unit at Sonadih in Chhattisgarh, with a capacity of approximately 5.1 million tonnes (***Order***). The CCI believed that the proposed divestiture was a remedy to eliminate the competition concerns emanating from the proposed combination. However, due to regulatory issues involved in transferring of the mining lease and mineral rights and given the uncertainty regarding transfer of mining leases on account of amendment in the Mines and Minerals (development and regulation) Act 1957, the CCI sought clarifications from the parties regarding transfer of mining leases.

Subsequently, on October 23, 2015, the parties in order to comply with the Order, submitted an alternative proposal (***Alternative Proposal)***, which provided for sale of 100% of the share capital of Lafarge India and requested the CCI to consider the Alternative Proposal in suppression of their earlier proposal. For the approval of the Alternate Proposal, the CCI passed a supplementary order to amend certain portions of the Order pertaining to divestment business, mode of sale of divestment business etc. (***Supplementary Order***)

The Supplementary Order approved the Alternative Proposal submitted by the parties, which, as discussed above, contemplated sale of 100% of the share capital of Lafarge India in the form of a share sale option to one strategic and/or one or more financial investors. The CCI required the divestiture to be carried out by way of sale of shares with an approved purchaser instead. The CCI directed the parties to appoint a monitoring agency, which would ensure that the divestment business is managed as a distinct entity, separate from business retained by the Parties. The CCI stated that the hold separate manager shall cooperate and report to the monitoring agency and also the divesting agency.

STATUS OF GLOBAL TRANSACTIONS NOTIFIED IN INDIA

Foreign-to-foreign or global transactions attract the provisions of the Competition Act if the prescribed thresholds are met, which include a local effects test. Where parties to a global transaction have either assets or turnover of the value which meets the specified local nexus thresholds, the transaction will be subject to merger control scrutiny in India. As such, under the Competition Act, a filing will be required even where a target has no turnover or assets in India in case the local nexus threshold limits are met based on the value of the acquirer's turnover or assets in India. The following table provides a snapshot of the global transactions that have been notified to the CCI in the past quarter.

Transaction	Trigger Event	Sector	Status
AkzoNobel N.V/ BASF SE	February 17, 2016 – agreed on the terms and conditions of an Asset and Share Sale and Purchase Agreement and signed a Signing Protocol for acquisition of BASF SE.	Chemicals and Specialty Chemicals	Under Review
Dow/ DuPont/ Diamond Orion Hold Co/ Diamond Merger Sub/ Orion Merger Sub (Form II)	Diamond Merger Sub, will merge into Dow and Dow will become a wholly owned subsidiary of Diamond Orion HoldCo. Further, Orion Merger Sub, will merge with DuPont and thus Du Pont will become a subsidiary of Diamond Orion Hold Co. Thus the entity of Diamond Orion HoldCo will be renamed as Dow DuPont.	Agrochemicals (including Insecticides, Fungicides, and Herbicides), Seeds, Packaging and Industrial Polymers and Food Additives	Under Review
Starwood Hotels and Resorts Worldwide/ Mariott International Inc.	November 15, 2015 – Agreement and Plan for merger signed between the parties, following	Hotels/ Hospitality	Approved

Transaction	Trigger Event	Sector	Status
	which board approval required on the same date.		
China National Agrochemical Crop/ Syngenta AG	Acquisition of shares and control of the target.	Agrochemicals; lawn and garden business	Under review
Gerdau S.A/ Sumitomo Corporation/ Japan Steel Works Ltd.	Gerdau will set up joint venture company in Brazil and transfer RMR business to JVC – parties will subscribe to shares of JVC – JVC part of Gerdau group post completion.	Infrastructure /Machinery/ Steel Production and Manufacture	Under Review
Johnson Controls Inc. /Tyco International PLC/ Jagara Merger sub LLC	Acquisition of majority ownership and management of Tyco by Johnson Controls.	Automotive parts/ Security products and services	Under Review
Denali Holding Inc/ EMC (Form II)	Acquisition of EMC by Denali.	IT and IT software manufacturing and services	Under review
CMA CGM S.A/ Neptune Orient Lines Limited (Form II)	CMA CGM proposes to acquire Neptune Orient Lines Limited, via a standard voluntary conditional cash offer for 100% of its issued securities.	Shipping and Port Services	Under Review
Allegran PLC/Pfizer Inc. (Form II)	Merger Sub, a newly incorporated wholly owned subsidiary of Allergan will merge with and into Pfizer. As a result, Pfizer will become a wholly owned subsidiary of Allergan and Allergan will be renamed as Pfizer PLC.	Pharmaceuticals	Under Review
Schulke & Mayr GmbH/ Ethicon, Inc.	March 25, 2015 – Schulke to acquire business of Healthcare Antisepsis Solutions of Ethicon. The transaction was entered into by the parties by way of an Asset Purchase Agreement. In India – Implemented through Country Transfer Agreement signed between Schulke India and JJPL on September 11, 2015.	Healthcare (Human Antisepsis and disinfection products)	Approved

INVESTIGATIONS INITIATED BY THE CCI UNDER SECTION 26(1) OF THE COMPETITION ACT

CCI INITIATES PROBE AGAINST ATHLETICS FEDERATION OF INDIA

The CCI, on March 16, 2016, has ordered a detailed probe against Athletics Federation of India (***AFI***) for alleged abuse of dominant position, following a reference filed by the Department of Sports, Ministry of Youth Affairs and Sports, Government of India under Section 19(1)(b) of the Competition Act.

It was alleged that in its Annual General Meeting held in April 2015, AFI decided to take action against the state units/ officials/ athletes who encourage unauthorized marathons without taking permission of AFI. This has been alleged as being anti-competitive and not conducive for development of the sport of athletics at the grass-root level.

The CCI, in its *prima facie* order found AFI to be an enterprise under Section 2(h) of the Competition Act, since it has been engaged in organising various national and international athletic events and generating revenue out of such activities through various means such as royalty, sponsorship etc. The CCI delineated the relevant market as provision of services relating to '*organization of athletics/ athletic activities in India*'. Further, on the issue of dominance, the CCI found that AFI, being the apex body for managing athletic events in India and by virtue of its association with IAAF, AAA and Indian Olympic Association, is controlling athletic events in India.

The CCI further observed that by virtue of its dominance in the relevant market, AFI is trying to impose discriminatory conditions like requiring mandatory permission for conducting national and international marathon meets and, therefore, restricting the entry of new entrants into the relevant market. The CCI was of the *prima facie* view that this conduct of AFI, appears to be an abuse of dominant position in terms of Section 4 of the Competition Act and accordingly directed the Director General (***DG***) to investigate the allegations.

The order of the CCI is available at: http://www.cci.gov.in/sites/default/files/26%281%29%20Order%20in%20Ref.%20Case%20No.%2001%20of%202015.pdf

CCI ORDERS INVESTIGATION AGAINST MONSANTO AND ITS INDIAN SUBSIDIARY ON REFERENCE BY THE GOVERNMENT AND VARIOUS SEED COMPANIES

The CCI, on February 18, 2016, has initiated a detailed investigation into the alleged excessive royalty fee/ trait value charged by Monsanto Inc. (USA) through its subsidiary, Mahyco Monsanto Biotech (India) Ltd. (***MMBL***) for licensing its patented Bt. cotton seed technology (Bollgard II) to 49 seed companies in India. The investigation has been ordered pursuant to the references made by the Ministry of Agriculture & Farmers Welfare, Government of India and Department of Agriculture and Cooperation, State of Telangana and complaints filed by All India Kisan Sabha; National Seed Association of India; and three other seed companies.

The CCI, while passing an order noted that seed companies enter into sub-license agreement with MMBL for procuring its Bt. cotton technology for a stipulated contractual trait value, which is allegedly exorbitant. Various State

Governments have come up with State legislations and orders fixing the minimum support prices of cotton seeds, and specifying the amount of trait value, which itself have been subject to various disputes and litigation.

In order to address the issue of exorbitant trait values, the seed companies had made representation to MMBL for settlement of payment in line with the orders of the state governments. It has been alleged that MMBL refused to negotiate the trait value, and instead, invoked arbitration proceedings seeking interim reliefs against the seed companies to deposit the contractual trait value. It has also been alleged that MMBL relied on termination notices to compel seed companies to pay excessive and extortionist trait values, which appears to be in contravention of the provisions of the Competition Act.

The CCI observed that Bt cotton technology sub-licensed by MMBL is used in more than 99% of the area under Bt cotton cultivation in India. The CCI also noted that the competitors of MMBL do not seem to pose effective competitive constraints on MMBL and there is huge consumer dependence on MBBL, making it a dominant player in the relevant market. The CCI noted that termination of the sublicense agreement may have the effect of denial of market access to the seed manufacturers, given their dependence on MMBL for Bt cotton technology. Further, the CCI found that charging of trait value payable on the basis of MRP of the seed packet has no economic justification and appears to be unfair. The CCI also noted that such unfair terms have the impact of ousting the seed companies from the downstream market, as a result of which, MMBL appears to be using its dominance in the upstream market to protect its presence in the downstream market through its group entities. Therefore, the CCI *prima facie* found the conduct of MMBL to be in violation of Section 4 of the Competition Act.

The CCI also found the sub – license agreement to be in the nature of refusal to deal and exclusive supply agreements within the meaning of Section 3(4)(b) and 3(4)(d) of the Competition Act. Further, the conditions imposed were not found to be reasonable as may be necessary for protecting any of the IPR rights, as envisaged under Section 3(5) of the Competition Act. Finding a *prima-facie* violation of Section 4(2) and Section 3(4) of the Competition Act, the CCI directed the DG to conduct a detailed investigation into the matter.

Dissent

Mr. M.S. Sahoo, Member of the CCI, dissented with the majority view and noted that the trait value charged by MMBL may be considered excessive only when it is higher than the competitive prices, i.e. prices in different geographical market for the same product or prices charged by competitors in the same product market. Member Sahoo also noted that if an enterprise is not complying with the trait fee fixed by a competent authority, it is for the authority to enforce it. He was of the opinion that non – compliance with a direction of an authority cannot be considered unfair under the Competition Act. Member Sahoo also noted that in any event, now that the Central Government has decided to fix price of seeds as well as trait fee under the Essential Commodities Act, 1955, the trait fee ceases to be a variable to be determined by the market forces and, therefore, nothing survives.

Interestingly, the order of the CCI has been challenged before the Delhi High Court, on alleged grounds of lack of CCI's jurisdiction to entertain purely commercial disputes, which is pending adjudication.

The CCI's order is available at: http://www.cci.gov.in/sites/default/files/Ref%2002-2015%20and%20107-2015%20-26%281%29%20order_10.02.2015.pdf

ALLEGATIONS DISMISSED BY THE CCI UNDER SECTION 26(2) AND 26(6) OF THE COMPETITION ACT

CCI REJECTS PRASAR BHARATI'S COMPLAINT AGAINST TAM MEDIA

The CCI, by its order dated February 25, 2016 dismissed the allegation of abuse of dominance against TAM Media Research Private Limited (***TAM***), a provider of television ratings for broadcast content.

Prasar Bharti had alleged that TAM, being the sole entity in India for providing metrics of television audience, was abusing its dominant position by providing undue advantage to the broadcasters, which telecast programs largely directed at the urban audience. The DG noted that TAM had its *People Meters* largely placed in the urban area and therefore provided higher Television Rating Points (***TRP***) to broadcasters telecasting content largely directed at urban audiences, thereby excluding the broadcasters whose contents catered to both rural and urban audiences. This exclusion was allegedly caused due to the non-reflection and consequent non-monetization of the viewership pattern of the rural areas. The DG also found that TAM was denying market access to the broadcasters by not including rural viewership metrics. The differential pricing for the broadcasters and the media/advertisers was found to be act of abuse of dominance by TAM in contravention of Section 4 of the Competition Act.

While accepting DG's finding on dominance of TAM, CCI rejected the arguments by TAM that future competitors could impact the determination of TAM's dominance. CCI held that *"an assessment of non-participant and also an uncertain operation in future has no relevance in determining the dominance of an existing enterprise"*. The CCI did not find any merit in other findings of the DG and held that TAM had not abused its dominant position. The CCI agreed with the fact that TAM's People Meters were largely placed in the urban regions was a known fact and the same was disclosed by TAM at the time of entering into agreements. The CCI also observed that differential treatment to differently placed entities could not constitute an abuse of dominance under the Competition Act.

The CCI, therefore, did not accept the findings of the DG and did not find TAM to be in contravention of the Competition Act.

The decision of the CCI is available at: http://www.cci.gov.in/sites/default/files/702012%20.pdf

CCI REFUSES TO INVESTIGATE ALLEGATIONS AGAINST UBER AND OLA

Meru's allegations against Uber

On February 10, 2016, the CCI passed an order under Section 26(2) of the Competition Act, dismissing Meru's allegations against Uber India. Meru Travel Solutions Private Limited (***Meru***) had alleged that Uber India (***Uber***) contravened Sections 3 and 4 of the Competition Act. It was alleged that Uber had received a total funding of USD 10 Billion through venture capital and private equity, and being armed with global funding, it adopted abusive practices to strengthen its dominant position in different markets and to eliminate competitors from the market.

Specifically, Meru alleged that the Uber, with a market share of 44%, was dominant in the relevant market of *'radio taxi services in Delhi – NCR'* and was abusing its dominant position by offering unreasonable discounts and abysmally low pricing to consumer. It was alleged that Uber's conduct was intended to oust its competitors from the market and

amounted to predatory pricing in violation of Section 4 of the Competition Act. Meru also alleged that Uber enters into exclusive contracts with taxi owners in violation of Section 3 of the Competition Act.

The CCI delineated the relevant market as '*Radio Taxi Services in Delhi*. However, since the market share figures submitted by Meru relied on a report (*TechSci Report)*, which was prepared without even interviewing Uber during collection of data, the CCI refused to place reliance on the market shares figures alleged by the Informant. The CCI also noted that reliability of the TechSci Report was further weakened due to presence of another report (*6Wresearch Report)* with contradictory result. Therefore, due to the conflicting statistics and the fluctuating market shares of various players, the CCI emphasised on the competitive nature of the market and dismissed the allegations against Uber.

Previously, the CCI had also refused to initiate investigation into similar allegations in the market of '*services offered by radio taxis and yellow taxis in Kolkata'*.

The order of the CCI is available at http://www.cci.gov.in/sites/default/files/26%282%29_96%20of%202015.pdf

Mega Cab's allegations against Ola

Mega Cabs Private Limited (***Mega Cabs***) had alleged that ANI Technologies Private Limited (***Ola***) is abusing its dominant position in radio taxi services market in Delhi – NCR. It also alleged that Ola had entered into anti – competitive agreements with the taxi drivers, adversely affecting competition in the market.

Specifically, it was alleged that, Ola having received multiple rounds of venture funding, managed to acquire a dominant position in the Delhi NCR region and indulged in predatory pricing by offering periodical discounts to consumers and incentivising the drivers with an intention of eliminating competition in the market. The acquisition of Taxi for Sure was also alleged to have strengthened the position of Ola further.

Relying on its earlier decisions and the regulatory architecture in Delhi and NCR, the CCI defined the relevant market as '*Radio Taxi services in Delhi'.*

The CCI, while analysing whether Ola was dominant in the identified market, doubted the veracity of the statistics relied on, which were based on a report commissioned on instructions of a particular client. The CCI further noted that the report itself demonstrated that there were various players in the identified market. As such, Ola could not have acted independently of its competitors. Therefore, the CCI dismissed allegations of abuse dominant position.

As regards Section 3 allegations, the CCI noted that inability of existing players or new entrants to match the innovative technology or app developed by any player, or model created for operating in a particular sector, cannot be said to be creating an entry barrier.

The order of the CCI is available at: http://www.cci.gov.in/sites/default/files/26%282%29_82%20of%202015_0.pdf

RECENT PENALTIES IMPOSED BY THE CCI UNDER SECTION 27 OF THE COMPETITION ACT

CCI IMPOSES A PENALTY OF INR 258 CRORES ON JET, SPICEJET AND INDIGO; COMPAT INTERVENES

Express Industry Council of India, which is an apex body of leading express companies, had alleged that five aviation companies - Jet Airways India Ltd. (***Jet***), Indigo Airlines (***Indigo***), Spicejet Ltd. (***Spicejet***), Air India Ltd (***Air India***) and Go Airlines (India) Ltd. (***Go Airlines***) had connived to introduce a Fuel Surcharge (***FSC***) for transporting cargo. The CCI, passed a *prima facie* order and directed the DG to investigate.

The DG examined (i) the correlation between behaviour of the airlines; (ii) behaviour of market in terms of tonnage during periods of revision of FSC by one airline and (iii) the dynamics and competitiveness of overall prices, and concluded that no concerted action could be inferred. However, the DG noted that the behaviour of the airlines with respect to imposition of FSC was not in conformity with the market conditions where the domestic players actively competed. The DG did not find the airlines' conduct to be in violation of Section 3 of the Competition Act.

The CCI, while disagreeing with the methodology followed by the DG for coming to its conclusion, noted that increment of the rates on same dates, or nearby dates were reflective of some sort of understanding among the airlines. The CCI also observed that there was no data, analysis or documents available with the airlines to explain the increase in FSC rates. On the basis of this, the CCI found that that the airlines have acted in a parallel manner. Therefore, the CCI was of the opinion that the only plausible reason for such parallelism could have been collusion. The CCI found the conduct of Jet, Indigo and Spicejet to be in contravention of S. 3(3)(a) of the Competition Act read with Section 3(1) and imposed an approximate penalty of INR 152 crore on Jet, INR 64 crore on Indigo and INR 42 crore on Spicejet.

As regards Go Airlines, the CCI noted that it had no control, and was never part of any commercial or economic aspect of cargo operations done by vendors, including imposition of FSC. The CCI noted that Air India's FSC rates were lower and inconsistent with that of other parties. On the basis of these factors, the CCI did not find a contravention against the conduct of Go Airlines and Air India.

The Competition Appellate Tribunal (***COMPAT***), by its order dated 9 February 2016 stayed the operation of the CCI's order imposing the said penalty. The COMPAT heard the arguments of the counsels for both sides reserved the order on March 15, 2016.

The CCI's order in *Express Industry Council of India* v. *Jet Airways (India) Ltd.* Is available at: http://www.cci.gov.in/sites/default/files/302013.pdf

CCI IMPOSES A PENALTY OF INR 74 CRORES ON ALKEM, AKCDA AND THEIR OFFICE BEARERS FOR ANTI–COMPETETIVE ACTIVITIES

On information filed by Mr. P. K. Krishnan, Proprietor of Vinayaka Pharma (***Informant)***, which is engaged in the business of distribution of medicines manufactured by pharmaceutical companies in Palakkad district of Kerala, the CCI on December 1, 2015, penalized All Kerala Chemists and Druggists Association (***AKCDA***), Alkem Laboratories Ltd.

(***Alkem***) and Mr. Paul Madavana, the Divisional Sales Manager of Alkem after finding them in contravention of Section 3 of the Competition Act.

The Informant had alleged Alkem rejected his application for appointment as a stockist for lack of a No Objection Certificate (***NOC***) from AKCDA. It was further alleged that after initially being offered stockistship of Alkem, Alkem subsequently refused to supply drugs to the Informant in contravention of Section 3 of the Competition Act.

The DG considered the submission made by the parties by various other pharmaceutical companies. It also discovered certain emails between AKCDA and All India Organisation of Chemists & Druggists and other pharmaceutical companies, which revealed that the practice of obtaining NOC was never stopped. The DG found that pharmaceutical companies were still co – operating with AKCDA. The DG, therefore, found that AKCDA and its office bearers were insisting on NOC before appointment of new stockists of pharmaceutical companies, which led to limiting and controlling of the supply of drugs and medicines in Kerala and in creation of entry barriers in contravention of Section 3(3)(b) read with Section 3(1) of the Competition Act.

The opposite parties, in their reply, claimed that the Informant had suppressed the fact that he had already been appointed as a stockist before the information was filed. Suppression of this material fact by the Informant, according to the opposite parties, made the proceedings infructuous. The CCI felt that though suppression of material facts could invite a contravention of Section 45(1)(b) of the Competition Act, the suppression in the present case was not material. Hence, the CCI did not impose a penalty on the Informant. The CCI also noted that the Informant was merely the medium through which, the CCI came to know of the anti – competitive practice. Therefore, the CCI denied to make the proceedings infructuous on these grounds.

The CCI, relying on the contents of the email exchanged between AKCDA and AIOCD and various pharmaceutical companies and other material collected by the DG, found AKCDA and Alkem and their office bearers in contravention of Section 3 read with Section 48 of the Act. The CCI imposed a penalty of INR 4,35,778 on AKCDA and INR 74.63 crores on Alkem. Two office bearers of the opposite parties were penalized to the tune of INR 84,451.

The COMPAT, in February 2016, stayed the order of the CCI, subject to payment of 10% of the total penalty.

The order of the CCI is available at: http://www.cci.gov.in/sites/default/files/282014.pdf

INTERVENTION BY THE COMPAT

COMPAT SETS ASIDE THE DECISION OF THE CCI IN HIRANANDANI CASE

On December 18, 2015, the COMPAT, while concurring with the observations of the dissenting (former) Member Dr. Geeta Gouri, set aside the majority order passed by the CCI which imposed a penalty of INR 3,81,58,303 on Dr. L.H. Hiranandani Hospital ("**LHH Hospital**").

The informant, while basing his allegations on the experience of an unrelated patient of the LHH Hospital, had alleged that the exclusive agreement entered into by the LHH Hospital with Cryobanks for providing umbilical cord stem cell banking services to the its maternity patients amounted to abuse of dominance and an anti-competitive agreement.

The DG and the CCI agreed with the allegations made by the Informant and delineated the market as *provision of maternity services by super speciality hospitals*. The CCI, in agreement with the DG, held that the exclusive agreement with Cryobanks imposed unfair conditions on LHH Hospital's patients and resulted in denial of market access for other cord banking service providers thereby causing an appreciable adverse effect on competition (***AAEC***).

The COMPAT, at the outset, noted that the CCI in its newsletter had provided details of this information even while the investigation was ongoing. The news bulletin was found to have disclosed only the facts of the majority order directing DG to conduct investigation and completely ignored the minority order. The COMPAT observed that this bulletin in itself raises concerns regarding fairness of procedure adopted by the CCI. The COMPAT thereafter observed that the statements made in the information unequivocally suggested that the informant was espousing the cause of *'LifeCell'*, whose services were previously availed by the LHH Hospital.

Before scrutinizing the case on merits, the COMPAT expressed that even though the Competition Act did not provide any qualification for the locus of the informant, the CCI while dealing with cases where the informant is a third party, must proceed with due caution and ensure that such third - party is not espousing the cause of someone else with an ulterior motive. The COMPAT was displeased with the fact that though the whole case was based on the experience of one Mrs. Manju Jain, the DG as well as the CCI failed to ask her if the exclusive agreement with Cryobank actually had any AAEC.

The COMPAT, disagreeing with the market delineated by the CCI, observed that since the issue pertains to the provision of cord cell services, the relevant market should be the market for cord cell banking and not maternity services as a whole. The COMPAT further indicated that while presuming that cord cell banking services was an integral part of the maternal services, the CCI confused the basic issue itself. This confusion, in view of the COMPAT, resulted in miscarriage of justice as the appellants have been found guilty of contravening Section 3(1) of the Competition Act without any evidence of AAEC.

The COMPAT also objected that the CCI imposed a penalty on the total receipts of LHH Hospital, instead of imposing the penalty on the maternity services. The COMAPT held that if it was assumed that the LHH Hospital was guilty of contravening provisions of the Competition Act for the maternity services, then the penalty should have been imposed only on the receipts from the maternity services and not on the total receipts. The COMPAT held that CCI was wrong in clubbing the turnover of the LHH Hospital derived from all the services with maternity services.

The order of the COMPAT is available at: http://www.compat.nic.in/upload/PDFs/judgement-orders-dec2015/FINAL%20-NEEL%2002.01.2016%20-%20LH%20Hirandanani%20Hosp%20Vs.%20CCI%20and%20Anr.%20-%20Appeal%2019%20of%202014.pdf

COMPAT SETS ASIDE INR 6300 CRORES PENALTY IMPOSED ON 11 CEMENT COMPANIES FOR VIOLATION OF NATURAL JUSTICE PRINCIPLES

By its order dated December 11, 2015, the COMPAT set aside order of the CCI dated June 20, 2012 and the penalty imposed therein, by which, the CCI had found that 11 cement companies had shared prices, production capacities and actual production using the Cement Manufacturers Association as the platform.

This sharing of information was found to have been done in order to limit and control, the production and supplies, and also to determine the prices of cement in violation of Sections 3(3)(a) and 3(3)(b) read with Section 3(1) of the Competition Act. The CCI imposed a penalty of 0.5 times of the net profit of the cement companies, totalling to approximately INR 6,317 crores.

The COMPAT while addressing a limited question of adherence of principles of natural justice by the CCI observed that the CCI's order was vitiated due to violation of one of the basic facets of the principles of natural justice being *"the person who had not heard the parties could not sit in judgment of the matter".*

The appellant had alleged that the Chairperson of the CCI, who had not attended the proceeding on two of the three dates on which the matter was argued, could not have decided the matter finally. It was found that the Chairperson, who had attended the proceedings only on the final date of arguments, had initialled each page of the CCI's Order dated June 20, 2012 (***Impugned Order)***, indicating thereby that the Impugned Order was authored by him.

Importantly, the COMPAT observed that rule of law is the cornerstone of a democratic setup and the principles of natural justice are required to be followed in all cases unless expressly barred by the legislation. It further noted that Section 36(1) of the Competition Act mandates that the proceedings before the CCI are to be guided by the principles of natural justice.

The COMPAT while holding that the Impugned Order passed by the CCI was vitiated due to participation of the Chairperson in the decision making process stated "*In our view, the prejudice caused to the appellants is writ large on the face of the record. As mentioned above, the Chairperson did not have the opportunity of hearing the arguments of the advocates for the parties, which lasted for three days... and yet he became party to the decision...*"

The COMPAT observed that as the Chairperson had not attended the arguments of the counsels for the parties, he could not be expected to know the nature and contents of the arguments made. This limited understanding of the arguments made by the counsels would have adversely affected the decision of the CCI. As such, the COMPAT allowed the appeal and set aside the order of the CCI and the penalty imposed therein. The COMPAT remitted the matter to the CCI for fresh disposal.

The order of the COMPAT is available at: http://compat.nic.in/upload/PDFs/judgement-orders-dec2015/JUDGEMENT%20FINAL%20CEMENT%20ORDER%2011.12.2015.pdf

COMPAT UPHOLDS THE RIGHT OF CROSS-EXAMINATION AS A PRINCIPLE OF NATURAL JUSTICE

By its order dated January 13, 2016 the COMPAT set aside the order of the CCI dated January 29, 2015, wherein the CCI had found the Himachal Pradesh Society of Chemist and Druggist Alliance (***HPSCDA***) and its president in contravention of provisions of Section 3 of the Competition Act and imposed a penalty of 10% of the receipts of previous three years on HPSCDA and 8% of the average income of the previous three years on the president of the HPSCDA. The CCI found that the HPSCDA had indulged in the practice of mandatorily requiring HPSCDA's NOC before the appointment of additional stockists in the State of Himachal Pradesh in addition to imposing PIS charges in violation of Section 3 of the Competition Act.

The COMPAT noted that the HPSCDA had raised specific pleas of violation of principles of natural justice before the CCI, which remained unaddressed by the CCI. The COMPAT indicated that a perusal of the submissions made by the HPSCDA before the CCI clearly show that HPSCDA had raised specific plea that the DG and CCI had relied upon unverified documents and not afforded HPSCDA an opportunity to cross-examine. HPSCDA had contended that the findings of the DG were perverse as the DG had relied upon unsubstantiated statements and fabricated documents.

The COMPAT noted that "*In our view, the objections raised by the Appellants regarding violation of principles of natural justice by the DG were quite serious and the Commission was duty bound to consider and decide the same before delving into merits of the findings...The Commission should have examined and decided whether the investigation conducted by the DG was consistent with the rules of fairness*". The COMPAT further held that the CCI should have either passed an order under section 26(7) of the Competition Act, directing DG to conduct further examination or investigating the matter itself in accordance with the law. The failure of the CCI to adopt either of the above options in the light of the present circumstances was considered by the COMPAT as grave miscarriage of justice.

The COMPAT directed the DG to conduct fresh investigation and the CCI to pass a fresh order after providing an opportunity to the parties to make their submissions. The COMPAT further directed the DG that during the course of re-investigation the DG should decide any application made by the appellants for cross-examination of any person whose statement has been recorded by recording reasons for the same.

The order of the COMPAT is available at: http://compat.nic.in/upload/PDFs/judgement-orders-2016/N-18.1.FINAL%20ORDER%20DTD.%2013.01.2016-%20HP%20Society.pdf

MUMBAI
1502 A, 15th Floor
Dalamal Towers
Free Press Journal Road
Nariman Point
Mumbai 400 021
T: +91 22 6636 7000
F: +91 22 6636 7172
E: mumbai@elp-in.com

NEW DELHI
801 A, 8th Floor
Konnectus Tower
Bhavbhuti Marg
Opp. Ajmeri Gate Railway Station
Nr. Minto Bridge
New Delhi 110 001
T: +91 11 4152 8400
F: +91 11 4152 8404
E: delhi@elp-in.com

AHMEDABAD
801, 8th Floor
Abhijeet III
Mithakali Six Road, Ellisbridge
Ahmedabad 380 006
T: +91 79 6605 4480/8
F: +91 79 6605 4482
E: ahmedabad@elp-in.com

PUNE
202, 2nd Floor
Vascon Eco Tower
Baner Pashan Road
Pune 411 045
T: +91 20 4912 7400
E: pune@elp-in.com

BENGALURU
6th Floor, Rockline Centre
54, Richmond Road
Bangalore 560 025
T: +91 80 4168 5530/1
E: bengaluru@elp-in.com

CHENNAI
No. 6, 4th Lane
Nungambakkam High Road
Chennai 600 034
T: +91 44 4210 4863
E: chennai@elp-in.com