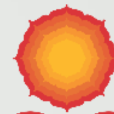

BACK TO BUSINESS : UPDATES ON THE INDIAN COMPETITION REGIME IN POST-PANDEMIC TIMES

2022

"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 maximising earnings. Earn we should but with dignity and pleasure"

Ashok Kumar Gupta
Chairperson
(Former Secretary to GoI)

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FOREWORD

CCI has been working as a resilient competition regulator since the last 13 years. CCI has shaped the Indian economy in its unique way, by facilitating competition in the markets. As the economy emerges from the shadow of COVID-19, CCI has been responding dynamically in aiding economic recovery.

As you are aware, on 5th August 2022, the Competition (Amendment) Bill, 2022, was introduced in the Lok Sabha, proposing significant changes to competition law regime. The Bill seeks to further empower CCI with the necessary tools to address new-age challenges.

To strengthen accessibility, CCI has opened regional offices in the last two years. Recently, the Western Office of CCI in Mumbai was inaugurated by the Hon'ble Minister of Finance & Corporate Affairs Smt. Nirmala Sitharaman on 6th October 2022.

In order to reach out to diverse stakeholders, CCI has translated its advocacy booklets in 11 regional languages, in addition to English and Hindi. These booklets contain information on topics such as filing information with CCI, cartels, bid rigging, abuse of dominance, combinations, leniency, etc. The booklets will facilitate competition advocacy and ensure wider reach of CCI.

To guide stakeholders, CCI has also published FAQs, based on feedback and queries. These FAQs are available on CCI's website. I would request ASSOCHAM to circulate the same in their regional chambers for wider dissemination.

Industry interactions have always remained one of the forerunners of competition advocacy. I am glad that ASSOCHAM is organizing this annual event. I also congratulate ASSOCHAM for releasing the Knowledge Report, which encapsulates updates on the Indian competition regime.

I wish the 7th Annual Conference on Competition Law a success.

13 October 2022

(Ashok Kumar Gupta)

Deepak Sood
Secretary General

FOREWORD

As we have entered the last quarter of the year 2022, it is important to highlight the significance that the year holds in the competition law regime. The year 2022 marks 20 years of enactment of The Competition Act, 2002 and in addition, it earmarks the introduction of The Competition (Amendment) Bill, 2022. The growth trajectory of the competition law regime in India has stood out within the contours of the changing market conditions owing to intervention of technology and digitization. The vision and dynamic role of the Competition Commission of India in keeping up with the evolving market conditions is inspiring.

The recent Competition (Amendment) bill proposes some crucial amendments to the Act that may directly impact the ease of doing business in India in a positive manner. For instance, provisions pertaining to speedier approvals of mergers and acquisitions (M&As); Settlement and Commitment framework to reduce litigations; incentivising the parties during an investigation with lesser penalty in exchange for information could have an accelerating effect on business activities. While competition law is an evolving subject owing to ever evolving market conditions, the practice, and the enforcement of the same is equally complex. In a more advanced set-up, India should move into an ecosystem that provides strong foundation and support to the business activities not just within the territory of India but also in cross-border business endeavours. The same can be achieved by a supportive legislation along with effective research and advocacy India on a regular basis.

ASSOCHAM in furtherance to its advocacy initiative has been at the forefront by curating platforms for discourse and deliberation on the competition law and its interface with evolving market. The 7th edition of the International Conference on "Competition Law: *Enforcement in India- the past, the present and future"* is designed to deliberate and map the recent developments in the competition regime and other factors such as digitalization, jurisdictional issues affecting the competition sector.

The key highlight of the Conference is this report titled **"Back To Business: Updates On The Indian Competition Regime In Post-Pandemic Times"**, showcasing the recent emerging trends in the competition law regime including the recent 2022 Amendment Bill, intervention of technology, digitalization etc. ASSOCHAM hopes that this report will help promote and sustain an enabling competition culture in India.

I acknowledge the efforts made by the teams at Khaitan & Co. and ASSOCHAM National Council for Competition Law towards bringing out the joint background paper and curating an interesting platform for an advanced discussion on the evolving dynamics of the competition law regime.

Deepak Sood

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FOREWORD

The ASSOCHAM National Council on Competition Law has been pioneering international competition law seminars in collaboration with the Competition Commission of India ("**Commission**") for several years. The 7th edition of the seminar will be held on 15 October 2022. The Chairperson, Competition Commission of India, has graciously accepted to be the Chief Guest inaugurating the event to give his invaluable perspective on this year's theme - "*Competition Law: Enforcement in India – the Past, the Present and the Future*" with focus on the key amendments proposed by the Competition (Amendment) Bill, 2022 ("**Amendment Bill**"), competition in digital markets, and potential challenges presented by the road ahead.

As seen in 2022, the Indian economy has fully recovered to the pre-pandemic GDP levels of 2019-20. India has also seen a major rise in foreign investments in 2022 with an increased interest by global private equity and venture capital players eyeing the promising Indian market.

On the enforcement front, the Commission has continued to be more watchful and pro-active in tackling cartels. During the onset of the COVID-19 pandemic, we saw the Commission deftly balancing market realities where it imposed token or nil penalties on small and medium businesses, while imposing penalties on large corporations. We also witnessed another order imposing substantial penalty on one of the top automobile companies of India in for contravening the provision of minimum resale price maintenance.

The year also saw a tremendous uptick in dawn raids by the Commission across sectors – from e-commerce, tyre manufacturing, engineering firms, alcohol manufacturing to vegetable seeds manufacturing. Interestingly, the scope of dawn raids was extended to include third parties and related stakeholders as well.

Further, recognising the significance of digital markets and technology players, the Commission initiated proceedings at prima facie level against tech companies through its various ongoing investigations into the conduct of Apple, Google, and Facebook.

The Commission is also trying to increase its advocacy and simplify the merger control process through means such as its merger control Frequently-Asked-Questions ("**FAQs**") to ensure compliance with the provisions of the Competition Act, 2002 ("**Competition Act**").

Most importantly, the year 2022 saw the introduction of the Amendment Bill on the floor of the Lok Sabha, which proposes a major revamp of the Indian Competition Law regime. The Amendment Bill proposes to introduce significant substantive and procedural changes to the existing competition law framework in India, which previously underwent a major legislative overhaul over a decade ago in 2007. Reforms to the Competition Act have been in the spotlight since 2018-19, when the Government of India set up the Competition Law Review Committee to review the existing framework and recommend modifications to the existing law to align it with best international practices.

Finally, we thank all panellists, everyone involved in organising this annual event and attendees who have registered for the conference. After two successive years of online annual events, this year's conference bounces back to a hybrid mode and promises to be an enriching and enlightening experience for all associated with this event.

Manas Kumar Chaudhuri
Chairman, ASSOCHAM National Council on Competition Law
Partner & Head of Competition Law, Khaitan & Co

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1. INDIAN COMPETITION LAW REGIME TO UNDERGO A REVAMP

Publication: Mondaq

On 5 August 2022, the Government of India tabled the Competition (Amendment) Bill, 2022 (Bill), in the lower house of the Indian Parliament. The Bill seeks to bring about significant substantive and procedural changes to the existing competition law framework, which last underwent a legislative amendment more than a decade back in 2007. Reforms to the Competition Act, 2002 (as amended) (Competition Act) have been in the spotlight since 2019, when the Government of India had constituted the Competition Law Review Committee to recommend modifications to the existing law to bring it in line with global best practices.

Some of the noteworthy changes proposed in the Bill are as follows:

(a) Merger Control

(i) *Introduction of Deal Value Thresholds (DVT)*

In addition to the existing value of asset and turnover based thresholds prescribed under the Competition Act, a new deal value threshold is proposed to be introduced. In the event the value of any transaction exceeds INR 20 billion (approx. USD 252 million or EUR 247 million) and the enterprise which is party to such a transaction has "substantial business operations in India", it would be considered a reportable transaction under the Competition Act. If none of the exemptions provided under the law apply, such a transaction would require an approval from the Competition Commission of India (CCI). While the Bill does not clarify what would constitute "substantial business operations in India", guidance is expected to follow from the CCI on the scope and import of this expression. The Bill further clarifies that the value of the transaction will include all consideration including indirect, indirect and deferred.

Our view – For years, it has been felt that transactions in various sectors, where possible competitive harm was apparent in the Indian markets, were escaping scrutiny as the thresholds provided in the Competition Act are fairly high. With the introduction of DVT, India seems to be following in the footsteps of jurisdictions such as Germany and Austria which have had DVT for a few years, leading to a mixed effect and outcome. Interestingly, the de minimis or the small target exemption remains as is for the time being. However, there is speculation that for the DVT to be effective, the de minimis exemption thresholds may also require a revision.

(ii) *Merger Review Timeline*

The Bill proposes to shorten the merger review timeline in phase 1 from the current 30 working day period to a 20-calendar day period. The overall review timeline granted to the CCI under the Competition Act is also to be shortened from 210 calendar days to 150 calendar days.

Our view – It was recently announced by the Chairperson, CCI, that the regulator took an average of 17 working days to clear a transaction in phase 1. This timeline is quite short and in fact, fares much better than some of the counterparts of the CCI around the world. We believe that the shortened timeline under the Bill would add significant burden on the CCI as well as filing parties to complete the review. If CCI requests are not met, parties could risk that their filing is invalidated, and in any event, additional requests for information "stop the clock" during a merger review.

(iii) *Material influence as the standard of Control*

The decisional practice of the CCI has been devolving towards a standard of material influence, the lowest threshold of control. This standard has now been embedded in the Bill. In the past

the CCI has considered shareholding, financing arrangements, board representation, expertise of a person to be relevant factors to evaluate existence and exercise of material influence.

Our view – The Bill simply formalizes the existing practices of the CCI captured in prior decisions. Codification of the lower standard of control also tallies with the recent non-renewal of an earlier notification issued by the government which specified the threshold of group companies at 50% ownership. As a result of the non-renewal, if any company has a shareholding of 26% or more in another company, then both companies will form part of a single group. Previously this threshold was 50%. Overall, these developments mean that the CCI will be able to cast a wider net to gain higher coverage of companies that will have to be considered for testing jurisdictional thresholds and mapping overlaps relating to parties to a transaction.

(iv) *Derogation of standstill for open Market Purchases*

As the Indian merger control regime is suspensory, acquirers were unable to structure open market purchases as part of an acquisition strategy without tripping the gun-jumping provisions under the Competition Act. The Bill seeks to exempt a transaction from standstill obligations if such transaction involves an open offer or an acquisition of securities through a series of transactions on a regulated stock exchange. However, the acquirer would not be able to exercise ownership, beneficial rights, voting rights, any interest in such securities or receive dividends or other distributions until the approval of the CCI for such acquisition has been procured.

Our view – Over the years, acquirers have faced gun-jumping proceedings due to the suspensory nature of the Indian merger control regime. This exemption has long been demanded by the industry and would allow transactions involving listed companies to be structured with greater freedom, to include open market purchases at the first instance.

(b) Behavioural

(i) *Settlements and Commitments*

The Bill proposes a new settlement and commitment mechanism for cases involving vertical restraints and abuse of dominance. The settlement and commitment process will not be applicable for cartel cases. Parties being investigated can provide commitments between the commencement of an investigation and the issuance of an investigation report by the Office of the Director General (DG). Settlements would be considered in the period between issuance of the DG's report and the final order of the CCI. The final order adopting the commitment or settlement would not be subject to any appeal.

Our view – The introduction of a settlement and commitment mechanism is a welcome move. Until now, if an informant had filed some information of a potential behavioural abuse, the regulator had to pass a final order on merits. The revised scheme will now allow the CCI to accept settlements and commitments with parties and close investigations quicker. This will ensure predictability, thereby minimising waiting period besides reduce the litigation costs of the parties and the CCI. While the complete mechanism has not been provided under the Bill, the essential details are expected to be provided by the CCI in its regulations including perhaps the treatment of ongoing cases.

(ii) *Introduction of limitation period*

The Bill seeks to introduce a period of 3 years within which an information can be filed from the date of the cause of action.

Our view – While the CCI has the power to condone delays, the introduction of a limitation period is to encourage parties to bring anti-competitive issues quickly to the fore and not as an afterthought. This will help the CCI recover evidence in a timely manner. Further, the law

of limitation exists in India which makes the amendment in line with such general law of the land.

(iii) *Hub & Spoke Cartels*

The Bill clarifies that the CCI could proceed to initiate action against entities at different levels of the supply and distribution chains implementing a cartel arrangement. While the CCI was exercising such powers under a more broader provision, now a specific provision is proposed to be included in the law.

Our view – Facilitation of cartels through third parties such as trade associations or distributors would now be specifically covered under the law. With this, the CCI will have the power to penalize even the enablers and intermediaries serving as conduits to sustain cartels.

(iv) *Leniency*

The Bill proposes to make significant changes to the leniency or lesser penalty programme. The first major change proposed is the introduction of *leniency plus*, which allows the CCI to grant additional leniency in penalty in a situation where a party being investigated for collusive conduct makes a true and vital disclosure of another undisclosed cartel.

The Bill also allows for a leniency applicant to withdraw its application. While the CCI would not be able to use the admission of any wrongdoing by the withdrawing leniency applicant, it could use the information provided by such person as part of its investigation.

Our view – The *leniency plus* regime is a consequence of the successful running that the CCI has had in the leniency realm. It appears that with this amendment it only seeks to further incentivize disclosure of hidden cartels.

(c) Other Significant Proposals

(i) *Appointment and Powers of the DG*

The Bill empowers the CCI to appoint the DG as opposed to the existing position where appointment to the DG's office was made by the Central Government.

The Bill also expands the powers currently provided to the DG under the Competition Act. Going forward, the DG would be able to retain information and documents requisitioned during an investigation for up to 360 days. While the DG currently has powers of summoning and examining officers of a company under investigation on oath, the Bill also grants power to the DG to examine 'agents' (which would include legal advisors, bankers and auditors of a company) on oath.

Our view – The CCI and the DG under the current framework are required to discharge their roles and responsibilities independently, on an arms-length basis. If the DG becomes a CCI appointee, then it remains to be seen what impact this would have on the autonomy of DG's office. Further, empowering the DG to examine advisors and auditors is arguably an excessive measure but the DG may look to use this to gather further information. It is noteworthy that while communications between clients and accountants / auditors don't benefit from legal privilege, communications with lawyers ordinarily do.

(ii) *Penalties*

In addition to the above changes, the Bill also seeks to change the manner in which penalties are imposed by the CCI. The Bill directs the CCI to publish penalty guidelines for various contraventions of the provisions of the Competition Act.

The Bill also enhances penalties for furnishing false information or failing to furnish material information in merger control cases from INR 10 million (approx. USD 126 million or EUR 124 million) to INR 50 million (approx. USD 630 million or EUR 619 million).

The scope of gun-jumping provisions has been expanded to empower the CCI to penalize parties where parties do not provide information requisitioned by the CCI to evaluate whether a non-notified transaction was actually reportable.

(iii) *Mandatory pre-deposit for appeals*

Further, in the event an appeal to an order of the CCI is filed before the National Company Law Appellate Tribunal, the Bill mandates that such an appeal would be entertained only post deposit of 25% of the penalty amount.

(iv) *Conclusion*

The changes proposed in the Competition Act by the government are far reaching. While some of the amendments proposed are progressive, some would impose significant administrative burden on the CCI as well as increase the compliance costs and measures of the parties involved. It is expected that if the Bill is passed, there would be further clarity on the broad mechanisms being introduced by the Bill through the regulations which would be amended by the CCI. Further, the mandate of the CCI to invite public comments on proposed regulations are expected to result in increased transparency and dialogue to help develop comprehensive and pragmatic regulations.

2. EXPANSION OF "GROUP" IN INDIA: NEW NOTIFICATION NEEDED TO AID EASE OF DOING BUSINESS

Publication: Lexology

Introduction

A key notification regarding the definition of "group" under the Competition Act 2002 (as amended) quietly expired on 3 March 2021. As a result, any company that has a shareholding of 26% or more in another company forms part of a single group. This seemingly minor and little-noticed change has had a profound impact on:

- the determination of merger control notifiability;
- the application of "intra-group" merger control exemptions; and
- the abuse of dominance under the Act (potentially).

Given that India is one of the main investment destinations in the world, this may significantly complicate the merger control regime going forward.

2011-2021 group definition notification

Section 5 of the Act[1] defines a "group" as:[2]

two or more enterprises which, directly or indirectly are in a position to: (i) exercise 26% or more of the voting rights in the other enterprise; or (ii) appoint more than 50% of the members of the board of directors in the other enterprise; or (iii) control the management or affairs of the other enterprise.

[1] Relating to identification of notifiable transactions.
[2] Explanation (b) under section 5 of the Act.

Accordingly, every enterprise in which another enterprise exercises any of these rights forms a part of the latter enterprise's group.

Immediately prior to merger control coming into effect in India in June 2011, the Ministry of Corporate Affairs (MCA), through its notification dated 4 March 2011, exempted a group exercising less than 50% of voting rights in other enterprises from the provisions of section 5 of the Act for a period of five years. In 2016, the notification was further extended until 3 March 2021. In effect, for this 10-year period, the notification ensured that the first condition was modified from the "exercise 26% or more of the voting rights in the other enterprise" test to the "exercise 50% or more of the voting rights in the other enterprise" standard.

However, the notification expired on 3 March 2021 and has not been renewed since. Accordingly, the voting rights bright-line test to be part of a group has reverted to 26%, as provided under section 5 of the Act. There are several implications that have largely gone unnoticed globally and in India.

The most obvious result is that many more companies can now be considered part of a group if the top company shareholding is between 26% and 50% and has a share ownership of 50% or more. The turnover and assets of all these companies now have to be included in the notifiability assessment.

This is explained in the following example: entity A (as the ultimate parent entity of group A) has a 51% shareholding in A1. Further, other shareholders of A1 include independent private equity players: X and Y, where X has a 26% shareholding in A1 and Y has a 23% shareholding in A1.[3] When the notification was still effective, A1 belonged solely to group A. However, after it expired, A1 has been part of both group A and, separately, group X.

Assessing notifiability of transaction to CCI

After the expiration of the notification, assets and turnover for a relevant entity (in the acquirer group) have to be calculated by combining the consolidated financials with the financials of all other entities where the relevant entity has a shareholding between 26% and 50%, in order to determine whether a merger control notification is required.

Among other thresholds, transactions[4] require a merger control notification to be made to the Competition Commission of India (CCI) if the combined assets or turnover of the acquirer group, the transferee group and the target or transferor company jointly exceed specified financial thresholds under the Act. The specific thresholds where the precise meaning of "group" come into play while determining notification requirements in India are provided below:

Parties to be considered for assessing notification threshold – selected tests	Relevant financials to be considered	Threshold figures
Acquirer group and target (in case of an acquisition)[5]	Assets in India	80 billion Indian rupees ($1.05 billion)
Acquirer group and target (in case of an acquisition)[6]	Turnover in India	240 billion Indian rupees ($3.17 billion)
Acquirer group and target (in case of an acquisition)[7] (both India and global thresholds must be met)	Assets in India	10 billion Indian rupees ($128.78 million)
	Assets globally	$4 billion

3 This example presumes that none of the shareholders have any affirmative voting rights or rights to appoint a director on the board of A1 excluding A.
4 Potentially notifiable transactions under the Act are acquisitions, mergers, or amalgamations.
5 This includes the acquisition of control in an entity that is competing with another entity already controlled by the acquirer.
6 Please see endnote 5.
7 Ibid.

Parties to be considered for assessing notification threshold – selected tests	Relevant financials to be considered	Threshold figures
Acquirer group and target (in case of an acquisition)[8] (both India and global thresholds must be met)	Turnover in India	30 billion Indian rupees ($396.93 million)
	Turnover globally	$12 billion
Transferee group and transferor company (in case of a merger or amalgamation)	Assets in India	80 billion Indian rupees ($1.05 billion)
Transferee group and transferor company (in case of a merger or amalgamation)	Turnover in India	240 billion Indian rupees ($3.17 billion)
Transferee group and transferor company (in case of a merger or amalgamation) (both India and global thresholds must be met)	Assets in India	10 billion Indian rupees ($128.78 billion)
	Assets globally	$4 billion
Transferee group and transferor company (in case of a merger or amalgamation) (both India and global thresholds have to be met)	Turnover in India	30 billion Indian rupees ($396.93 million)
	Turnover globally	$12 billion

As can be seen from these selected notifiability tests, asset and turnover financials for a group are relevant for several notification thresholds under the Act. In this regard, whether companies and other business organisations are part of a group becomes a critical issue when assessing merger control notifiability under the Act.

For context, a transaction becomes notifiable to the CCI if any of these thresholds are met.

To understand the true impact of the non-renewal of the group voting rights test, comparing how notifiable transactions were assessed prior to the expiration of the notification is useful. Between 2011 and 2021, parties would consider the consolidated financial statements of the ultimate parent entity of the acquirer group or transferee group to identify the assets and turnover at the group level. This was standard practice because consolidated financials included the assets and turnover of all entities in which the parent entity has 50% or more shareholding. This was a quick and efficient way to assess notifiability, as the 50% shareholding cut-off for consolidated financials tallied with the voting rights threshold set out by the notification.

However, now that the voting rights threshold has decreased to 26%, consolidated audited financials alone will no longer be sufficient to identify the group to which an enterprise belongs – to the extent they do not include the assets and turnover of various entities where the ultimate parent entity will have shareholding or voting rights below 50% but above 26%.

This can be explained by expanding upon the example provided above: A1 is acquiring control or a shareholding in a third party (P) where A1 is the acquirer and P is the target. In this regard, the first group threshold (as mentioned in the above table) will be met if either:

- A (being the ultimate parent entity in the acquirer group) and P jointly have assets of more than 80 billion Indian rupees in India; or
- X (being the ultimate parent entity in the acquirer group) and P jointly have assets that total the same amount in India.

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[8] Ibid.

In this regard, prior to the expiration of the notification, the consolidated financials of A[9] were considered to identify the assets or turnover at the acquirer group level. However, now the assets and turnover of A or X will be calculated by combining the consolidated assets or turnover of A or X added with the assets or turnover of all other entities in which A or X has a shareholding between 26% and less than 50%.

Given that many large companies have a vast network of associate or affiliated companies (ie, companies in which the top parent entity has less than a 50% shareholding) and cross shareholdings, merger control notifiability assessment in India has become significantly more complicated. This will also likely increase the number of notifiable transactions in India.

Inconsistencies in "acquirer group" and "target" definitions

Another impact of the notification's expiration is the differential treatment meted out to the direct parties to a transaction and the ultimate parent entity while assessing financials in notifiability exercises.

Under the Act, notification thresholds can be met or exceeded jointly, either by:

- group thresholds tests – the acquirer group or transferee group and the target or transferor company; or
- parties' thresholds tests – the acquirer and the target or the merging or amalgamating entities (ie, the transferor and the transferee companies).

To illustrate, using the above example, the acquisition of P by A1 requires a notification to the CCI if either the consolidated financials of A1 and P jointly meet any of the parties' thresholds tests or if A or X and P jointly meet any of the group thresholds tests in the manner explained above.

The expiration of the notification demonstrates an inconsistency in relation to what financials are included in an acquirer group in contrast with what financials are included with regards to:

- a target;
- an acquirer;
- a transferor company; or
- a transferee company.

Under the Act, those four entities each constitute an "enterprise", the definition of which clarifies that they include subsidiaries. This aligns with consolidated financial statements, which are inclusive of subsidiaries.[10]

Therefore, while applying the parties' thresholds tests, the consolidated financial statements of the relevant entities are enough to assess if notification thresholds are breached. However, as explained above, when calculating group thresholds tests now, the assets and turnover of the ultimate parent entity must be considered by combining the consolidated financials with the value of assets and turnover of all the entities in which the ultimate parent entity has a shareholding of between 26% and 50%. Given that the ultimate parent entity is also an "enterprise" under the Act, the threshold for identifying the assets or turnover of an ultimate parent entity should be the same as the threshold for identifying the assets or turnover of an acquirer, target, transferor company or transferee company.

The following example explains this dichotomy: if A is acquiring P (instead of A1 in contrast to the earlier example), the parties' thresholds tests will be met if the consolidated financials of A and P meet the notification thresholds. However, if group notification thresholds are applied, the consolidated financials of A (which is the

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9 Prior to the expiration of the group definition notification, A1 belonged solely to group A.

10 Under the Companies Act 2013, a company is stated to be a subsidiary company if the holding company either controls the composition of the board of directors or exercises of controls more than one-half of the total voting power either on its own or together with one or more of its subsidiary companies. The definition of "subsidiary" under section 2(87) of the Companies Act 2013 is available at: https://www.mca.gov.in/bin/ebook/dms/getdocument?doc=NTk2MQ==&docCategory=Acts&type=open.

ultimate parent entity in group A) will have to be added to the financials of all entities in which A has a shareholding of between 26% and 50% along with the consolidated financials of P.[11]

This dual treatment of A (depending on the nature of notification tests applied) is clearly a departure from the typical legal position. Further, this dichotomy does not make sense from a competition perspective, given that, when A is the acquirer and P is the target, the competitive concerns will not change simply because A is considered as the group entity rather than the direct party to the transaction. Therefore, it makes little sense that the assets or turnover figures of A (at the group thresholds test level) should be inflated against the figures considered for A (at the parties' thresholds test level).

Expansion of intra-group exemption

The CCI's (Procedure in regard to the transaction of business relating to combinations) Regulations 2011 exempt intra-group acquisitions if certain thresholds are met. Since the expiration of the notification, the scope of the intra-group exemption is widened, which can allow certain problematic transactions to pass through without CCI merger control review. Specifically, as explained below, transactions where a change in control occurs from negative control[12] to majority control can use the intra-group exemption, in contrast to the previous position where such significant change in control transactions would require approval from the CCI.

Because of the effective expansion of the definition of "group" in March 2021, a change of negative to positive control can easily use the intra-group exemption and, therefore, may avoid scrutiny, even if such increment in control causes competitive concerns.

This is explained in the following example: A has a 26% shareholding in A1, and no other shareholder has more than a 26% shareholding.[13] In this regard, if A proceeds to acquire another 50% shareholding in A1 by way of either primary or secondary purchases (whereby A will have a 76% shareholding in A1), such transaction will be able to use the intra-group exemption. Importantly, the pass-through of such transactions can be problematic; as such, a significant change in the degree of control can have considerable competitive impact in the market.

Because of the expansion of the definition of "group", it is plausible that various transactions between entities (forming part of the same group under the updated "group" definition) could potentially end up escaping scrutiny by the CCI. Since the legislative intent behind the intra-group exemptions was to only allow non-problematic transactions to pass through, the non-renewal of the group definition notification can potentially problematic transactions to escape CCI merger control scrutiny in light of the effective modification of the intra-group exemptions.

Comment

Given that the MCA is committed to the principles of "ease of doing business", the non-renewal of the group definition notification is surprising. The absence of the notification significantly increases the regulatory burden on the CCI, while also increasing the burden on the parties to a combination to disclose additional information. Parallelly, the notification's expiration has also widened the scope of the intra-group exemptions, thereby possibly allowing potentially problematic transactions to escape merger control scrutiny. Curiously, the MCA has chosen not to tackle this issue yet, even though most of the problems related to it were highlighted by the Merger Working Group of the International Bar Association's Antitrust Section in its submission to the MCA dated 7 March 2022. Aside from merger control, the expiration of the notification can also have a far-reaching impact in assessing abuse of dominant position cases.[14]

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11 For the avoidance of any doubt, prior to the expiration of the group definition notification, both the parties' thresholds tests and the group thresholds tests would be assessed using the consolidated financial statements of A and P.

12 A shareholding between 26% to less than 50% where the shareholder can only block special resolutions.

13 Presuming that no shareholder has any other control rights.

14 Abuse of dominant position is dealt with under section 4 of the Act. The operative portion of section 4 clearly mentions that no enterprise or "group" shall abuse its dominant position. Further, section 4 defines the term "group" to have the same meaning as given under section 5 of the Act. Therefore, given the expansion of the "group" definition under section 5, the scope of the prohibition on abuse of dominance now extends significantly. This issue is further complicated since a single enterprise can now belong to three separate groups purely based on shareholding (presuming that at least three separate entities can have 26% shareholding in an entity).

The notification's expiration appears to be an oversight at first glance and an innocuous mistake when examined in more detail. It is hoped that India will issue a new notification to prevent the significant issues that have arisen in the past year from continuing.

3. EU'S NEW TAKE ON DUAL DISTRIBUTION - LESSONS FOR INDIAN ENTERPRISES

Publication: Lexology

In May 2022, the European Commission (EC) adopted the new Vertical Block Exemption Regulation (New VBER) and Vertical Guidelines which were implemented from 1 June 2022.

Agreements between firms operating at different levels of the supply chain are referred to as "vertical agreements". Competition regulators across the world typically penalise vertical agreements only if they cause an adverse effect on the state of competition in the market.

The EC allows certain vertical agreements to escape competitive scrutiny by providing them safe harbour under the previous Vertical Block Exemption Regulations (VBER), which expired on 31 May 2022. Typically, the VBER allowed vertical agreements to avoid competitive scrutiny when the parties to an agreement individually had a market share of less than 30%.

While the earlier provisions of the VBER have largely been retained, one of the key changes in the New VBER pertains to "dual distribution". This article provides a brief background regarding this change and attempts to identify the possible impact of this change on the Indian market.

What is Dual Distribution?

Dual distribution refers to situations where a manufacturer / supplier (Upstream Player) sells its goods or services to end customers both – directly, and indirectly through its distributors / resellers (Downstream Player).

Pertinently, dual distribution arrangements entail a vertical agreement between an Upstream Player and a Downstream Player, both of whom also act as competitors in the downstream market.

What are vertical agreements with respect to Dual Distribution?

In dual distribution arrangements, the Upstream Player has vertical supply agreement(s) with the Downstream Player(s). These agreements often allow for exchange of information relating to prices (including final resale prices), end-customer details, technical information, customer behaviour, demand patterns, etc. Such exchanges are relevant in improving the quality of supply and distribution. If the Upstream Player is engaged in dual distribution, the aforesaid agreements qualify as "vertical agreements with respect to dual distribution".

In a dual distribution situation, the exchange of the said information can lead to collusion or softening of competition between the Upstream Player and the Downstream Player in the downstream market. This can be done through the limiting supply of products / services, geographical / customer allocation, foreclosure, denial of market access, etc., considering that both the entities are essentially competitors from an end customer's point of view.

Simply put, where the Upstream Player is engaged in dual distribution, information exchange under vertical agreements can cause competitive concerns in the downstream / retail market.

What does the New VBER say about Dual Distribution?

Agreements associated with dual distribution were mostly seen as kosher under the VBER. However, as direct sales (particularly website-based sales by manufacturers themselves) have picked up pace post 2020, dual distribution has become a contentious issue.

Originally, the draft New VBER proposed that a safe harbour would only be available for vertical agreements with respect to dual distribution where the combined market share of the parties is below 10%. Such a narrow threshold effectively took away the benefit of VBER from most dual distribution players.

However, after deliberation with relevant stakeholders, this threshold was done away with, and under Article 2(6) of the New VBER, safe harbours for information exchange in dual distribution situations were provided as long as the individual market shares of the Upstream Player and the Downstream Player are below 30%. Pertinently, this is the general threshold for all types of vertical agreements which benefit from VBER.

Curiously, the safe harbour for dual distribution under New VBER is made subject to additional qualifications. As such, the safe harbour remained inapplicable if the exchange of information, (i) is not directly related to implementation of the vertical agreement, or (ii) is not necessary "to improve the production or distribution of the contract goods or services".

As non-exhaustive examples, the EC clarified that the exchange of technical information, information regarding customer preferences and feedback (on an aggregated basis), etc. are likely to be non-problematic; while the exchange of information relating to actual / future prices, granular customer level information, etc. is problematic and thus outside the scope of the New VBER.

How does this change impact the Indian market?

The EC's original position in narrowing the scope of VBER (by way of a 10% threshold), and the updated position by adding qualifications to the 30% market share threshold, clearly signal that the EC perceives that dual distribution could cause adverse effect on competition. Therefore, it is unwilling to give such agreements blanket protection from regulatory actions.

While the VBER has no application in India and the amendment has no direct impact on vertical agreements in India, the regulatory shift of the EC's perspective can have a significant impact on Indian firms engaging in dual distribution.

As a matter of practice, the Competition Commission of India (CCI) tends to follow experienced competition law jurisdictions such as the EC in its enforcement strategies and trends. In the past, the CCI has clearly taken inspiration from the EC in pursuing enforcement actions in sectors such as cement, steel, e-commerce, etc. The CCI has also aligned itself with the EC by initiating multiple enforcement proceedings against enterprises which are similar to cases agitated in the EC in both, fact and scope.

Given the above, it is highly possible that the CCI will adopt its enforcement strategies going forward to inquire into / take actions against entities engaged in dual distribution in India. Considering that dual distribution is seeing an uptick through established brands and the rise of "next-generation consumer goods companies", enterprises will need to engage in diligent sanitary checks / exercises to ensure that their existing practices don't fall foul of the Competition Act, 2002.

Considering that Indian competition law does not provide any market share based safe harbours for vertical agreements, entities engaged in dual distribution must safeguard themselves against risks of possible enforcement action by:

- getting vertical supply / purchase agreements vetted from a competition law standpoint to ensure that problematic information is not exchanged;
- establishing firewalls / clean team protocols / firewalls to ensure that the information received by an Upstream Player (in the capacity of a supplier) does not lead to anticompetitive behaviour in the downstream market; and
- updating existing agreements / arrangements to ensure their compliance with principles of competition law.

4. APPLICABILITY OF THE "SINGLE ECONOMIC ENTITY" CONCEPT TO CARTELS

Publication: Legal Era

Section 3 of the Competition Act, 2002 (as amended) (Act) prohibits agreements that cause an appreciable adverse effect on competition in India. The CCI's jurisprudence on Section 3, and specifically cartels, has become quite nuanced and mature. However, an issue that remains unsettled between the CCI and parties defending allegations of anticompetitive conduct is whether agreements between a corporation and its "group"[15] entities can be investigated and enquired into under Section 3 of the Act.

It is often argued that entities falling within the same group are essentially part of a single economic entity (SEE), and hence, agreements among group entities cannot be scrutinized under Section 3 of the Act. The SEE defense emanates from the principle that a corporation cannot collude or conspire with its own group enterprises, as a result of common interests, joint functioning, and lack of independence of such enterprises. The SEE concept has been previously considered by the CCI in several cases, but with divergent interpretations.

CCI's Decisional Practice so far

In the *Exclusive Motors*[16] case, the CCI examined allegations of an anticompetitive agreement under Section 3 of the Act between Automobili Lamborghini S.P.A. (Lamborghini) and Volkswagen Group Sales Private Limited (Volkswagen) and observed that agreements between entities constituting one enterprise could not be assessed under the Act. The CCI noted that as long as Lamborghini and Volkswagen formed part of the same group, they would be a SEE and an internal agreement between them would not be considered as an agreement for the purposes of Section 3 of the Act. Notably, the erstwhile Competition Appellate Tribunal (COMPAT) upheld the CCI's findings on SEE after highlighting the parent company's significant shareholding in the subsidiary.

Similarly, in the *Shamsher Kataria*[17] matter, the COMPAT concurred with the CCI's observations on certain automobile manufacturers' overseas agreements with their parent companies / affiliates abroad. It concluded that the respective manufacturers and their parent / affiliates could be termed to be part of a SEE since they belonged to the same group where the affiliate's decision-making was largely influenced by the parent's policy. On this basis, the COMPAT determined that the internal overseas arrangements between the parent companies and their affiliates were excluded from scrutiny under Section 3(4) of the Act.

Keeping up with this trend, the CCI assessed claims of contravention of Section 3 of the Act in *Kansan News*[18], but refused to hold the entities, which were part of the same group, liable under Section 3(3) of the Act. It opined that they could not form a cartel.

The CCI further clarified its views in the *Public Sector Insurance Cartel*[19] case. Bid rigging in a tender floated by the Government of Kerala was alleged against certain public sector insurance companies (PSICs). The PSICs asserted that they constituted a SEE as the Government of India, through the Ministry of Finance (MoF), held 100% shareholding in them and controlled their management and affairs. Nevertheless, the CCI rejected their claims while observing that (i) the PSICs placed separate bids in response to the tender, and (ii) the PSICs participated in the tender independent of the MoF, through independent decision-making and strategies. After establishing these facts, the CCI noted that the MoF did not exercise any de facto or de jure control over the PSICs' business decisions in submitting the tender bids. The CCI observed that the PSICs were separately incorporated, competing entities with separate balance sheets and concluded that they could not constitute a SEE.

Comparably, in the *Delhi Jal Board*[20] case, while countering bid rigging allegations, Grasim Industries Limited (GIL) and Aditya Birla Chemicals (India) Limited (ABCIL) contended that, as part of the same group, they constituted a SEE, with common decision makers, management / employees, promoters, directors, customers, logo, central marketing team, etc. and could therefore not be held liable for cartelization. The CCI highlighted

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[15] Explanation (b) of Section 5 of the Act defines "group" as two or more enterprises which are, directly or indirectly, in a position to:
a. exercise 26% or more of the voting rights in the other enterprise; or
b. appoint more than 50% of the members of the board of directors in the other enterprise; or
c. control the management or affairs of the other enterprise.

[16] *Exclusive Motors Private Limited v. Automobili Lamborghini S.P.A.*, Order dated 6 November 2012 in Case No. 52 of 2012.

[17] *Toyota Kirloskar Motor Private Limited v. Competition Commission of India*, Order dated 9 December 2016 in Appeal No. 60 of 2014.

[18] *Kansan News Private Limited v. Fastway Transmission Private Limited*, Order dated 3 July 2012 in Case No. 36 of 2011.

[19] *In Re: Cartelization by public sector insurance companies in rigging the bids submitted in response to the tenders floated by the Government of Kerala for selecting insurance service provider for Rashtriya Swasthya Bima Yojna*, Order dated 10 July 2015 in Suo Motu Case No. 02 of 2014.

[20] *Delhi Jal Board v. Grasim Industries Limited and Others*, Order dated 5 October 2017 in Reference Case Nos. 03 and 04 of 2013.

that despite being part of the same group, GIL and ABCIL bid as separate entities and behaved like competing companies in the market as well as before the procurer. The CCI ascertained that, GIL and ABCIL, by submitting different bids, consciously decided to represent themselves as independent decision-making centers to the procurer and accordingly refused their SEE claims. The CCI, in addition to its factual analysis, went a step further and distinguished bid rigging cases in public procurement from previous cases that dealt with SEE. It highlighted that the definition of "group" under Section 5 was applicable only to merger control and could not be applied to proceedings under Section 3 of the Act. CCI's distinction of the SEE concept in bid rigging matters can also be seen in a subsequent order[21], where the CCI dismissed claims of bid rigging against entities of the same group, primarily because the procurer was specifically informed that the bidding entities were related.

The CCI, however, switched its position in its recent decision in the *Shipping Lines Cartel*[22] case. Inconsistent with its previous orders, the CCI explicitly held that the concept of group or SEE is inherently unknown and inapplicable to cartel proceedings.

Aftermath

The shift in the CCI's standpoint in the *Shipping Lines Cartel* order has resulted in significant ambiguity in the applicability of the SEE defense to proceedings under Section 3 of the Act. If the CCI decides to adopt such a view in future cases, agreements between subsidiaries and their parent enterprises could become subject to antitrust scrutiny. This may adversely impact the ease of doing business in the country, with corporations being required to reassess their internal group arrangements from a competition perspective. The Shipping Lines Cartel decision can potentially expose corporations to motivated and frivolous complaints before the CCI, with the unforeseen scrutiny of agreements within a group.

5. CCI SIMPLIFIES FORM II NOTIFICATION FORMAT

Publication: Bloomberg Quint

In a welcome move, the Competition Commission of India (CCI) has published the revised format of Form II (long form) to notify reportable transactions. While the overhauled format was published on 31 March 2022 by way of amendment to the CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011 (Combination Regulations), the requirement to comply will come into effect from 1 May 2022.

A Form II is typically required to be filed with the CCI where parties to a notifiable transaction (i.e., transactions that breach prescribed financial thresholds) have a combined market share of over 15% (in horizontally overlapping markets) or over 25% (in vertically overlapping markets). Transactions involving a lesser combined market share of the parties can be notified by way of Form I (short form).

The present format of Form II, which comprises 13 queries, is fairly repetitive and at times, ambiguous in its scope. Moreover, some of the questions are excessive and seek voluminous information with little or no bearing on the competition analysis.

The revised Form has not only reduced the number of queries to 7 but has improved the overall structure of the Form II by, inter alia, clubbing similar questions under a common head. The queries can broadly be classified into the following heads:

- information about the merger/acquisition/amalgamation (including a description of the merger/acquisition/amalgamation, value of the transaction, rights to be acquired by the parties, timelines, etc.);
- corporate information about the parties (including details of financial values, shareholders, directors/key employees, downstream investments, group structure, etc.);

[21] *NLC India Limited v. M/s Phoenix Conveyor Belt India Private Limited and Others*, Order dated 9 November 2018 in Case No. 42 of 2018.

[22] *In Re: Cartelisation by Shipping Lines in the matter of provision of Maritime Motor Vehicle Transport Services to the Original Equipment Manufacturers*, Order dated 20 January 2022 in Suo Motu Case No. 10 of 2014.

- business related information (including a list of business activities of the parties/group/portfolio companies, offices/factories, trademarks, etc.);
- information in relation to overlapping markets (including details of structure of the market, market size, market share of the parties and competitors, suppliers, customers, legal framework, recent R&D activities, recent entry and exits from the market, impex details, etc.); and
- analysis of the likely impact of the merger/acquisition/amalgamation on competition and economy.

Comment and Takeaways

This amendment was in the offing for a while and has finally seen the light of the day. The amended Form enlists more meaningful questions fundamental to competition impact assessment and does away with several onerous and superfluous questions.

While the format of Form II has been streamlined and simplified, the enhanced rigour to capture all the material information relevant to carry out competition analysis is clearly discernible. For instance, the revised Form II format has introduced the requirement for providing quantitative market facing data for the last 5 years in relation to market size, market share of the parties and competitors, and customers and suppliers (as opposed the current requirement of providing data for only 1 year). This will likely aid the CCI to appreciate the market dynamics better and over a longer span of time, and allow it to reach a more informed decision.

The revised Form II format also reveals striking similarities with the Form I format queries. For instance, the query on foreign investment, country of origin, complementary overlaps, alternate plausible markets, etc. find mention in the updated Form II format as well.

This development resonates with the CCI's continuous efforts to proactively adopt business friendly processes, especially in the context of merger control. In August 2019, the CCI had simplified the Form I format and also introduced the Green Channel route under which a transaction without any overlaps between the parties will be deemed approved upon filing. In a similar vein, in 2020, the CCI issued the guidance note to Form I which provided further clarity to stakeholders. With the simplification of the Form II format, the CCI has reinforced its commitment to contribute to the central government's "ease of doing business" initiative.

6. ARTIFICIAL INTELLIGENCE, ALGORITHMS AND INDIAN ANTITRUST

Publication: Lexology

The world, as we know it, is rapidly digitising through breakthrough advancements in artificial intelligence (AI). Data sciences and AI are indeed the new reality and no longer a work of fiction as perceived in sci-fi movies. The increasing prevalence of data is driving businesses to develop and use AI to remain competitive in the market. Recent developments in machine learning have in fact elevated algorithms to a new level, enabling machines to analyse, act and learn with a human-like level of intelligence.

This characteristic of automated systems has drawn interest from global antitrust regulators as it enables businesses to achieve collusive outcomes without requiring an agreement in the traditional antitrust sense. Thus, the biggest challenge before regulators is detecting such price-fixing and tracing automated manipulation in the market, which is difficult, if not nearly impossible.

Further, AI can lead to unintended or autonomous collusion. Another associated challenge is establishing a causal link between algorithms and harm. Given these challenges, the overwhelming attention to algorithms globally seems justified. The Competition Commission of India (CCI) has also encountered issues related to algorithms in the airline and ride-hailing sectors. This article provides an overview of the anticompetitive usage of algorithms in India, and the extent to which such cases correspond to the global trend of such arrangements.

Algorithm cases

In 2018's *Ride-hailing* case,[23] the informant alleged that drivers have delegated their pricing decisions to common cab aggregator intermediaries (Ola and Uber) in a hub-and-spoke style cartel. The drivers, though independent contractors as submitted by Ola and Uber, followed the prices set by the pricing algorithms of the cab aggregators, and thus allegedly engaged in price-fixing to set supra-competitive prices.

Disagreeing, the CCI reasoned that cab aggregators are not associations of drivers and though the drivers charged the algorithm-determined prices, they did not agree among themselves to delegate the pricing power to the apps. Thus, they had no opportunity to coordinate fares while accepting rides. The CCI was also convinced that fares were dynamically priced, factoring in several parameters, such as:

- distance;
- traffic;
- number of riders; and
- drivers.

Such algorithmic pricing could be beneficial as well, as was noted in *Webtaxi*.[24] In this case, taxis belonging to several companies used Webtaxi, a booking platform in Luxembourg, which set taxi fares for them using price algorithms, based on several factors. The Luxembourg Competition Authority noted the arrangement as by-object restriction but found it beneficial, considering the algorithm-determined fares, based on digressive price per kilometre, would always be equal to, or lower than, the meter price and lower than those of competitors.

Similarly, in the two *Airline*s cases,[25] the CCI twice investigated the pricing of the leading airlines in India in 2014 and 2016 to examine if airfares were manipulated by algorithms. In both cases, the CCI enquired if common software was used or implemented based on a common understanding or such software resulted in price collusion in any way.

Much like the *Ride-hailing* case, the CCI found no evidence of collusion. The finding was supported by various considerations such as, use of different pricing software, and where the same software was used it was customised by historical inputs of the respective airlines. Further, the following factors drove the CCI to exonerate the airlines for the following reasons:

- absence of price parallelism;
- intervention from respective route analysts of airlines to decide airfares; and
- evidence suggesting that pricing was influenced by the extant demand-supply conditions.

In one case, the CCI also noted the heavily fluctuating market shares of airlines during the alleged cartel period.

While it is too early to use these three cases to predict the future trajectory of algorithms and antitrust in India, they do shed light on the challenges associated with automated pricing cartels. They also echo the global trend – namely, most algorithm-related cases that have been found unlawful have one key thing in common: algorithms were used to enforce traditional anticompetitive arrangements. The cases of *Trod* (in the United Kingdom and the United States),[26] *Casio* (in the United Kingdom)[27]and *Cigarette Cartel* (in Spain),[28] among others, serve as examples of that commonality.

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[23] *Samir Agrawal v Competition Commission of India & Ors*, Order dated 6 November 2018 in Case No. 37 of 2018. The CCI decision was upheld by the National Company Law Appellate Tribunal in Competition Appeal (AT) 11/2019 decided on 29 May 2020.

[24] Luxembourg Competition Authority decision 2018-FO-01, 7 June 2018.

[25] *Alleged Cartelization in the Airlines Industry*, Order dated22 February 2021 in Suo Motu Case No. 03 of 2015; and *Ms Shikha Roy v Jet Airways (India) Limited & Ors*, Order dated 3 June 2021 in Case No. 32 of 2016.

[26] *Online sales of posters and frames* (Case 50223), the Competition and Markets Authority (CMA) decision of 12 August 2016. The CMA investigation followed similar investigations by the US Department of Justice in *US v Daniel William Aston and Trod Limited* (2016) and *US v David Topkins* (2015).

[27] *Online resale price maintenance in the digital piano and digital keyboard sector* (Case 50565-2) CMA decision of 1 August 2019.

[28] In 2019, Spain's National Commission of Markets and Competition fined the following companies a combined €57.1 million

In the *Trod* case, Trod and GB Eye were penalised for agreeing not to undercut each other's posters and frames sold on Amazon UK by using repricing software. The case of *Casio* involved imposing resale price maintenance by Casio on retailers that sold its musical instruments online by using automated price-monitoring software. In *Cigarette Cartel*, a few leading tobacco companies and a distributor were fined in Spain and other jurisdictions for sharing real-time sales data and future pricing using software. All these cases indicate the application of textbook competition law principles to online distribution or service as in any traditional form of distribution.

Another concern about algorithms, outside of facilitating "explicit" or "traditional" collusion, is anticompetitive information exchange. The *Eturas* case [29]is a fitting example here, where Eturas, the owner of the online travel booking platform, sent a system-generated message to travel agents to cap the discounts. While Eturas was held liable for acting as a facilitator, Lithuania's highest court extended liability to only those travel agents who were aware of the restriction and did not oppose it.

It is interesting to distinguish the *Ride-hailing* case from the *Webtaxi* and *Eturas* cases. In the latter two cases, the lack of human intervention did not preclude the authorities from recognising the possibility of the facilitation of collusion without a meeting of minds or direct contact. In contrast, the CCI did not even acknowledge the existence of an agreement between cab aggregators and drivers, or drivers inter se in the *Ride-hailing* case, even though the drivers agreed with the cab aggregators to set prices, knowing well that other drivers also have similar arrangements with those aggregators. Thus, this could arguably have been viewed as a hub-and-spoke arrangement, given that drivers (competitors) had delegated price coordination and setting to the cab aggregators (hubs).

However, in the *Airlines* cases, the CCI was mindful of the absence of human interaction and the consequent trouble in establishing an agreement. Therefore, it emphasised in one of the *Airlines* cases that agreement could be deduced from several coincidences and indicia, which taken together and in the absence of an alternative explanation, could evidence an agreement.

Comment

The challenges illustrated above are merely the tip of the iceberg, as the prerequisite of establishing an agreement is especially tested in cases of self-learning AIs, that can result in autonomous tacit collusion. The key challenge remains as to whether such AI is just a tool used by humans or whether its ability to behave autonomously implies that its action cannot be attributable to a human operator. The latter could lead to a regulatory gap unless legal systems address that in advance.

As for future cases, given the opacity of AI systems, regulators globally are suggesting pre-emptive remedies, such as due diligence of algorithmic models of companies, so that companies disclose the workings of their algorithms and are held accountable for decisions made by those algorithms. In a similar vein, the Organisation for Economic Co-operation and Development (OECD)[30] also suggests a few approaches, such as price regulation, policies to make tacit collusion unstable and rules on algorithm design, while being mindful of the multi-dimensional nature of AIs which interface with intellectual property laws, consumer protection laws and data protection laws.

Despite the above concerns, it would be unwise to treat algorithms with only scepticism and hostility. If they can facilitate and automate collusion and unfairly discriminate against vulnerable consumers, they also enhance market efficiencies and allow firms to adapt intelligibly to market conditions in the following ways:

- responding to stock availability;
- capacity constraints;
- reducing search costs and information asymmetries; and

(S/DC/0607/17): (i) Philip Morris Spain; (ii) JT International Iberia; (iii) Altadis; and (iv) Logista Integral Distribution Company.

[29] Case No. A-97-858/2016, Supreme Administrative Court of Lithuania decision of 2 May 2016.

[30] OECD (2017), *Algorithms and Collusion: Competition Policy in the Digital Age*.

- providing price comparisons.

Therefore, although algorithms demand monitoring, especially in concentrated and homogenous markets that are already susceptible to collusion, the measures to address those concerns should be carefully crafted. This has been fairly displayed by the CCI, by not expressing any real concerns in the *Ride-hailing* and *Airlines* cases. However, it would be helpful for the CCI and other stakeholders to better appreciate the workings of AI by undertaking market studies and coordinating with experts in data sciences. A deeper understanding of the mysterious world of AI would facilitate a well-thought-out and balanced regulatory intervention.

As for companies using algorithms, "compliance by design", which can be achieved by documenting the purpose, inputs and technical workings of AIs, is the best option. The software developers are equally encouraged to customise algorithms to the individual customer's needs to avoid collusive outcomes and have robust confidential agreements to avert leakages of classified information.

7. DIGITAL A NEW CHALLENGE TO COMPETITION AGENCIES

Publication: Legal Era

Digital economy, extremely fast-paced, is primarily based on innovations. Innovations are one of the most soughtafter “safe-harbors” against anti-competitive practices which any defense counsel would prefer to advance this argument in the course of proceedings before competition agencies.

The market-share concentration amongst few global digital enterprises leading to either monopolization or oligopolistic concentration, may be a cause of worry for competition agencies. Coupled with foregoing, the option to acquire start-up digital enterprises is another facet often times characterized as “killer acquisition” but may also be an economic efficiency enhancing conduct between the parties. Thus, it is too early to confirm all commercial activities of digital enterprises are per se anticompetitive.

Options are being considered to introduce ex-ante legal regime to check the unfettered growth of few digital enterprises. However, ex ante assessment of ex post facto breaches, if any, may rarely be identical to exercising suo motu powers hence, a legal contradiction perhaps.

The economists and other experts who regularly assist and advise the Commissioners of competition agencies in all matters, must engage in carrying out robust research to find out authentic objective and economic justifications of the business models of these innovative enterprises.

As regards “self-preferencing”, “gatekeeping” and “network effects”, the emerging terminologies governing the current thought processes of competition agencies, are concerned, all these ingredients are found in traditional markets also. The members of trade associations, using the platform of trade association, promote their own business interests with all authorities and plead for better commercial terms which seem very similar to “self-preferencing”.

These traditional industry sectors, either represented by their associations or by their own corporate business strategies, directly or indirectly prefer not to allow new entrants to enter the relevant market which seems identical to “gatekeeping”.

Finally, the unwritten and sometimes written strategies of integration amongst upstream, mid-stream, downstream and end consumers/customers are identical to “networking” amongst the various independent enterprises in the entire vertical business chain of any industry segment. To demonstrate by an example, the concept of maximum retail price (MRP), validated by the Indian Legal Metrology Act 2009, is one of the most pernicious concepts of price-fixation in the entire vertical business chain which may be frowned upon by any competition agency not having the disadvantage of Legal Metrology Act equivalent. Most of the time manufacturers, setting the MRP, directly and/or indirectly ensure that a market operating price (MOP), below the MRP, be maintained throughout the vertical business chain until it reaches the end consumers. The MOP, more often than not, lead to fixation of “minimum resale price maintenance” between manufacturers and its distributors. The Indian Commission (CCI) by applying existing provisions of the law has remedied these anti-competitive practices in the traditional markets thus far successfully. The latest decision of the CCI in the Maruti

Suzuki case is an illustration in this behalf. With a bit of up to date but robust research by experts within a competition agency it seems that digital enterprises too can be investigated successfully and possible anti-competitive adverse effects, if any, can also be remedied without carrying out drastic amendments to the law.

A bouquet of few on-going cases, handled by the CCI within the existing framework of the law, would confirm the foregoing analyses more comprehensively:

- The CCI via a prima facie order directed the office of the DG to investigate allegations of abuse of dominance against Amazon and Flipkart and both these digital enterprises challenged the jurisdiction of the CCI in Constitutional Writs before High Court and finally before the Supreme Court of India but failed to get any favorable order against the CCI. Investigation before the DG has resumed and the same is sub-judice as on date.

- The CCI took suo motu cognizance of WhatsApp's updated privacy policy which enabled it to share user data with Facebook and its subsidiaries. The CCI prima facie held privacy to be an element of non-price competition and that in digital markets, unreasonable data collection and sharing may grant competitive advantages to the dominant players and may result in exploitative as well as exclusionary effects. The investigation is sub-judice.

- Apple is alleged to impose unlawful restraints on app developers from reaching users of its mobile devices (e.g., iPhone and iPad) unless they go through the 'App Store' which is stated to be controlled by Apple. The Commission is of the prima facie view that mandatory use of Apple's IAP for paid apps & in- app purchases restrict the choice available to the app developers to select a payment processing system of their choice especially considering when it charges a commission of up to 30% for app purchases and in- app purchases.

Finally, amendment as normally has been suggested across jurisdictions, may solve some issues momentarily but it is reiterated that as the innovation in the digital market is extremely fast-paced, the competition agencies cannot keep pace with such dynamism and cannot plead frequent amendments to meet the challenges of the dynamic changes in this market. Most of the competition legislations do not per se envisage that all business entities must be investigated. All businesses are prima facie not engaged in anti-competitive practices. It is the statutory duty of the competition agency, assisted by a competent investigating wing and the experts on law and economics, to find out by adhering to the "principles of natural justice" the sub-set of business within a whole pie of any business model and establish breach, if any. This process must be carved out diligently.

Conclusion

In India, for example, the first trigger to scrutinize any combination of enterprises is assessing the combined thresholds of assets and turnovers of such enterprises. However, applying these thresholds for digital enterprises may not always allow the CCI to scrutinize combination of digital enterprises. This legal infirmity may be remedied by introducing the transactional value of the deal besides the existing rule of assets and turnover tests. No further amendment in law may be needed in our view as of now.

8. IDENTIFYING THE BOTTOM LINE: WHAT GUIDES THE IMPOSITION OF ANTITRUST PENALTIES IN INDIA

Publication: Competition Policy International

With the ebbing of the pandemic's second wave, the Indian competition authority (Competition Commission of India (CCI)) is back to full throttle. Nearly 50 percent of the CCI's penalty orders[31] since the onset of the COVID-19 pandemic were issued in the previous three months.[32] A common thread in the recent penalty orders is the

[31] Orders under Section 27 of the Competition Act, 2002 (Act).

[32] 8 out of 16 orders under Section 27 of the Act issued through March 2020 and November 2021 were passed between August 2021 and November 2021. Interestingly, this is a higher rate of activity than recent pre-COVID periods (2018-2019).

weightage afforded to the pandemic's impact on the contravening parties, particularly in cases involving MSMEs.[33] In this article, we review the impact of emergent circumstances on the CCI's contravention orders. In the process, we also identify discernible trends (or the absence thereof) in the CCI's penalty imposition, some of which predate the pandemic.

A Rocky Foundation?

In the absence of criminal sanctions, monetary penalties remain the only effective tool to serve as a deterrent under Indian competition law. Consistent with international standards, a breach of competition rules in India can expose an entity to a penalty of up to 10 percent of the average turnover for the "last three preceding financial years" or in case of cartels – "up to 3 times the profits for each year during which the cartel subsisted." Given the mammoth extent of penalties that the CCI is empowered to impose, it sure does make for a powerful enforcement weapon to check anticompetitive behavior.

Taking the bull by its horns and making a statement about its arrival, the CCI imposed headline grabbing fines in the *Cement Cartel* case,[34] *DLF* case,[35] *NSE* case,[36] and the *Auto-parts* case[37] – all of which are pending in appeal before the Supreme Court of India (SC). The quantum of fines imposed sent shockwaves across business houses in India until the SC, in its landmark *ALP Tablets* judgment,[38] clarified that fines should be determined based on "relevant turnover" or the revenue accruing from the business unit infringing the relevant provisions of the Act. This golden rule became the guiding light for the CCI (over and above the doctrine of proportionality, factoring in mitigating and aggravating circumstances) while quantifying penalties in futures cases.

For a number of decisions thereafter, the CCI religiously applied the relevant turnover test to impose fines. For instance, the relevant turnover in a case concerning the public procurement of LPG cylinders was the revenue realized from the sale of LPG cylinders.[39]

Typically, the CCI discloses its methodology in imposing fines – the benefits of which are three-fold: (i) promotion of the CCI's accountability, (ii) facilitation of effective appeals to penalty orders, and (iii) provision of certainty to stakeholders.

However, of late, certain orders of the CCI haven't identified a relevant turnover or disclosed the methodology adopted based on which the party was penalized.

For instance, in February 2021, the CCI imposed an INR 0.2 million penalty on an association of publishers and booksellers for collusion.[40] More recently, in August 2021, the CCI penalized Maruti Suzuki India Limited with INR 2000 million for implementing discount control policies (*Maruti* case).[41]

A conspicuously missing piece in both orders is the relevant turnover and percentage of the relevant turnover on which the fine was imposed by the CCI. Admittedly, Section 27 of the Act[42] allows the CCI to impose penalties "*as it deems fit*" and does not explicitly require the CCI to disclose any methodology. However, Section 27 of the Act must be read in conjunction with Section 36 of the Act – which requires that the CCI be guided by the principles of natural justice. A cardinal principle of natural justice is that orders passed in the discharge of adjudicatory functions must be reasoned orders.[43] This serves a two-fold purpose: first, reasoned orders enable the party against whom a decision is passed to effectively challenge the CCI's orders; and second, reasoned orders act as a check on arbitrariness. Here, we also draw attention to an observation in the *ALP*

[33] MSMEs refers to Micro, Small & Medium Enterprises.
[34] *Builders Association of India v. Cement Manufacturers' Association and Others*, Case No. 29 of 2010.
[35] *Belaire Owner's Association v. DLF Limited and Others*, Case No. 19 of 2010.
[36] *MCX Stock Exchange Limited v. NSE Limited and Another*, Case No. 13 of 2009.
[37] *Shri Shamsher Kataria v. Honda Siel Cars India Limited and Others,* Case No. 03 of 2011.
[38] *Excel Crop Care Limited v. Competition Commission of India*, Civil Appeal No. 2480 of 2014.
[39] *In Re: Alleged cartelisation in supply of LPG Cylinders procured through tenders by Hindustan Petroleum Corporation Limited*, *Suo Motu* Case No. 01 of 2014.
[40] *International Subscription Agency v. Federation of Publishers' and Booksellers' Associations in India*, Case No. 33 of 2019.
[41] *In Re: Alleged anti-competitive conduct by Maruti Suzuki India Limited in implementing discount control policy vis-à-vis dealers*, *Suo Motu* Case No. 01 of 2019.
[42] Section 27 of the Act enables the CCI to impose penalties for a contravention of the Act.
[43] See Judgment of the Supreme Court of India in *M/s Kranti Association Private Limited v. Masood Ahmed Khan and Others*, SLP (C) No. 12766 of 2008.

Tablets judgement.[44] The judgment categorically notes that "*the discretion provided under Section 27 of the Act needs to be regulated…so that there is uniformity and stability with respect to imposition of penalty.*"

Therefore, in the absence of a rational explanation, consistent application as well as disclosure of the CCI's methodology, these penalties may not only be seen as arbitrary but could also invite challenges before appellate authorities. The *Maruti* case[45] is also of particular significance since it is the second case which found a contravention of resale price maintenance (RPM) in India and was therefore, expected to set the tone for RPM enforcement. Perhaps, disclosure of the penalty methodology could've even better signaled the stringency with which the CCI views RPM.

Rejection of "Relevant Income"

The SC's order in the *ALP Tablets* case[46] is the cornerstone of penalty imposition in India since it laid out the concept of relevant turnover (discussed above). Statistics reveal that 35-40 percent of the CCI's penalty orders explicitly reference the *ALP Tablets* case[47] when reasoning the penalty imposed on enterprises.

In stark contrast, only one order (dated February 2021)[48] referenced the *ALP Tablets* case[49] during determination of individual penalties. In said case, an association argued that no penalty could be imposed on its office bearers because the office bearers did not earn an income from the association. Therefore, their "relevant income" was nil.

Adopting a formalistic interpretation of *ALP Tablets* case,[50] the CCI reasoned that "relevant turnover" and not "relevant income" was the subject of the *ALP Tablets* case[51] and altogether rejected the idea of relevant income. It remains, however, unclear why the principle of proportionality should extend itself to enterprises (who benefit from the concept of relevant turnover resulting in trimmed fines) and not individuals (who are penalized based on their entire income).

This position also stands at odds with the practice in leniency matters, where the amnesty granted to the leniency applicant (even prior to the amendments to the "Lesser Penalty Regulations" in 2017)[52] was automatically extended to include employees of the leniency applicant – who were not necessarily named as applicants.

Double Whammy for Individual Penalties

Questions surrounding relevant income aside, much like the rocky foundation based on which penalties for enterprises are determined – recent orders of the CCI remain silent on the percentage used for computing penalties on individuals.[53]

Consider the following string of cases.

In November 2021, the CCI imposed a "*symbolic*" fine of INR 0.5 million on several paper manufacturers for indulging in cartelization.[54] The CCI, however, deemed it fit to impose nil penalties on the office bearers of the

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[44] *Excel Crop Care Limited v. Competition Commission of India*, Civil Appeal No. 2480 of 2014.

[45] *In Re: Alleged anti-competitive conduct by Maruti Suzuki India Limited in implementing discount control policy vis-à-vis dealers*, *Suo Motu* Case No. 01 of 2019.

[46] *Excel Crop Care Limited v. Competition Commission of India*, Civil Appeal No. 2480 of 2014.

[47] *Id.*

[48] *International Subscription Agency v. Federation of Publishers' and Booksellers' Associations in India*, Case No. 33 of 2019.

[49] *Excel Crop Care Limited v. Competition Commission of India*, Civil Appeal No. 2480 of 2014.

[50] *Excel Crop Care Limited v. Competition Commission of India*, Civil Appeal No. 2480 of 2014.

[51] *Id.*

[52] Amendment to the Competition Commission of India (Lesser Penalty) Regulations, 2009 *vide* notification dated August 22, 2017.

[53] For context, Section 27 of the Act prescribes the penalties that can be imposed on "enterprises." The Act defines "enterprises" to include individuals, companies, associations, firms, etc. Therefore, the quantum of penalty that can be imposed on both, individuals and entities (such as, a company), is dictated by Section 27 of the Act. Note that, individuals can be penalised under Section 27 of the Act for "directly" or "vicariously" contravening the Act. So far, the CCI has only investigated individuals for "vicariously" contravening the Act. Under Section 48 of the Act, vicarious liability can be imposed when the key managerial personnel or employees of a company – conducted themselves in a manner that permitted / facilitated a contravention by the company.

[54] *In Re: Anti-competitive conduct in the paper manufacturing industry*, Case No. 05 of 2016.

contravening enterprises. The office bearers were, instead, let off with a warning with no rationale on the differential treatment meted to the office bearers *vis-à-vis* the paper manufacturers.

Interestingly, in October 2021 (not one month prior to the *Paper Cartel* order[55]), the CCI imposed a cumulative penalty of INR 0.15 million on the office bearers of two companies for engaging in bid-rigging.[56] The CCI reasoned that the penalties were "*symbolic*" and sufficient to "*achieve the ends of justice in the facts and circumstances of the case.*" Here, unlike the *Paper Cartel* order,[57] a symbolic penalty was imposed on both, the contravening companies and their office bearers. Along similar lines, a March 2021 order imposed a penalty of INR 10,000 on individuals for indulging in bid-rigging. The amount was determined as sufficient to meet the "*larger goal of swift market correction.*"[58]Finally, a February 2021 order imposed a penalty of INR 0.1 million on office bearers of an association citing (rather unsurprisingly) the appropriateness of the penalty based on "*the facts and circumstances of the present case.*"

Repeated emphasis on the specific facts and circumstances of a particular case as a guiding factor evidence the subjectivity involved during penalty imposition. We expect the CCI to maintain this tenor in its upcoming orders.

Timeline Dissonance

Section 27 of the Act enables the CCI to impose penalties "as it deems fit" – subject to the prescribed maximum permissible limits. Specifically, for anticompetitive conduct (other than cartels), an enterprise may be penalized at 10 percent of the average turnover for the "last 3 preceding financial years." However, Section 27 of the Act doesn't provide guidance on the relevant period constituting the "last 3 preceding financial years" – leaving this determination entirely on the discretion of the CCI instead.

This could possibly explain why the CCI's practice is mysterious when it comes to which "last 3 preceding financial years" will be considered for penalty determination. Equity and logic dictate that the period would coincide with the last 3 years during which the parties engaged in anticompetitive activity. However, a closer look at some of the instances (listed below) reveal the *ad-hoc* connotation being afforded to expression "last 3 years" – which could mean "3 years preceding the submission of the investigation report" or "3 years preceding the date of the final order" or "3 years preceding the last known date of contravention." The only perceptible pattern therefore that comes to light is the absence of one. This dissonance in application of fundamental principles has plagued the CCI's orders since before the pandemic and see no signs of abatement to date. The broad construct of Section 27 of the Act cannot be interpreted in a manner that permits (i) inequitable outcomes during penalty imposition; or (ii) disproportional penalty imposition. This position is aligned with the principles of statutory interpretation recognized by the SC in the *ALP Tablets* case.[59] As such, the absence of a perceptible pattern could arguably fall foul of both principles.

Illustrative Cases

Case	Penalty on enterprise	Penalty on individual	Duration of contravention
LPG case dated August 2019 [60]	1% of its average relevant turnover from FY 2014 to FY 2016	1% of their average income for from FY 2014 to FY 2016	From 2011 to 2013
MPCDA case dated June 2019[61]	1% of the average of the revenue turnover from FY 2015 to FY 2017	1% of the average of gross total income from FY 2015 to FY 2017	From 2014 to 2016

55 *Id.*
56 *GAIL (India) Limited v. PMP Infratech Private Ltd. and Others*, Case No. 41 of 2019.
57 *In Re: Anti-competitive conduct in the paper manufacturing industry*, Case No. 05 of 2016.
58 *People's All India Anti-Corruption and Crime Prevention Society v. Usha International Limited and Others*, Case No. 90 of 2016.
59 See Para 74 of the *ALP Tablets* case.
60 *International Subscription Agency v. Federation of Publishers' and Booksellers' Associations in India*, Case No. 33 of 2019.
61 *Madhya Pradesh Chemists and Distributors Federation v. Madhya Pradesh Chemists and Druggist Association and Others,* Case No. 64 of 2014.

Conclusion

With great power comes great responsibility – as an economic regulator wielding the power to impose the highest pecuniary fines, a measured and reasoned approach is the bare minimum burden that the CCI must discharge.

Effective deterrence depends, in part on the uniformity and predictability of fines. After 12 years of active enforcement experience, the CCI would likely benefit from the introduction of penalty guidelines akin to its foreign peers.[62] Further, most of the CCI's global counterparts have in place a "base penalty" mechanism which the CCI could take a leaf out of. The CCI could design a formula that can serve as a starting point to determine such base penalty premised on the seriousness of the infringement, duration of the conduct, etc. leaving the adjustments attributable to the aggravating and mitigating factors on a case-by-case basis.

The adoption of fining guidelines promises to achieve multiple goals – it will balance the objective of bringing in uniformity and deterrence, without compromising the need for flexibility and individualized assessment; and increase transparency by limiting the discretion vested with the authority. The recommendation to introduce penalty guidelines was also formally proposed in the report of the Competition Law Review Committee (set up in 2019) – a recommendation which found place in the draft Competition (Amendment) Bill, 2020 (Bill).[63]

An optimal and just penalty system is truly need of the hour; and until the extant laws are amended, the CCI should consider self-regulation as a means to bring in a semblance of consistency and predictability in its penalty orders.

9. CCI RELEASES ITS MARKET STUDY FINDINGS ON THE PHARMACEUTICAL SECTOR IN INDIA

Publication: Mondaq

Within close to a year of initiation of its market study into the pharmaceutical sector, on 18 November 2021, the Competition Commission of India (CCI) released its findings in its report titled '*Market Study on the Pharmaceutical Sector in India: Key Findings and Observations*'.

Statistics reveal that the CCI has received 43 cases involving the pharmaceutical sector. The relentless flow of incoming cases in this space prompted the authority to examine the sector with the aim to understand discounts, margins, prevalence of branded generic drugs, wholesale and retail level distribution policies, role of trade associations, impact of e-commerce and online pharmacies on price and competition, among other aspects.

Given the CCI's emphasis to consider a 360 degree view of the industry, various stakeholders, such as pharmaceutical companies, stockists, chemists, trade associations, doctors, sector experts and regulators were consulted to gain an in-depth insight into the issues plaguing the sector.

Key Observations and Findings

Brand competition trumps price competition:

The CCI recognised the role of generic drugs in bringing down drug prices, thereby reducing healthcare costs and improving access. In its view, competition in the generic drugs space should typically centre on price, as generics are homogeneous and interchangeable to the originator product and are chemically and functionally identical.

The following observations are noteworthy:

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[62] See European Commission's "*Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1 of 2003*"; and the Competition & Market Authority's "*Guidance as to the appropriate amount of a penalty.*"

[63] The Bill proposes the insertion of a new provision (i.e. Section 64B) which directs the CCI to publish guidance as to the appropriate amount of penalty for contravention under the Act.

- Despite the domination of generics, with the presence of multiple manufacturers for each formulation, brand competition outweighs price competition.
- A considerable price difference exists between brands of a market leader when contrasted with the prices of other market participants, especially those with lower market share.
- Brand differentiation in terms of a perception of different levels of quality and trade margins offered to incentivise chemists are key drivers of brand competition in India's markets for generics.
- The perception of difference in the quality of drugs by different manufacturers also feeds into brand differentiation.

Recommendations

Observing that the enforcement of quality regulations was not *inter alia* uniform across states leading to different quality standards being followed, the CCI has provided a multi-pronged approach and harmonised regulatory recommendations to address the lacking uniformity in drug quality across the spectrum. To achieve this, the report *inter alia* recommends:

- The Central Drugs Standard Control Organisation (CDSCO) to create awareness on quality issues, build capacity, and harmonise training and practices across the country for consistent application of quality standards;
- Creation of a central portal to facilitate transparency on grant of licenses, inspections, prosecutions on non-compliance, etc.;
- Quality control across the pharmaceutical supply chain guided by good distribution practices;
- Standard compliance marks for unbranded generics;
- Quality controls in public procurement by implementing strategies through pooled / centralised procurement systems and layered quality checks; and
- Establishment of national digital drugs database to address information asymmetry by creating an online, centralised drug databank by consolidating real-time data on active pharmaceutical manufacturing companies in the country, therapeutic class wise / formulation-wise approved branded / unbranded products along with their manufacturing and marketing entities which may be created, and made accessible to regulators, industry, physicians and consumers alike.

High margins to lure stockists with no retail price competition:

The report noted that pharmaceutical manufacturers compete to have their products sold by retailers / pharmacies through high margins, particularly in trade generics. Other significant findings in the report are:

- While retail margins act as an incentive mechanism and may allow new entrants with limited product portfolios to enter and expand their market shares against established incumbents with wider product portfolios, it does not translate to lower prices for end consumers.
- Setting high margins does not necessitate lowering of the manufacturers' price, as it may be adjusted by increasing the final price of the product.
- The sufficient flexibility allowed to manufacturers for manoeuvring MRPs (for drugs outside the Drugs (Prices Control) Order, 1995 (DPCO)) – to accommodate margins which drive competition – indicate

muted price competition between manufacturers possibly resulting in a systemic upward pricing pressure, eroding the benefits of generic competition.

- The prevailing chemist centric approach of setting margins was seen to not be aligned with consumer interest. The report remarks that this mechanism is another means of allowing exploitation of agency problems and information asymmetry that riddles the sector while keeping price competition at bay.

Recommendations

The report opines that effective competition between retailers *inter alia* through price discounts offered to consumers can address price effects of high retail margins on final prices. Based on deliberations with stakeholders, the CCI among others, recommended a regulatory trade margin rationalisation scheme (with price caps) designed to exclude undesirable effects, such as enhanced sale of drugs when the entire therapeutic class is not covered; or increased sale of higher priced drugs which have better financial incentives.

Online v offline modes of distribution:

The report recognised the steady rise of market share of online pharmacies and observed that while data and digital technology can improve access to and efficiency of healthcare delivery, concentration of data with few platforms raise concerns over collection, storage, security, and sharing of such data.

It further asserted that competition law in India is wide enough to enable the assessment of any competition harm that may be caused by disproportionate collection / use of data by digital entities with market power.

Recommendations

To safeguard patient privacy and protecting sensitive personal medical data, the CCI expressed the need for necessary regulations to be enforced until India legislates its data protection laws; and

It recommended self-regulation by online pharmacies to adopt measures in relation to collection, use, and sharing of data and privacy.

Best practices for trade associations

Echoing its decisional experience, the CCI emphasized that: (i) mandatory requirement of No Objection Certificates (NOC) for appointment of stockists; and (ii) mandatory payment of Product Information Service (PIS) charges for introduction of new drugs by pharmaceutical companies, have been held to be anti-competitive by the CCI in several cases.

The report noted that when trade associations provide a platform for competitors to collectively create and enforce norms that have an impact on entry and supply, and therefore, on competition, such conduct would warrant competition scrutiny.

Recommendations

The CCI urged such trade associations to adopt an effective competition compliance programme to disengage in any anti-competitive conduct prohibited under the Competition Act.

Comment

This report marks the second study (however, more in-depth) that the CCI has conducted following it recommendations in a 'Policy Note' on *'Making Markets Work for Affordable Healthcare'* in October 2018. The CCI expects that the insights gained will inform and contribute significantly to the design of the pharmaceutical market in India to help attain the objective of affordable medicines for all.

Notably, this report comes in the wake of a slew of market studies that the CCI has commenced under the aegis of its advocacy initiative which seeks to study hot sectors either witnessing an uptick in probes for potential

market failures (such as digital markets / e-commerce) or defined by rapid technology driven transformations (e.g. telecom, media and entertainment, film distribution, and over-the-top (OTT) streaming platforms).

Be that as it may, considering the sensitivity of the healthcare industry and impact on common lives, tackling competition issues within its realms remains an enforcement priority for the CCI and one can only expect the CCI to be even more watchful of market participants' conduct in this space.

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Competition law defines the rules and guidelines that promotes or endeavors to keep competition in the market by controlling and regulating anti-competitive conduct by organizations. Competition law is upheld through open and private enforcement. The Competition Act follows the way of philosophy of current and modern competition laws. The Act forbids against serious anti- competitive arrangements, abuse of dominant position by ventures and regulates combinations (acquisition, acquiring of control and M&A), which causes or liable to cause a considerable adverse impact on competition in India.

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