NATIONAL

NCLAT dismisses allegations against Ola concerning abuse of dominance

The Competition Commission of India (**'CCI'**) passed an order dismissing the allegations of abuse of dominance against Ola Cabs (**'Ola'**). Meru Travel Solutions Pvt. Ltd and Fast Track Call Cab Pvt. Ltd. (**'Informants'**) had filed an appeal contesting the CCI's common order dated 19.07.2017. In the original complaint, the Informants had accused Ola of indulging in predatory pricing to monopolize the radio taxi services market in Bengaluru, where the Informants had been operating.

The Informants alleged this to be a violation of Section 4 of the Competition Act, 2022 (**'Act'**) because Ola's allegedly anti-competitive behaviour has negatively affected the Informants' business. Consequently, the CCI directed the DG to look into the matter. After considering the DG's report, the CCI opined that there had been no instances of abuse of dominance by Ola and resultantly, the case was dismissed. This led the Informants to file the present appeal in question.

After a careful assessment of the matter, the NCLAT concluded that Ola's allegedly 'predatory pricing' was part of its broader strategy to establish itself firmly as a reliable radio taxi service and that it was a part of variable cost. While the Informants alleged that Ola had entered into agreements with drivers that are anti-competitive and violative of Section 3 of the Act, however, upon closer inspection, the NCLAT opined that these agreements were welfare measures for drivers to help them source credit for buying vehicles. Moreover, the NCLAT noted that participation in these schemes was completely optional for the drivers. In light of all these considerations, the NCLAT upheld its previous order and dismissed both appeals.

Source: Competition Appeal (AT) No. 19 of 2017

CCI orders suspension of Amazon's investment in FCPL

In 2019, Amazon NV Investment Holdings LLC's (**'Amazon'**) sought the CCI's approval through a notice for its acquisition of 49% shares (**'Combination'**) in Future Coupons Private Limited (**'FCPL'**). In March 2021, FCPL filed an application before the CCI questioning the purpose of investment of Amazon in FCPL.

The CCI found Amazon guilty of violating sections 43A, 44 & 45, which deal with the imposition of penalty for not furnishing material information and it had charged Amazon on two grounds. First, for misrepresenting and concealing the actual economic and strategic purpose of acquisition in its notification to CCI i.e., the actual rationale of the acquisition was to become the single largest shareholder of Future Retail Limited (**'FRL'**) when FDI opens up in the retail sector. Second, for failing to notify the CCI of certain

pertinent steps which were interconnected as a part of Amazon's acquisition of FCPL's 49% equity. The CCI observed omission on the part of Amazon to mention two crucial steps i.e., disclosing FRL shareholders' agreement and commercial arrangements.

Therefore, the CCI suspended Amazon's acquisition of 49% shares of FCPL and imposed a fine of ₹200 crores on Amazon. Amazon has denied any concealment on its part and has challenged the CCI's order before the National Company Law Tribunal (**'NCLT'**).

Source: CCI Amazon Order dated 17.12.2021

CCI orders an investigation against IREL (India) Ltd. for abusing its dominance

Mr. Kalpit Sultania (**'Informant'**) filed the instant matter under section 19(1)(a) of the Competition Act, 2002 (**'Act'**) against IREL (India) Ltd. (**'OP'**) alleging contravention of the provisions of Section 4 of the Act. The Informant alleged that the OP, being the sole company authorized to mine and produce Sillimanite, has established itself as a market leader in the mining and supply of beach sand Sillimanite in India. He further alleged that this had, in turn, given OP the freedom to operate without interference from its competitors, and resultantly, customers have no other option than to transact with the OP.

Firstly, the CCI rejected the OP contention that it is not an 'enterprise' under Section 2(h) of the Act. OP sells Sillimanite for consideration and it is being extracted and sold, both in the country and abroad, and based on this nature of operations performed, the CCI held OP as an enterprise under Section 2(h). The CCI accepted the Informant contention that the relevant market in the present case is "mining and supply of beach sand Sillimanite" and OP is in a dominant position as it has the exclusive right to undertake mining and supply of beach sand minerals in India.

Concerning the allegations of abuse of dominance, the CCI observed that *prima facie* there is a substance in such allegations which points towards a violation of Section 4(2) of the Act. However, the OP didn't submit any response on this issue and therefore, the CCI directed the Director-General (**'DG'**) to initiate an investigation into the matter under the provisions of Section 26(1) of the Act and to complete the investigation and submit the investigation report within 60 days from the receipt of this order.

Source: Case No. 22 of 2021

CCI orders penalty against three maritime transport companies for alleged cartelization

The CCI had *suo motu* initiated this case based on an application dated 01.10.2014 filed under the provisions of Section 46 of the Competition Act, 2002 (**'Act'**) read with Regulation 5(1) of the CCI (Lesser Penalty) Regulations, 2009 by NYK Line. The present matter involved the alleged cartelisation in offering transport services to automobile manufacturers for various trade routes. The three maritime companies involved in this case are Nippon Yusen Kabushiki Kaisha (**'NYK Line'**), Kawasaki Kisen Kaisha Ltd. (**'K-Line'**), Mitsui O.S.K. Lines Ltd. (**'MOL'**) and Nissan Motor Car Carrier Company (**'NMCC'**).

The CCI alleged in the order that there was an agreement between all four of them to enforce the "respect rule", which implied avoiding competition with each other and protecting the business of the incumbent carrier with the respective automobile original equipment manufacturer. The CCI noted that to achieve this goal, the maritime transport companies resorted to multilateral as well as bilateral contacts with each other to share

commercially sensitive information which included freight rates. Further, the CCI noted that the objective of the companies was to preserve their position in the market and maintain or increase prices, including by resisting requests for price reduction from certain original equipment manufacturers.

The CCI held that all the four parties: NYK Line, K- Line, MOL and NMCC, contravened the provisions of the Act which prohibits anti-competitive agreements including cartels, from 2009 to 2012. Therefore, the CCI *suo moto* passed an order imposing a fine of ₹63 crores for the cartelization with respect to maritime motor vehicle transport services provided to automobile Original Equipment Manufacturers for various trade routes. Further, the CCI has directed these four companies to cease and desist from anti-competitive practices.

Source: *Suo Motu* Case No. 10 of 2014

CCI found Google to be abusing its dominant position

The Digital News Publishers Association (**'Informant'**) alleged that Alphabet Inc., Google LLC, Google India Private Limited and Google Ireland Limited (**'OPs'**) violated Section 4 of the Competition Act, 2002 (**'Act'**). The CCI noted that the main allegation against the OPs was that their conduct had resulted in the companies represented by the Informant, receiving amounts that they assumed to be lower than their fair share considering the OPs have not disclosed the amount that it had generated from the original content of the companies.

The CCI held that the OPs were dominant in the "market for online general web search services and market for online search advertising services in India". The OPs were seen to be a major player in the online digital advertising intermediation services. The CCI stated that it would investigate the same and asserted that the role of various news outlets was very important in a democracy and digital platforms should not be allowed to abuse their dominant position concerning the fair distribution of revenue.

Therefore, the CCI held *prima facie* that the OPs had violated provisions, namely section 4(2)(a), 4(2)(b)(ii), 4(2)(c) and 4(2)(e) of the Act. Further, the CCI recognized that the OPs were using their dominant position in the relevant markets to protect their position in the said markets for news aggregation services in violation of section 4(2)(e) of the Act, which merited a thorough investigation.

Source: Case No. 41 of 2021

CCI orders investigation against Apple for abusing its dominance

'Together We Fight' Society alleged that Apple Inc. and Apple India Private Limited (**'Apple'**) have violated Section 4 of the Competition Act, 2002 (**'Act'**) with respect to app developers. The CCI found that Apple was in a dominant position. Consequently, the CCI was of the view that the criticality of app stores in smart device digital ecosystems required a nuanced approach to the market definition. Due to Apple tying its distribution service along with its payment processing solutions, it was seen to restrict the competitive process for app developers should they choose to develop on the iOS platform.

The CCI also stated that Apple held an undue advantage over its competitors in pertinence to having access to certain data, that was unavailable to the latter. This further leads to Apple leveraging on this dominant position to enter/protect its downstream market of various verticals. Further, the CCI was convinced that a *prima facie* case was

made out against Apple, thereby meriting an investigation.

The CCI asserted that Apple held a monopoly position in the relevant market for App stores in India. The CCI held that the OPs had indeed violated provisions, namely section 4(2)(a), 4(2)(b), 4(2)(c), 4(2)(d) and 4(2)(e) of the Act. The CCI has directed the DG to carry out an investigation under section 26(1) of the Act and submit a report on the same within 60 days from the date of receipt of this order.

Source: Case No. 24 of 2021

CCI accuses National Egg Co-ordination Committee of fixing egg prices

The Informant Parties (**'IPs'**) filed the present matter under Section 19(1)(a) of the Competition Act, 2002 (**'Act'**) alleging contravention of Section 3(3)(a) of the Act by National Egg Co-ordination Committee (**'NECC'**) and Agro Corpex India Limited (**'ACIL'**) (collectively referred to as **'OPs'**). The IPs alleged that the NECC fixes and declares daily egg prices at various centres and publishes prices on its website which is treated to be the *de facto* price in the market, while the ACIL exports eggs either directly or through conversion to ensure price stability. The IPs alleged the conduct of OPs amount to a contravention of Section 3(3)(a) and 3(3)(b) of the Act.

The CCI noted that the NECC declared egg prices on its website under two heads: 'NECC Prices' and 'Prevailing Prices'. It further notes that such declared price is the *de facto* price in the market since no other body in India declares egg prices. The CCI held that the NECC's conduct of declaring price-related information may not be anti-competitive *per se* but the act of enforcing or trying to enforce its declared egg prices violates Section 3(3)(a) read with Section 3(1) of the Act.

Accordingly, the CCI directed the NECC under Section 27 of the Act to give sufficient disclaimers that its declared prices are only suggestive and it shall cease and desist from issuing any directives or threats relating to the non-adherence of the declared egg prices by the members.

Source: Case Nos. 09 and 36 of 2017

CCI dismisses allegations of abuse of dominance against pharmaceutical companies

Zippigo Pharma (**'Informant'**) filed the instant matter under Section 19(1)(a) of the Competition Act, 2002 (**'Act'**) alleging contravention of the provisions of Sections 3 and 4 of the Act against certain pharmaceutical companies (**'OPs'**). The Informant alleged that the OPs demanded it to adhere to certain terms and conditions to get the supply of drugs that do not apply to the Informant's counterparts operating in the area and are, therefore, unfair and discriminatory.

The CCI observed that there was no allegation regarding anti-competitive agreements under Section 3(3) of the Act. Further, the CCI observed that there exists no case under Section 3(4) as the Informant could not prove any market power in the hands of OPs which has been enforced to cause vertical restraints. The CCI also dismissed the case under Section 4 of the Act as there are several pharmaceutical companies as OPs in the present case and it can't be said that one OP holds a dominant position. Therefore, the CCI found no evidence to support a prima facie case that the OPs had violated Sections 3 or 4 of the Act. Hence, the CCI directed the matter to be closed under Section 26(2) of the Act.

Source: Case No. 32 of 2021

CCI dismisses allegations of abuse of dominance against Mediglobe

Mr. Manish Sharma (**'Informant'**) filed the present information under Section 19(1)(a) of the Competition Act, 2002 (**'Act'**) alleging contravention of Section 4 of the Act against Mediglobe Medical Systems (P) Ltd. (**'Mediglobe'**). In 2019, various government departments in the State of Madhya Pradesh published notices inviting tenders for the supply and installation of Medical Oxygen Gas Pipeline System and Non-Modular Operation Theatres in several government hospitals. The Informant provided its clients with the lead of such tenders and they applied for such tenders but could not procure the same even after fulfilling the essential qualification criteria. The Informant sought information from the concerned departments and found that Mediglobe had successfully acquired the tender.

The Informant alleged that the concerned department gave an unfair advantage to Mediglobe, even though it had not fulfilled the pre-qualification criteria of the tender. The Informant alleged that Mediglobe has violated the provisions of Section 4 of the Act since it had procured tenders in collusion with the government officials even after the non-fulfilment of essential criteria, resulting in the denial of market access to the Informant's clients.

The CCI noted that the allegations do not give rise to any competition concerns under Section 4 of the Act as the submission of a bid by an ineligible bidder cannot be considered as an abuse of dominant position by the bidder. Further, since the information does not refer to any agreement or undertaking between Mediglobe and the concerned government department, the CCI noted that Section 3 has also not been violated either. Therefore, the CCI concluded that there exists no prima facie case under Section 4 or Section 3 of the Act and hence, the CCI directed the information to be closed under Section 26(2) of the Act.

Source: Case No. 40 of 2021

CCI dismisses allegations of abuse of dominance against Yamaha Motors

Royal Motors (**'Informant'**) filed the information in the present case under Section 19(1)(a) of the Competition Act, 2002 (**'Act'**) alleging abuse of dominance against Yamaha Motors (**'Yamaha'**) under Section 4 of the Act. The Informant had entered into a dealership agreement (**'Agreement'**) with the Yamaha in 1993. The Informant contended that the Yamaha had restrained the Informant from dealing in products other than Yamaha and had proposed to bring in another dealer in the Informant's geographic area of Mayiladuthurai as per Clauses 4.2 and 11.2 of the Agreement respectively. The Informant requested the Yamaha to refrain from appointing another dealer in the geographic area and resultantly, Yamaha decided to terminate the agreement with Informant without assigning any reasons under Clause 14.4 of the Agreement.

The CCI noted that the Informant has challenged the imposition of unfair conditions on him under Clauses 4.2, 11.2, and 14.4 of the Agreement. The CCI observed that Yamaha is an enterprise under Section 2(h) of the Act and it delineated the relevant market of Yamaha as "market for manufacture and sale of motorcycles in the territory of India". The CCI then examined that Yamaha holds a 10% market share in the relevant market while its competitors enjoy higher market shares. The CCI observed that Yamaha was not enjoying a dominant position in the relevant market and as such, Yamaha has not abused its dominant position.

Therefore, the CCI concluded that there exists no *prima facie* case against Yamaha under Section 4 of

the Act and hence, the CCI closed the present matter under Section 26(2) of the Act. Further, the CCI rejected any grant of reliefs sought by the Informant under Section 33 of the Act.

Source: Case No. 36 of 2021

CCI refuses to hear allegations of oppression and mismanagement against OCS India

Mr. Anupam Gupta (**'Informant'**) filed the present information alleging contravention of various provisions of the Companies Act, 2013 by Overseas Courier Service India Pvt. Limited (**'OCS India'**). OCS India was incorporated under the Companies Act, 1956 and established in 1994 to provide courier services both domestically and internationally. OCS generated a turnover of INR 50 million as of 30.03.2006. On 08.08.2006, the four shareholders of the company, including the Informant, transferred 76% shareholding of the company to OCS Japan.

The Informant stated that since the controlling interest of the company was transferred to OCS Japan, the company witnessed a continuous downward trend due to fraud committed by majority shareholders and its nominee directors, thereby eroding the financial strength of OCS India. The Informant had filed a petition before the NCLT under various provisions of the Companies Act, 2013 for oppression and mismanagement because there has been a financial loss to the company of more than 150 crores from 2007 to 2018 due to the irregularities in the affairs and management of the company.

The CCI observed that the allegations in the present matter are confined to oppression and mismanagement by the majority shareholders of OCS India and the affairs of OCS India have been run with irregularities and in an unprofessional manner causing financial loss to the company. Further, the CCI noted that the matter is pending before the NCLT alleging contravention of provisions of the Companies Act, 2013. The CCI held that since the allegations pertain to the provisions of the Companies Act, 2013 and there is no violation of the provisions of the Competition Act, 2002, there exists no prima facie case and hence, the matter must be closed under Section 26(2) of the Act.

Source: Case No. 37 of 2021

INTERNATIONAL

Epic Games filed an appeal against Apple; White House and 35 US States support Epic

Epic Games had launched an in-app payment system in *Fortnite* and Apple considered it a violation of the exclusivity terms under the Developer Program License Agreement (**'DPLA'**). Consequently, Apple removed *Fortnite* from the App Store, suspended the *Fortnite* Developer Program account and threatened to remove the accounts of all Epic affiliates. Epic sued Apple for violations of Sections 1 and 2 of the Sherman Act (**'Act'**), California's Cartwright Act, and Unfair Competition law challenging Apple's anti-competitive contracts and abuse of its dominance. The District Court found Apple to be a monopolist and its prohibition against the competing app distribution channels poses substantial anticompetitive effects.

Epic Games and Apple have filed their respective appeals on different aspects of the District Court's ruling. 35 US States have expressed their support towards Epic's appeal and submitted an amicus brief arguing that Apple enjoys a monopoly position as a seller of iOS apps. Epic disputed the court's ruling that Apple's DPLA is not a contract under Section 1 of the Act because Apple requires

developers to sign it. Epic contended that a contract coerced by Apple, that has significant market power, is a contract under Section 1. *Second,* Epic. Epic also contended that Apple had unlawfully maintained its monopolies in the iOS app distribution and in-payment solutions markets by expressly excluding all competitors.

Epic challenged the terms of the DPLA creating anti-competitive constraints to be unenforceable. Therefore, Epic sought that the district court's judgment on Apple's counter-claims for breach of contract and declaratory judgment should be reversed and passed in its favour. The US Court of Appeals for the Ninth Circuit is yet to pass the judgment in this regard.

Source: Case: 21-16506

Digital Ad Monopolization: Ongoing tussle between Google and US States

On 21 January 2022, Google filed a motion to dismiss the claim of the states in the case, *In Re: Google Digital Advertising Antitrust Litigation,* where more than half a dozen states filed a lawsuit against Google. The state of Texas had led the lawsuit and it mainly revolves around digital advertising. The suit alleges that Google owns much of the technology that facilitates the buying and selling of display advertising on the web and processes about 11 billion online ad spaces daily. Further, it alleged that Google has secured a digital ad monopoly that overcharges ad publishers and an unredacted version of the complaint recently revealed the company charges up to four times more than its competitors. The suit also reveals the name of the 2018 agreement between Google and Facebook that sought to kill competitive bidding for advertising space: 'Jedi Blue'.

The US states alleged that Google's conduct violates Section 2 of the Sherman Act (**'Act'**). Google argued that a handful of rivals have filed the complaint to serve their narrow interests and such a lawsuit would threaten the incentives for investment and innovation that have benefitted advertisers and online publishers. Further, Google contended that the 2018 agreement does not restrict Facebook from competing against Google products. Google contested that it had no duty to share data with a rival and its product designs were not anti-competitive.

Google asserted that the 'win rate' provisions contained in Jedi Blue do not violate section 1 of the Act as they are not illegal *per se* according to Google. Further, Google challenged that the US state plaintiffs had failed to analyse how the 'win rate' provisions harm competition in the 'In-App Networks Market' as a whole and that Google has market power in the 'In-App Networks Market'. The petition is still pending in the District Court of New York.

Source: Case 1:21-md-03010-PKC

European Commission approves acquisition of Kustomer by Meta with some conditions

The European Commission (**'EC'**) has approved the acquisition of Kustomer by Meta under the EU Merger Regulation. Kustomer supports customer relationship management ('CRM') software market and is used by businesses for engaging with their customers by answering questions, solving problems, and giving advice in the context of the business-customer relation. Meta is a vital tool for organizations to communicate with customers and support CRM software providers. Therefore, Meta and Kustomer are vertically integrated.

The EC investigated the Kustomer's rivals in customer service and support customer relationship management software. Particularly, the EC looked into the data that Meta could gather from

Kustomer's clients. The EC noted that since Kustomer is a B2B service, it has no knowledge of any of its customers' personal data. Further, the EC noted that even if Kustomer expands in the future, the new data it collects will be inconsequential because of its current size. The EC noted that other online display advertising competitors will continue to have access to such commercial data and Meta's ability to obtain additional information about its online display advertising service would not significantly harm competition among online display advertising suppliers.

Moreover, to address the competition concerns, Meta offered comprehensive access commitments like public API access, core API access-parity commitment with a 10-year duration. The EC found that, with the undertakings in place, the proposed transaction would no longer raise competition issues as it did not meet the turnover thresholds under Article 1 of the EU Merger Regulation. The EC's judgment is conditional on the parties adhering to their agreements in full.

Source: EC Press Release

Apple hit with periodic penalty order by Dutch Consumers and Markets Authority

Netherlands' Authority for Consumers and Markets (**'ACM'**) passed an order against Apple Inc. (**'Apple'**) subjecting it to periodic penalty payments. Apple was accused of abusing its dominant position by mandating app providers, that offer digital content or services within their app, to use Apple's IAP system for processing payments, although this condition has since been suspended. Additionally, such app providers were not allowed to refer within their own apps to payments options outside the app.

The ACM carried out a detailed assessment of the matter and concluded that Apple enjoyed a dominant position by virtue of single-homing and not allowing alternative app stores on its flagship mobile phones. It noted that Apple posed unreasonable restrictions on dating-apps providers' freedom that had impacted their business since they were denied access to crucial information required to carry out invoicing, cancellations, and refunds directly with their customers, as well as run background checks to maintain the sanctity of their apps. The ACM has mandated Apple to change its conditions such that dating apps offered in the Dutch App Store are no longer restricted to using Apple's IAP system for processing payments and have the freedom to refer within the app to payment systems outside the app. Apple has been given two months to execute this order, failing which it must pay a periodic penalty of €5,000,000 per week, up to a maximum of €50,000,000.

Source: Case No. ACM/19/035630

Amazon faced penalties of €1.13 billion in the Italian Market

Italy's antitrust authority (**'AGCM'**) has imposed a fine of €1.13 billion on Amazon for abusing its dominant position. AGCM noted that Amazon had been promoting its own logistics service, called Fulfillment by Amazon (FBA), which is the main reason for its dominance. Further, it stated that Amazon had stopped third-party sellers from associating the Prime label with offers not managed with FBA. FBA service are used when other companies wanted access to key benefits like the Prime label that allows them to participate in Black Friday sales and other key events.

The AGCM emphasized that access to these functions is necessary for a seller's success in the market and noted that the third-party sellers using FBA are not subject to the same stringent performance requirements as non-FBA sellers. The

non-FBA Sellers would have to meet higher thresholds to prevent a suspension from the platform. Further, it observed that sellers using FBA are discouraged from offering their products on other online platforms, at least to the same extent they do on Amazon. Apart from the imposition of this fine, the AGCM has demanded Amazon to grant the privileges enjoyed by FBA sellers to all third-party sellers, provided they respect other rules and laws. It has mandated Amazon to define and publish those standards within a year, and its actions will be enforced by a monitoring trustee.

Amazon opposed this decision and is looking to file an appeal. Amazon argues that non-FBA sellers can use its Seller Fulfilled Prime service, which gives them access to Prime benefits without having to use Amazon's logistics services. Further, it emphasizes that the proposed fine and remedies are unjustified and disproportionate as small and medium-sized businesses have multiple channels to sell their products both online and offline.

Source: A528 – AGCM Press Release

Bundeskartellamt holds Google's paramount significance for competition across markets

Germany's Federal Cartel Office, Bundeskartellamt, has held under Section 19a(1) of the German Competition Act that Google has paramount significance for competition across markets. It had conducted an assessment in which they found that Google held a dominant position in the marketplace across multiple verticals. The overall assessment revealed that Google held an economic position of power across various markets which gave rise to a scope of action across such markets that was inadequately controlled by competition.

For the overall assessment, the Bundeskartellamt factored in several aspects of Google's operations or functioning like Google's considerable financial means that were used for internal research and development activities. Second, the Bundeskartellamt also considered the fact that Google could profit from economies of scope by offering a range of different services across markets and enhancing such services. Third, the Bundeskartellamt also factored in Google being in a position to set rules for its potential users and advertising customers by being in a combination with its advertising services. Fourth, the Bundeskartellamt also took into account that Google had access to a broad and deep database which was due to a large number of highly sought after and far-reaching services, that were interconnected and complementary to each other. Fifth, the Bundeskartellamt took into account that Google and its affiliated services attracted a high number of active users daily.

Source: Case: B7 – 61/21