CCLP
Centre for Competition Law and Policy

NATIONAL

CCI penalized the bidders involved in the supply & installation of signages at SBI

The Competition Commission of India ('**CCI**') *suo motu* took this matter under Section 19(1) of the Competition Act, 2002 (**'Act'**) based on a complaint dated 28.06.2018 alleging bid-rigging and cartelization in the tender floated by SBI Infra Management Solutions Pvt. Ltd. (**'SBIIMS'**) for supply and installation/replacement of signages of SBI across India (**'SBI tender'**). The CCI *prima facie* found that there existed a case for contravention of the provisions of Section 3(1) read with Section 3(3) of the Act concerning the SBI tender. The CCI directed the Director General (**'DG'**) to investigate the matter.

The DG concluded that the OP-1 to OP-7 (**'OPs'**) indulged in anti-competitive agreement/ conduct and concerted practices to rig the SBI tender, thereby contravening Sections 3(3)(c) and 3(3)(d) read with Section 3(1) of the Act. The CCI concluded that OPs entered into an agreement resulting in geographical market allocation and bid-rigging in the SBI tender. The OPs contended that their conduct did not lead to an appreciable adverse effect on competition (**'AEEC'**) but the CCI observed that the OPs were unable to rebut the statutory presumption of AAEC.

Therefore, the CCI held OPs guilty of contravening the provisions of Sections 3(3)(c) and 3(3)(d) read with Section 3(1) of the Act and additionally found 9 individuals of the OPs liable for anti-competitive conduct under Section 48 of the Act. The CCI directed the OPs under Section 27(a) of the Act to desist from indulging in such practices contravening Section 3 of the Act. Accordingly, the CCI imposed respective penalties to 7 OPs and nine individuals of that OPs.

Source: *Suo Motu* Case No. 02 of 2020

CCI issued notice to Dumper Truck Union to not enter into anti-competitive agreements

CJ Darcl Logistics Ltd (**'CJDL'**) filed the present information under section 19(1)(a) of Competition Act, 2002 (**'Act'**) alleging contravention of the provisions of Sections 3 and 4 of the Act by the Dumper and Dumper Truck Union LimeStone (**'OP'**) and its members. CJDL alleged that the OP, operating at the Sanu Mines area in Jaisalmer, did not allow the CJDL to carry out transportation work through its own vehicles. Further, CJDL also made it mandatory to take vehicles along with drivers from the members of the OP only and at a higher rate. The CJDL alleged that the OP and its members had threatened drivers and personnel of the Informant with bodily harm in case they tried to execute the work.

The CCI noted that there existed a *prima facie* case of contravention of the provisions of Sections 3 and 4 of the Act by the OP and accordingly, it directed the Director General (**'DG'**) to carry out an investigation. Based on the DG's report, the

CCI observed that there was an understanding between the members of the OP to limit/control the provision of transportation services and to fix the transportation rate at a rate higher than that determined through an open tendering process.

The CCI held that this conduct was in violation of the provisions of Section 3(3)(a), i.e., directly or indirectly determining purchase/sale prices and Section 3(3)(b), i.e., limiting or controlling the provision of services. Concerning the issue of abuse of dominance, the CCI did not determine whether the OP is an "enterprise" under the provisions of Section 2(h) of the Act and no case was made out against the OP for abuse of dominance under Section 4 of the Act. Accordingly, the CCI only directed the Union to cease and desist from indulging in unfair business practices under Section 27(a) of the Act in relation to the contravention of provisions of Section 3 of the Act.

Source: Case No. 31 of 2019

CCI imposed a fine of ₹ 1,788 crores on five tyre manufacturers for cartelization

The CCI initiated the instant case based on a reference received by the Ministry of Corporate Affairs under Section 19(1)(b) of the Competition Act, 2002 (**'Act'**) against five tyre manufacturing companies: Apollo Tyres Ltd., MRF Ltd., CEAT Ltd., JK Tyre and Industries Ltd., Birla Tyres Ltd. and their association, Automotive Tyre Manufacturers Association (**'ATMA'**), for indulging in cartelization. The CCI observed that the tyre manufacturers communicated price-sensitive information among themselves through their organization's platform, ATMA, and had made collective decisions on tyre costs.

The CCI further decided that ATMA acquired and compiled information relevant to the company- and segment-specific data (both monthly and cumulative) on tyre manufacturing, domestic sales, and export in real-time. The CCI noted that the communication of such sensitive information made cooperation among tyre manufacturers easier. The CCI observed that the ATMA had coordinated to increase the prices of cross-ply/bias tyres variants sold by the companies in the replacement market as well as to limit and control the production and supply in the said market. The CCI observed that such conduct amounted to the contravention of the provisions of Section 3(3)(a) and 3(3)(b) read with Section 3(1) of the Act.

Accordingly, the CCI passed an order dated 31.08.2018 imposing a penalty of ₹ 1,788 crores against the five tyre manufacturers and the ATMA. Further, the CCI directed the ATMA to disconnect and remove itself from collecting wholesale and retail pricing, whether through member tyre businesses or otherwise. When the original order was passed, it was kept in sealed covers as per the directions of the Madras High Court in a petition filed by MRF Ltd. However, the plea was dismissed by the High Court and later by the Supreme Court.

Source: Press Release No. 65/2021-22

CCI dismissed the allegation of abuse of dominance against Tata Motors

M/s Samaleshwari Automobiles (**'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 Tata Motors Ltd. ('**OP-1'**) and Tata Motors Finance Ltd. (**'OP-2'**). The Informant contended that OP-1 is a dominant entity in the passenger-vehicle segment and it had used its position to exploit the informant. The Informant alleged that the Dealership Agreements expressly mandated the Informant to deal only with the OPs.

Further, he contended that the loan facility offered by OP-2 had removed the dealer's decision-making authority and unfairly put the liability for the borrower's unpaid payments on the dealer.

The CCI observed that the relevant market in the instant case is the *'market for manufacture and sale of passenger vehicles in India'*. Further, the CCI noted that the OP-1 does not hold a dominant position in the market as it only enjoyed an 8.2% market share in the passenger-vehicles segment. After the investigation, the CCI concluded that OP-1 does not hold a dominant position because it did not possess the strength to function independently of the market's competitive dynamics or to influence its competitors, consumers, or the relevant market in its favour. The CCI noted that it appears that the Informant filed this matter to avoid the arbitration proceedings arising out of other matters and therefore, the CCI directed the matter to be closed under Section 26(2) of the Act.

Source: Case No. 44 of 2021

CCI dismissed the allegation of abuse of dominance against Greenfield City Projects

Ms. Nirmala Agarwal and Mr. Mohan Lal Agarwal (**'Informants'**) filed the instant matter under Section 19(1)(a) of the Competition Act, 2002 (**'Act'**). The Opposite Parties (**'OPs'**) including Greenfield City Projects, Srijan Realty, and Bengal Greenfield Housing Development are engaged in the residential real estate projects in Kolkata and had collectively developed "Green Field City". The Informants had booked an apartment in this real estate project. The Informants alleged that the OPs are dominant in the market and have imposed discriminatory and unfair conditions on Informants, thus abusing their dominant position.

The CCI noted that the informants had neither attributed any relevant market in their information nor produced any document for substantiating their allegations in relation to the alleged dominance of the OPs. The CCI observed that a potential buyer of residential apartments/units enters into an agreement with the developer after considering factors such as substitutability, service characteristics, price, and intended use. Therefore, the CCI delineated the relevant product market to be '*provision of services for development and sale of residential apartments in Kolkata*'. Concerning the geographical market, the CCI held that the geographical region of Kolkata was the relevant geographical market as it exhibits homogeneous and distinct market conditions.

Based on the information publicly available, the CCI determined the position of the OPs in the relevant market and noted that there were ample numbers of competing real estate developers including Eden Group, Merlin Group, GM Group and others already present in the relevant market. Therefore, the CCI noted that the buyers had various options available with them for buying residential apartments and they are not dependent upon the OPs. Thus, the CCI opined that there exists no prima facie case against the OPs concerning the violation of the provisions of Section 4 of the Act.

Source: Case No. 47 of 2021

CCI dismissed allegations of abuse of dominance against ISACA Inc.

Rajendra Khare ('**Informant**') filed the instant matter under Section 19(1)(a) of the Competition Act, 2002 ('**Act**') against Information Systems Audit and Control Association, Inc. (**'ISACA'**) alleging the contravention of the provisions of Section 4 of the Act. The ISACA owns models such as Capability Maturity Model Integration ('**CMMI**') for enterprises to have clear and sustainable

business results by accessing models and resources that are updated regularly to reflect the ever-changing business landscape. While the ISACA owns CMMI Certification, the Indian Government uses it as an eligibility criterion for tender requirements for high-value bids.

The Informant alleged that this created an entry barrier for participating in such tenders because the Indian companies have to get themselves appraised by the ISACA Approved Lead Appraisers to get CMMI Certification. The Informant alleged that ISACA is classifying ISACA Licensing Partners into different tiers and providing different service levels to partners in different tiers, thereby contravening Section 4(2)(a)(i) of the Act. Further, the informant alleged that the ISACA creates artificial scarcity by restricting the number of audits that can be undertaken by one lead appraiser in a year at 16 which results in a steep artificial increase in price for CMMI Maturity Level Certification.

However, the CCI noted that this restriction was in place to ensure the quality of audit work done by a lead appraiser and as such, there is no contravention under Section 4(2)(b)(i) of the Act. Further, the CCI opined that the provision of different services with different cost structures may not be termed as discriminatory in the present case and hence, it does not contravene Section 4(2)(a)(i) of the Act. Therefore, the CCI held that there exists no *prima facie* case under the provisions of Section 4 of the Act and hence, it directed the matter to be closed under Section 26(2) of the Act.

Source: Case No. 42 of 2021

CCI dismissed allegations of anti-competitive conduct against NABL

Mr. Dushyant (**'Informant'**) alleged that the National Accreditation Board for Testing and Calibration Laboratories ('**NABL**') and other Opposing Parties ('**OPs**') had contravened the provisions of Sections 3(4) and 4 of the Act by forming many exclusive supply agreements ('**ESAs'**). The Informant alleged that the suppliers to the OPs are required to obtain testing or accreditation services from NABL/ labs accredited by NABL and claimed that it resulted in the total monopolization of authority in NABL to the disadvantage of other accrediting organizations, contractors, laboratories, and end-customers.

The CCI noted that there was no direct information that NABL had a role in deciding such terms and conditions, giving it some preference. Further, concerning the alleged violation of Section 4, the CCI noted that the procurer should have the liberty to pick what goods/services it wants to buy based on its own judgment and special needs. While the Informant identified separate relevant markets and claimed that each OP was dominant in its relevant market, the CCI noted that the Informant failed to provide any statistics or facts to back up those claims.

The CCI noted that all the OPs came from a diverse and broad market, both public and private and the procurers should state the standards that they want providers of products and services to follow, rather than providing names/nominations or prescribing any conditions/criteria that might force specific rivals out of the market. Therefore, the CCI held that there existed no *prima facie* case of contravention of any of the provisions of Sections 3 and 4 of the Act.

Source: CCI Case No. 48 of 2021

Cartelization in India

The Competition Act, 2002 ('Act') declares any agreement that causes or is likely to cause an appreciable adverse effect (**'AAEC'**) on markets in India as void. These agreements could be horizontal (between enterprises engaged in identical or similar trade of goods and services) or vertical (between enterprises that are at different stages/levels of the production chain in different markets). Cartelization is a horizontal agreement presumed to have AAEC and hence, the CCI prohibits enterprises from forming cartels and disrupting competition.

Section 2(c) of the Act defines 'cartel' as an association of producers, sellers, distributors, traders or service providers who agree to limit, control or attempt to control the production, distribution, sale or price of, or trade in goods, or production of service. A cartel exists between two or more enterprises when there is an implicit or explicit agreement to fix prices, limit production and supply, allocate market share or sale quotas, or engage in collusive bidding or bid-rigging in one or more markets.

The CCI can impose penalties on the enterprises, contravening Section 3 of the Act, up to 3 times its profits or 10% of its turnover, whichever is higher for each year of the continuance of the agreement. In *Excel Crop Care Ltd v. Competition Commission of India,* the Supreme Court provided the factors for the CCI to determine the quantum of penalty: (i) the nature, gravity and extent of the contravention; (ii) the role played (ringleader or follower); (iii) the duration of the participation; (iv) loss or damage due to the contravention; (v) market circumstances; (vi) the bona fides of the company; and (vii) the profits derived from the contravention.

INTERNATIONAL

The Australian Competition Authority withdraws charges in bank criminal cartel case

The Commonwealth Director of Public Prosecutions (**'CDPP'**) decided to withdraw the criminal charges against Citigroup Global Markets Australia Pty Limited, Deutsche Bank AG, and four senior banking executives in connection with the criminal cartel allegations relating to the ANZ institutional share placement.

The alleged misconduct occurred in 2015 when the joint lead managers, Citigroup, Deutsche Bank, and JP Morgan, were left with a significant overhang of shares. The joint lead managers were alleged competitors in the sale of those shares, but they agreed to coordinate their sales in a manner amounting to cartel behaviour. The ACCC became aware of this when a party involved in the conduct filed an immunity application.

The ACCC investigated this activity and reported it to the CDPP in mid-2017, who chose to file criminal cartel charges. The ACCC conducted investigations into cartel behaviour, supervised the immunity process, and prosecuted civil cartel contraventions in the Federal Court of Australia. On the other hand, the CDPP was charged for pursuing criminal cartel offences in accordance with the Commonwealth's Prosecution Policy. However, the CDPP has withdrawn the criminal cartel charges against the concerned parties.

Source: ACCC Release No. 10/22

Dutch Authority penalized Apple for imposing unfair conditions on dating-app providers

The Dutch Authority for Consumers and Markets (**'ACM'**) held that Apple's revised conditions for dating-app providers are unreasonable and unnecessary. ACM noted that the app developers could not modify their current apps and ACM

considered this to be an unreasonable condition that contradicts Apple's specifications. Therefore, ACM noted that Apple has been unable to meet the ACM's standards and hence, Apple must pay an additional €5 million. Apple had already paid €20 million in penalties.

Apple imposed restrictions on dating-app providers who want to accept alternative payment methods in its revised terms and conditions. Apple provided that a dating app provider needs to create a completely new app for using an alternative payment system and submit it to the Apple App Store. The ACM observed this condition to be detrimental to the providers because the choice of an alternative payment system would incur additional costs and the current app-users will have to switch to the new app to use the alternative payment option. The ACM noted this will take a significant amount of time and effort for the app providers to properly inform consumers about this change.

The ACM held that the dating-app providers must have the liberty to use other payment options other than Apple's and they should also have the ability to refer to the payment systems outside of the app. ACM expressed this in the current order subject to periodic penalty payments imposed by ACM on Apple in August 2021.

Source – ACM publication dated 14-02-2022

CMA fines firms over £35m for Illegal Arrangement for NHS Drug

The Competition and Markets Authority (**'CMA'**) imposed a penalty of more than £35m for an illegal arrangement in the supply of important NHS prescription anti-nausea tablets after investigating the conduct of several pharmaceutical firms. The CMA fined the firms in relation to an arrangement where a competitor was not paid to launch a product which enabled price increases. The CMA found that the Alliance Pharmaceuticals, Focus, and Lexon were involved in an arrangement restricting competition in the supply of a drug to treat nausea, dizziness and migraines. The CMA also noted that another company, Medreich, was also involved in an arrangement that restricted competition in the supply of prochlorperazine 3mg dissolvable or 'buccal' tablets to the NHS. The Alliance Pharmaceuticals appointed Focus as its distributor under the arrangement, and Lexon and Medreich were paid a share of the profits that Focus earned by selling the Alliance's product. Therefore, Lexon and Medreich agreed not to compete in the supply of these tablets in the UK.

The CMA noted that these firms conspired to stifle competition in the supply of these drugs so that the NHS – the main buyer of the drugs – lost the opportunity for increased choice and lower prices. The CMA noted that the prices paid by the NHS for prochlorperazine rose by 700% and the annual costs incurred by the NHS for prochlorperazine increased from £2.7 million to £7.5 million. Therefore, the CMA penalized these firms for being involved in an illegal arrangement.

Source: CMA Press Release dated 03-02-2022

FTC Antitrust Complaint against Altria Group and JUUL Labs Inc. dismissed

A court at the United States Federal Trade Commission (**'FTC'**) dismissed a case filed by the agency seeking to compel Marlboro manufacturer Altria Group to surrender a minority stake in JUUL. The FTC alleged that Altria's decision to buy a 35% stake in JUUL in 2018 had eliminated competition and therefore constituted the violation of federal antitrust laws. The complaint alleged that the series of agreements between Altria and

JUUL involves Altria stopping to compete in the

US market for closed-system electronic cigarettes in exchange for a major ownership stake in JUUL, the industry's main player.

The Judge, D. Michael Chappell, concluded that FTC failed to show anticompetitive effects of the non-compete provision as well as a reasonable probability that Altria would have competed in the e-cigarette market in the near future through marketing a competing product independently, or through collaboration or acquisition. The Judge further stated that Altria's acquisition of the stake in JUUL has made the e-cigarette market more competitive and the complainant's counsel could not prove the violation of Section 5 of the Federal Trade Commission Act, Section 1 of the Sherman Act, or Section 7 of the Clayton Act.

Source: FTC Release dated 24-02-2022

Meta fined £1.5m for breaching the enforcement order of UK's CMA

The CMA issued an initial enforcement order ('**IEO**') at the start of an investigation into a completed merger by Meta, formerly known as Facebook, of Giphy. The order required Meta to actively inform the CMA of any 'material changes' to the business, including resignations of key staff, and then seek prior consent before rehiring or redistributing responsibilities. However, Meta did not inform about the resignation of 3 key employees and the reallocation of their roles, who were previously included on a list of key staff provided to the CMA.

Earlier, the CMA had fined Meta over £50 million in October 2021 after it had significantly limited the scope of compliance reports, despite repeated warnings from the CMA. The CMA noted that Meta failed to alert CMA in advance for the second time despite knowing it was legally required to do so. The CMA observed that IEOs are an integral part of CMA's mergers toolkit for ensuring that CMA can take effective action against any anti-competitive concerns. Therefore, taking into account the nature and gravity of the breach of IEO, the CMA issued Meta with a penalty of £1.5m.

Source: CMA Press Release dated 04-02-2022

EU Complaint filed against Google for Anti-Competitive Ad-Tech activities

The European Publishers Council ('**EPC**') filed an antitrust complaint against Google with the European Commission (**'EC'**) to break Google's monopoly over ad-tech. The EC could leverage the findings of the French competition authority, the UK Competition and Markets Authority, the Australian Competition and Consumer Commission, as well as the US States lawsuit.

The EPC opined that Google should be held responsible for its anticompetitive behaviour in relation to high ad prices and lack of transparency, and hence it recommended active steps to be taken to rectify the situation. The EPC called for effective measures to provide a remedy to all the stakeholders in the market including all the press publishers, advertisers and consumers as the absence of effective competition in ad-tech causes enormous loss to all stakeholders.

The EPC contended that Google has end-to-end dominance of the ad tech value chain amounting to market shares as high as 90-100% in portions of the ad-tech chain, thereby making Google the buyer and the seller in the same transaction and simultaneously controlling the ad-tech suite at the same time. The EPC sought to file a complaint against Google for anti-competitive ad-tech initiatives.

Source: EPC publication dated 11-02-2022