Inauguration of the 9th Annual Day of Competition Commission of India on 20th May, 2018 by Shri Rajiv Mehrishi, the Comptroller & Auditor General of India, Shri Injeti Srinivas, Secretary, Ministry of Corporate Affairs and Shri Devender Kumar Sikri, the then Chairperson, Competition Commission of India
Detection of cartels is a challenging proposition for any competition authority, given the environment of secrecy within which they operate. Traditional methods of cartel discovery such as receipt of tips, references, market research or leads from another investigation are useful but not as effective as hearing from the horse’s mouth itself i.e. getting a party involved in the cartel to voluntarily spill the beans. Leniency provisions do exactly that – provide an incentive to the involved party to provide concrete information to the authority regarding operation of cartel in exchange of reduction of penalties to be levied on it.

The Competition Act, 2002 (Act) provides for leniency provisions under Section 46. Through this, the Act empowers the Competition Commission of India (the Commission/CCI) to impose a reduced penalty on a member of a cartel who is alleged to have violated section 3, if such a member makes a “full, true and vital disclosure” in respect of alleged violations of the Act.

Leniency programmes have proved to be an effective tool of cartel detection in competition jurisdictions around the world. In India, these provisions have begun to show their usefulness with more and more leniency applications being received and investigations opened. Going forward, the Commission strongly believes that the robust leniency programme that has been put in place will help unravel more cartels in the times to come.

Some important enforcement decisions were pronounced by the Commission, this first quarter of 2018-19. The efforts of the Commission in penalizing cartels through the leniency provisions bore fruit in cases involving Indian Zinc-Carbon Dry Cell Battery Manufacturers and bidders to tenders floated by the Pune Municipal Corporation. Further, investigations were initiated against Board of Control for Cricket in India, Oil and Natural Gas Corporation and Trailer Owners Associations in Chennai region to enquire into abuse of dominance in the respective relevant markets. On the combinations front, an important assessment of acquisition of Monsanto by Bayer AG reached its conclusion with the Commission approving the proposed combination, subject to some modifications.

The quarter gone by also witnessed vital clarifications on some important interpretational issues in competition law by the judiciary. These include: (a) whether notice under section 6(2) of the Act is to be given prior to consummation of a transaction; (b) whether the NCLAT is empowered to dismiss the appeal for non-compliance of its direction to deposit the amount of part penalty as a condition for grant of stay; (c) whether pre-determination of ‘relevant market’ is mandatory while assessing the violation under section 3 of the Act; and (d) whether persons summoned by the DG are entitled to be accompanied by their advocate.

The Commission celebrated its 9th Annual Day on 20th May 2018 and continuing with our tradition to invite eminent personalities to deliver the ‘Annual Day Lecture’, this year’s lecture was delivered by Shri Rajiv Mehrishi, the Comptroller & Auditor General of India, on “Competition Law in India: Reflection and Rethinking”.

I’m also delighted with the introduction of “Do it yourself (DIY)” which is a self-guidance system for determining the notifiability of mergers and acquisitions to the Commission. The system is in line with the Government of India’s vision for e-governance and Digital India Programme and should help bring the stakeholders closer to the combination review process and aid better compliance.

(Sudhir Mital)
IN-FOCUS

LESSER PENALTY PROVISIONS UNDER COMPETITION ACT, 2002

“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.” –Adam Smith

What Adam Smith described is a phenomenon better known as ‘Cartels’ that continues to plague competitive processes in markets across the globe. By forming such cartels, enterprises or persons enter into an agreement to fix prices, reduce output, allocate markets or rig bids to distort the market outcomes in their favour. The Competition Commission of India (the Commission/CCI) is empowered to inquire into such cartels, and to impose penalty upon each person or enterprise included in that cartel. However, the biggest challenge lies in detecting cartels, as they are secret by nature and substantial resources have to be dedicated by Competition authorities to detect them. As a solution, authorities around the world have adopted Leniency/Lesser penalty programmes which are universally considered as one of the best available ways to detect cartels. Since cartels are so secretive, internal information is usually necessary to identify them and leniency programmes enable such information to be made available to the competition authority.

What is Leniency Programme?

Leniency programme is an official system of granting immunity or lenient treatment to a cartel member who comes forward and discloses information about such anticompetitive agreements and assists the Commission.¹ The benefit of having a sound leniency programme is that it helps the Commission to get inside information and details of the suspected cartels as it incentivizes the cartel members to cooperate with the Commission and escape stringent penalties.

Leniency provisions are a win-win situation for the Commission as well as for the cartel member who agrees to share information with the Commission.

International Experience

United States was the first to adopt leniency provisions in 1978, whereby corporations or individuals involved in illegal cartel activities were allowed amnesty if they came forward and denounced the cartels. After a number of amendments, this programme proved to be a success and motivated several other countries to adopt similar leniency provisions.

Implementation of leniency programme by Canada in 1991, European Commission in 1996, United Kingdom in 2000 and France and Germany in 2001 demonstrated the interest of countries in adapting this ‘carrot and stick’ method. At present, more than 60 countries including Australia, Japan, Korea, Poland etc. have adopted a leniency programme. Developing economies such as Brazil, Mexico, South Africa also have active leniency initiatives leading to the detection and dismantling of the largest global cartels and resulting in record-breaking fines.²

According to OECD, the percentage of cartel cases detected through leniency applications is reported to range between 45-55% for countries like Canada, Chile, Germany, Korea and New Zealand and up to 80% for the EU. In the United States, over 90% of penalties imposed by the US Department of Justice were linked to investigations assisted by leniency applicants.³

Though leniency programs differ from jurisdiction to jurisdiction, yet, as per an ICN report, most of them share common features which includes a full immunity (zero penalty) given to the first member of the cartel who self-reports the cartel and its involvement; and a lesser penalty is awarded to the subsequent second (or even third or more) applicant.⁴

Leniency Provisions in India

Section 46 of the Competition Act, 2002 (Act) provides for leniency provisions which empower the Commission to grant lesser penalty to any member of the cartel (producer, seller, distributor, trader or service provider) who has violated Section 3 of the Act if they make a full and true disclosure in respect of the alleged violations and such disclosure is also vital. The Commission shall not grant lesser penalty wherein the report of the investigation by the DG has been already received before making a disclosure or; the person making the disclosure does not continue to cooperate until the completion of the proceedings.

² The United States, Department of Justice, Frequently Asked Questions About The Antitrust Division’s Leniency Program And Model Leniency Letters, 2017 available at: https://www.justice.gov/atr/file/518241/download
If the Commission is satisfied that the member of the cartel has in the course of proceedings,—

(a) not complied with the condition on which the lesser penalty was imposed by the Commission; or

(b) has given false evidence; or

(c) the disclosure made by the member is not vital,

The Commission may try them for the offence with respect to which the lesser penalty was imposed and shall impose penalty.

To effectively implement the leniency programme, Competition Commission of India (Lesser Penalty) Regulations, 2009 (Regulations) were introduced in 2009. As per the regulations, the reduction in monetary penalty depends upon few factors as explained in the following diagram:-

Factors influencing reduction of penalty

- the stage at which the applicant comes forward with the disclosure
- the evidence already in possession of the Commission
- the quality of the information provided by the applicant
- the entire facts and circumstances of the case

Quantum of Immunity under Leniency Provisions

The quantum of reduction in monetary penalty under the Lesser Penalty Regulations are as under:-

1. Upto a 100% reduction in penalty of the applicant if it is the first to make a vital disclosure enabling the Commission to form a prima-facie opinion regarding the existence of a cartel.

2. Upto a 100% reduction in penalty of the applicant, even if the matter is under investigation, if without its disclosure, the Commission or the Director General did not have sufficient evidence to establish the contravention.

3. Reduction in penalty of up to 50% and 30% may be granted to the second or third applicant(s) respectively on making a disclosure by submitting evidence, which provides a significant added value to the evidence already available with the Commission or Director General for establishing the existence of the cartel.

Cases

- In Re: Cartelisation in respect of zinc carbon dry cell batteries market in India v. Eveready Industries India Ltd. (Case No. 02 of 2016)

  Cartel members: Eveready Industries India Limited, Indo National Limited and Panasonic Energy India Co. Ltd. etc.

  Lesser Penalty granted by Commission:

  - 100 (hundred) percent reduction of penalty was granted to Panasonic Energy India Co. Ltd. as it was the first to approach the Commission and the information and evidence provided by it was crucial in assessing the domestic market structure of batteries, nature and extent of information exchanges with regard to the cartel and identifying the names, locations and email accounts of key persons involved in the cartel activities and enabled the DG to conduct search and seizure operations at the premises of the manufacturers and seize crucial evidence.

  - 30 (thirty) percent reduction in the penalty was granted to Eveready Industries India Limited who was second in making a disclosure and approached the Commission not at the beginning but at a later stage of the investigation, i.e. three days after the search and seizure operations had been carried out by the DG.

  - 20 (twenty) percent reduction in the penalty was granted to Indo National Limited who was third in making a disclosure in this case. The Commission took into account several factors such as, applicant’s three week delay in approaching the Commission, the existing priority status, continuous and expeditious co-operation extended by the applicant including admission of cartelisation etc. before asserting the penalty.

- In Re: Nagrik Chetna Manch (Case No. 50 of 2015)

  Cartel members: Fortified Security Solutions (Fortified), Ecoman Enviro Solutions Pvt. Ltd. (Ecoman), Lahs Green India Pvt. Ltd. (Lahs Green), Sanjay Agencies, Mahalaxmi Steels (Mahalakshmi) and Raghunath Industry Pvt. Ltd. (Raghunath)

  Lesser Penalty granted by Commission:

  - 50 (fifty) percent reduction in penalty was granted to Mahalaksmi and Lahs Green and their individuals, keeping...
in view the *modus operandi* of the cartel, the stage at which the lesser penalty application was filed, the evidences gathered by the DG independent of Lesser Penalty Application and co-operation extended in conjunction with the value addition provided in establishing the existence of cartel.

- 40 (forty) and 25 (twenty-five) percent reduction in penalty was granted to Sanjay Agencies and Ecoman, along with their individuals respectively as the evidences and cooperation provided by them was held to have helped the investigation in establishing the existence of a cartel.

- **In Re: Cartelisation by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters. v. Essel Shyam Communication Limited (now Planetcast Media Services Limited) (Suo Moto Case No. 02 of 2013)**

  **Cartel members:** Essel Shyam Communication (ESCL), now known as Planetcast Media Services and Globecast, a subsidiary of the Orange Group (earlier France Telecom Group), Globecast India Private Limited, Globecast Asia Private Limited etc.

  **Contravention of provision:** Section 3(3)(d) read with Section 3(1) of the Act.

  **Lesser Penalty granted by Commission:**

  - 75 (seventy five) percent reduction in the penalty was granted to M/s Pyramid Electronics keeping in view the value addition provided by it in establishing the existence of cartel and the stage at which it had approached CCI.

  **Procedure for Grant of Lesser Penalty**

  - The applicant or its authorized representative may make an application containing all the material information, or may contact the designated authority, either orally or through e-mail or fax, for furnishing the information and evidence relating to the existence of a cartel. The designated authority shall, thereafter, (within five working days), put up the matter before the Commission for its consideration.

  - The Commission shall mark the priority status of the applicant and the designated authority shall convey the same to the applicant but mere acknowledgement shall not entitle the applicant for grant of lesser penalty.

  - The date and time of receipt of the application by the Commission shall be the date and time as recorded by the designated authority.

  - Unless the evidence submitted by the first applicant has been evaluated, the next applicant shall not be considered by the Commission.

  - Lack of continuous cooperation entitles the Commission to reject the application after providing due opportunity of hearing to that applicant.

  - After rejection of the priority status of the first applicant, the subsequent applicants shall move up in order of priority for grant of priority status by the Commission.

**Conclusion**

A majority of OECD member countries regard leniency as the most important tool for detecting cartels. India too, has followed the international best practices and has successfully incorporated leniency provisions in its competition law regime. Rise in number of leniency applications has facilitated the Commission in not only gathering hard evidences but also in detecting and penalizing cartels. A transparent and robust leniency programme as laid out by the Commission has effectuated an efficient enforcement of the Act and has helped the cartel members weigh the benefits they could avail, especially in the form of 100% reduction in penalty by coming forward and cooperating with the Commission.
SECTION 3 & 4 ORDERS

CCI held that withdrawing post sale discounts alone is not sufficient to establish an anti-competitive agreement

Information was filed under Section 19 of the Competition Act, 2002 in three cases, which were clubbed, namely: (i) Mr. Saifudheen E., Proprietor of M/s. Popular Traders against Ramco Cements Limited (Ramco) and the Kerala Cement Dealers' Association (KCDA) [Case No. 75 of 2012]; (ii) Mr. K. M. Chakrapani, Proprietor of M/s. Coir India against Ramco [Case No. 56 of 2013]; and (iii) Mr. Muraleedharan K., Proprietor of M/s. S. V. S. Enterprises against Ramco and KCDA [Case No. 106 of 2013]. The Commission vide its Order dated 05th February, 2014, clubbed the three matters and referred the same for investigation to Director General (DG) under Section 26(1) of the Act.

The DG conducted investigation and filed its common investigation report including two Supplementary Investigation Reports on 30th March, 2015, 27th August, 2015, 29th June, 2017 respectively. In its second Supplementary Investigation Report, the DG found contravention of Section 3 of the Act by Ramco, KCDA and Dalmia Cements (Bharat) Limited (‘Dalmia’) on the basis of their conduct during a meeting held on 23rd October, 2013 at Horizon Hotel, Thiruvananthapuram (Meeting). As per the DG, this meeting was organised by the said cement manufacturers with the assistance of a unit of KCDA i.e. Thiruvananthapuram Cement Dealers Association (TCDA). In the meeting, officers / office bearers, as the case may be, of the Opposite Parties were found to have exhorted cement dealers not to sell cement below the invoice price.

The issues before the Commission were two fold, first, the role of KCDA in obstructing supply of cement to dealers, thereby limiting/controlling the supply of cement in the State of Kerala and second, fixation of sale prices of cement dealers. On the first issue, Commission was of the view that the material available on record is not sufficient to conclusively establish any role played by KCDA in termination of cement dealership, insisting its consent/NOC as a mandatory requirement for award of cement dealership or stoppage of supplies to the dealers. With respect to the second issue, it was alleged that firstly, the Opposite Parties, through their office bearers, made statements to cement dealers during the said Meeting to avoid sales below their invoice price and secondly, withdrawal of the discount offered by Ramco and Dalmia. In this regard, the Commission observed that detailed investigation followed by two further investigations could not discover material that could persuasively establish indulgence into any anti-competitive conduct covered under the provisions of the Act. Further, one-off instance of only two, among many competitors, withdrawing post sale discounts alone was not sufficient to establish an anti-competitive agreement.

Hence, the Commission closed the matter holding that no case of contravention of Section 3(3) read with Section 3(1) of the Act is made out in the present case.

CCI granted 100 percent reduction in penalty to Panasonic Energy India Co. Ltd. in Indian Zinc-Carbon Dry Cell Battery cartel case

The case was taken up by the Commission suo motu under Section 19 of the Act based on the disclosure by Panasonic Energy India Co. Ltd. (Panasonic) under Section 46 of the Act read with the Competition Commission of India (Lesser Penalty) Regulations, 2009 (Lesser Penalty Regulations) against three leading Indian zinc-carbon dry cell battery manufacturers- Eveready Industries India Ltd. (Eveready), Indo National Ltd. (Nippo), Panasonic and their association, Association of Indian Dry Cell Manufacturers (AIDCM) for colluding to fix prices of zinc-carbon dry cell battery in India.

During investigation, the DG carried out simultaneous search and seizure operations at the premises of Eveready, Nippo and Panasonic on 23 August 2016 and seized incriminating material and documents therefrom. Subsequently, while the investigation was in progress and report from the DG was pending, Eveready and Nippo, approached CCI as applicants under the Lesser Penalty Regulations.

The evidence collected in the case showed that the three battery manufacturers, facilitated by AIDCM, had indulged in anti-competitive conduct of price coordination, limiting production/supply as well as market allocation in contravention of the provisions of Section 3(3)(a), 3(3)(b) and 3(3)(c) read with Section 3(1) of the Act. It was observed that the conduct was continuing from 2008 i.e. prior to 20th May, 2009, the date on which Section 3 of the Act became enforceable, and till 23rd August, 2016 i.e. the date of search and seizure operations by the DG.

CCI decided to levy penalty on the three battery manufacturers at the rate of 1.25 times of their
profit for each year from 2009-10 to 2016-17. Also, penalty of INR 1.85 Lakh was levied on AIDCM at the rate of 10 percent of their income for preceding three years. Additionally, penalty leviable on individuals was reduced by 100 percent, 30 percent and 20 percent respectively. Pursuant to reduction, penalty imposed on Eveready was INR 171.55 Crores and on Nippo was INR 42.26 crores. No penalty was imposed on Panasonic.

CCI busts cartel in tenders of Pune Municipal Corporation

In 2015, Nagrik Chetna Manch filed an information with the Commission under Section 19(1)(a) of the Act alleging bid rigging/ collusion in Tender nos. 34, 35, 44, 62 and 63 of 2014 floated by the Pune Municipal Corporation during the period December 2014 to March 2015 for “Design, Supply, Installation, Commissioning, Operation and Maintenance of Municipal Organic and Inorganic Solid Waste Processing Plant(s)”. The case was forwarded to the DG for investigation as Case no. 50 of 2015. Investigation revealed that six companies/firms were involved in bid-rigging namely Fortified Security Solutions (Fortified), Ecoman Enviro Solutions Pvt. Ltd. (Ecoman), Lahs Green India Pvt. Ltd. (Lahs Green), Sanjay Agencies, Mahalaxmi Steels (Mahalaxmi) and Raghunath Industry Pvt. Ltd. (Raghunath).

The DG collected several pieces of evidences during investigation, which showed collusion amongst bidders, such as common address of some bidders, use of same bank account by bidders for preparing demand drafts, use of common IP addresses for uploading tender bids, besides oral statements of officials of the firms. Accordingly, the Commission concluded that there was meeting of minds and co-ordination between various individuals which included proprietor/ partner/ director of the firms to rig the tenders by submitting proxy/ cover bids to enable Ecoman to emerge as L1 bidder in all five tenders. Such collusive bidding is prohibited under provisions of Section 3(3)(d) of the Act.

Importantly, during the pendency of investigation, all six companies/firms approached the Commission as Lesser Penalty Applicants under Section 46 of the Act read with the Lesser Penalty Regulations.

The Commission, after finding contravention of provisions of the Act, computed INR 13.07 Lakh, INR 45.20 Lakh, INR 42 Lakh, INR 1.51 Crores, INR 3.36 Crores and INR 30.55 Lakhs as leviable penalty on Fortified, Ecoman, Lahs Green, Sanjay Agencies, Mahalaxmi and Raghunath, respectively. However, under the Lesser Penalty provisions of the Act and the Lesser Penalty Regulations, the Commission reduced penalty on four firms i.e. Mahalaxmi, Lahs Green, Sanjay Agencies and Ecoman. While Mahalaxmi and Lahs Green and their officials were granted 50 percent reduction in penalty, Sanjay Agencies and Ecoman, along with their officials were granted 40 and 25 percent reduction in penalty, respectively.

In addition to the above matter, the Commission, suo motu, investigated two more cases involving tenders of Pune Municipal Corporation for “Design, Supply, Installation, Commissioning, Operation and Maintenance of Municipal Organic and Inorganic Solid Waste Processing Plant(s)” . These cases were taken up on the basis of evidence gathered by the DG during investigation into the above matter and disclosure by firms under Section 46 of the Act read with the Lesser Penalty Regulations.

One case was initiated to investigate two tenders floated by the Pune Municipal Corporation during the financial year 2013-14 i.e. Tender nos. 21 and 29 of 2013. The other case was initiated to investigate one tender floated during the financial year 2014-15 i.e. Tender no. 59 of 2014.

From the evidence gathered during investigation, the Commission found evidence of bid rigging/ collusive bidding, in contravention of the provisions of Section 3(3)(d) of the Act, in above stated Tender nos. 21 and 29 of 2013 and Tender no. 59 of 2014 floated by Pune Municipal Corporation by submitting proxy/ cover bids. This was also revealed in the Lesser Penalty Applications filed by five firms namely Saara Traders Pvt. Ltd. (Saara), Lahs Green, Ecoman, Fortified and Raghunath.

In the case involving two tenders floated in financial year 2013-14, Saara, Ecoman, Fortified and Raghunath were found to have contravened the provisions of the Act. Accordingly, an amount of INR 46.45 Lakhs, INR 33 Lakhs, INR 11 Lakhs and INR 26.40 Lakhs, respectively was computed as leviable penalty on each of these firms. Penalty was also imposed on individuals of these firms except for Fortified, a proprietorship firm. Although all firms approached CCI as Lesser Penalty Applicants, CCI granted 50 percent reduction in penalty only to Saara and its officials.

Further, in case involving tender floated in financial year 2014-15, Lahs Green, Ecoman, Fortified and Raghunath were found to have contravened the provisions of the Act by rigging the bid in Tender no. 59 of 2014. However, in view of the penalty already levied in Case no. 50 of 2015 for infringement during the period 2014-15, no penalty was levied on the firms or its officials.
INVESTIGATION INITIATED

CCI Directs Investigation against Oil and Natural Gas Corporation for alleged abuse of dominant position

The Commission, vide order dated 12th June, 2018, directed investigation against the opposite party Oil and Natural Gas Corporation (ONGC) for alleged abuse of dominant position.

The Informant (INSA), an association of various Indian Ship owners, provides services of specialised Offshore Support Vessels (OSVs) at various stages of offshore Oil & Natural Gas Exploration and production activities. The INSA alleged that while procuring the services of Offshore Oilfield Support Vessels from Informant, ONGC coerced members of INSA to enter into Charter-Hire agreements (CHA) which contained one-sided/unfair non-negotiable terms and conditions pertaining to termination and dispute resolution, which amounted to abuse of its dominant position.

The INSA has alleged that the ONGC, in 2016, invoked unilateral right of termination and terminated 27 OSVs agreements in order to exert financial pressure on OSV service providers to reduce their contracted rates.

The Commission upon consideration of the material placed on record found ONGC to be dominant in the relevant market, i.e. ‘market for charter hire of OSVs in the Indian EEZ’. ONGC was found to have chartered/operated at least 80 percent of the offshore drilling rigs in the Indian EEZ in the last 5 years. Further, it was seen out of 48 contractually committed/operational offshore drilling rigs, 45 are operated by ONGC, making it the de facto dominant buyer of OSV services.

Further, other factors mentioned under Section 19(4) of the Act such as highest market share, comparative size and resources, possession of economic power as an undertaking of the Government, dependence of member companies of the Informant on the demand/business generated by ONGC were also considered to conclude its dominance in the relevant market.

With regard to abuse, the Commission found Clause 14.2 of the Special Condition to Contract (SCC) which gave a unilateral right to ONGC to terminate the agreement without assigning any reasons to be unfair and one-sided. Further, the Commission found ONGC has not only included such onerous clause in the CHA but actually invoked it. The Commission took into consideration the manner in which the termination notices were sent and consequently withdrawn by the ONGC on receiving a reduced offer from the members of the Informant which showed the high-handed approach of ONGC, prima facie leading to a contravention of Section 4(2)(a)(i) of the Act.

Accordingly, the Commission directed the DG to investigate the matter under Section 26(1) of the Act. The Commission also allowed interim relief to the effect that ONGC will not invoke Clause 14.2 of the SCC, in any manner, against the Ship-owners till further order vide a separate order dated 15th June, 2018.

CCI Directs Investigation against BCCI for Alleged Abuse of Dominant Position

CCI vide its Order dated 1st June, 2018 directed investigation against Board of Control for Cricket in India (BCCI) in information received from Pan India Infra Projects Private Limited (Pan India), formerly known as Essel Sports Private Ltd., for alleged abuse of dominant position.

The Informant is a promoter of Indian Cricket League (ICL) while BCCI is a society registered under the Tamil Nadu Societies Registration Act, 1975 and is also a member of International Cricket Council (ICC) and promotes Indian Premier League (IPL). BCCI controls the game of cricket in India while promoting and framing the laws and selecting teams to represent India in test matches, one day internationals (ODIs) and 20-20 matches in India or abroad.

The Informant alleged that BCCI has abused its dominant position in the relevant market by way of blacklisting the Informant for award of broadcast rights for IPL, deciding to boycot ICL and refusing to accord permission for hosting the matches of ICL and hence, denied market access to Pan India. It had further been alleged that BCCI used its regulatory power to protect its interest in the commercial sphere. The above conduct of BCCI, as claimed, has led to violation of Section 4 of the Act.

The Commission, after hearing the parties, prima facie found merit in the allegations made by the Informant. The Commission delineated the relevant market as the market for ‘organization of professional domestic cricket leagues/events in India’. The Commission was prima facie of the view that BCCI holds a dominant position in the relevant market owing to it being only association for cricket in India at national level and in that
capacity, ICC vesting it with certain rights.

With regard to abuse, the Commission was of the view that apart from restraining the organisation of a competitive league (i.e. ICL) by the Informant, BCCI appears to have excluded the Informant in the downstream market by disallowing it to bid for the media rights for IPL. Such denial *prima facie* appears to be in contravention of the provisions of Section 4(2)(c) of the Act. It was further observed by the Commission that the sports federations engaged in organization of tournaments/leagues are put to advantage if they also possess the authority to grant approval for organization of similar events by others and set conditions for such organization. BCCI seems to have taken advantage of such a situation.

The Commission, thus, found that a prima facie case of abuse of dominant position within the meaning of Section 4(2)(c) has been made out against BCCI. Accordingly, the Commission directed the Director General to investigate the matter under Section 26(1) of the Act.

## CCI Directs Investigation against various Trailer Owners Associations in Chennai region for alleged collusion of tariff fixation

The Commission, vide its order dated 12th June, 2018, directed investigation against various Trailer Owners Associations in Chennai region (collectively referred to as ‘OPs’) in an information received from National Association of Container Freight Stations (NACFS), Chennai Chapter (Informant) for alleged collusion of tariff fixation by trailer owners for movement of goods at Container Freight stations.

The members of the Informant, an association of container freight stations, require trailer services for movement of goods and containers during Export and Imports. The Informant submitted that tariff should ideally be negotiated on a one-to-one basis between trailer owner and CFS operator. However, the OP through various meetings have agreed to tariff fixation and other terms and conditions with respect to payment and hiring of trailer trucks etc. which are in contravention of provisions of the Section 3 of the Act.

The Commission took note of the letters, details of meetings and the strike notice issued by OPs placed on record by Informant which substantiated the facts asserted by the Informant.

The Commission observed that though the trade associations are allowed to engage in legitimate collective action, when such trade associations transgress their legal contours and facilitate collusive or collective decision-making with the intention of limiting or controlling the competition in the market, it may amount to violation of the provisions of the Act. Accordingly, the Commission held that practice of price-fixing by the OPs association for the container trailer transport services takes away the freedom of the market forces to determine those prices, and *prima facie* falls foul of Section 3(3)(a) read with Section 3(1) of the Act. Also, the limitation imposed on the members of the Informant that they cannot ply more than 20 trailers of their own and further, the threat of and also initiation of actual strike has the potential to limit and restrict the provision of services in the market, and, hence, *prima facie* amounts to a contravention of Section 3(3)(b) read with Section 3(1) of the Act.

Accordingly, the Commission directed the Director General to investigate the matter under Section 26(1) of the Act.

## ANNUAL DAY

The Commission celebrated its 9th Annual Day on 20th May 2018 with a lecture delivered by Shri Rajiv Mehrishi, the Comptroller & Auditor General of India, on “Competition Law in India: Reflection and Rethinking”. This lecture was attended by an esteemed audience representing, among others, business and industry, bureaucracy, regulatory authorities, chambers of commerce, legal fraternity and academics.

In his lecture, Shri Mehrishi emphasized the need of a market regulator to address the issue of market failure. He highlighted issues such as structure of regulatory bodies, interface of competition law with sectoral regulators, market power of the State, and the challenges thrown by the new economy in competition regulation. Shri Mehrishi expressed his concerns relating to market regulation in the new economy in terms of first mover advantage emanating from economies of scale, common shareholding, vertical integration, financing cartels etc. With regard to interface with sectoral regulators, he flagged the issue of jurisdictional overlap with CCI, arising due to several sectoral regulators having provisions pertaining to competition in their legislations. To resolve this overlap, he suggested statutory amendments and setting up of some engagement protocols between CCI.
and sectoral regulators. He also emphasized that given its specialized skills and experience across sectors, CCI is best placed to regulate markets on matters of competition.

Shri Devender Kumar Sikri, the then Chairperson, CCI, in his welcome address highlighted Commission’s journey so far and stated that during the last nine years, Commission reviewed 951 antitrust cases, 569 merger filings and has held more than 600 advocacy events. He emphasised that CCI has always strived to nurture a culture of competition in markets through credible antitrust enforcement and regular engagement with stakeholders. He also cited the role of leniency provision of the Competition Act as an effective tool in detecting cartels.

Speaking on the occasion, Shri Injeti Srinivas, Secretary, Ministry of Corporate Affairs, appreciated the crucial role played by CCI at each stage of corporate life cycle i.e. entry of firms, operation in markets and exit of firms. He stressed the need to expand regional outreach of CCI, simplify procedures of competition regulation, and strengthen internal capacity of the Commission.

The event ended with a vote of thanks by Secretary, CCI
On 26th March, 2018, the Commission received a notice from Tata Steel Limited (TSL) in relation to its proposed acquisition of 75 per cent or more of the total equity share capital of Bhushan Steel Limited (BSL). The notice was filed pursuant to resolutions passed by the board of directors of TSL in meetings and subsequent submission of a resolution plan by TSL to the insolvency resolution professional. (Hereinafter, TSL and BSL are collectively referred to as the Parties).

TSL, a public limited company, is engaged in integrated steel manufacturing operations, ranging from mining to steel-making and further downstream processing. The annual crude steel capacity across Indian operations of TSL is stated to be nearly 13 million ton per annum (MTPA). BSL is also a public limited company and is similarly engaged in integrated steel manufacturing operations, including downstream processing. BSL’s current annual crude steel production capacity is stated to be 5.6 MTPA.

The activities of the Parties overlapped in the ‘manufacturing and selling of various finished flat carbon steel products in India’. Though, TSL deals in other products such as ferro alloy minerals, TMT rebars in straight lengths, long carbon steel products, etc., BSL is not present in any of these product segments. Further, while BSL manufactures and sells alloy billets, TSL is not engaged in manufacturing or sale of alloy billets.

The Commission noted that there are various stages in the production process of flat carbon steel products i.e. hot rolling, cold rolling and coating. As per the information given by the Acquirer, the finished product may be sold at each of these stages or be utilized for further processing in the next stage. Based on such segmentation, activities of the Parties overlapped in respect of following finished flat carbon steel products (FCSPs):

i. Hot rolled coils and sheets (HR-CS) and plates (HR-P) (together, HR-CSP);

ii. Cold rolled coils and sheets (CR-CS);

iii. Surface coated products (SCP) (including galvanized products (GP) and colour coated products (CCP)); and

iv. Flat steel tubes and pipes (T&P) (including precision and non-precision T&Ps).

The Commission was of the view that each of the above said product segments may constitute separate relevant product market. However, the exact delineation of relevant market was left open as the combination did not give rise to any competition concern.

The Commission assessed the combination on several alternative parameters such as installed production capacity, gross production, production for sale and domestic sales. The Commission noted that there are other significant competitors such as JSW Steel Ltd., Essar Steel India Limited, Steel Authority of India Limited, Jindal Steel & Power Limited and Bhushan Power & Steel Limited present in the said business segments, which would continue to provide competitive constraint to the parties, post-combination.

The Commission further noted that both the Parties are large integrated steel producers and are active across the value chain in the flat steel products. Further, the finished product at the end of each of the stage in the production process of flat carbon steel products i.e. hot rolling, cold rolling and coating may be sold either in the open market or utilized for further processing in the next stage. Accordingly, following vertically related markets, inter alia, were identified for competition analysis:

i. Upstream segment of HR-CSP and downstream segment of (i) CR-CS; and (ii) Tubes and Pipes (T&P);

ii. Upstream segment of CR-CS and downstream segment of (i) surface coated products (SCP); and (ii) T&P; and

iii. Within SCP, upstream segment of galvanized products (GP) and downstream segment of colour-coated products (CCP)

The Commission noted that each of the above-mentioned markets is characterized by presence of significant competitors and therefore, post-combination, TSL would not have the ability to foreclose the market for other competitors.

The Commission therefore approved the combination under sub-section (1) of Section 31 of the Act.
CCI approves the acquisition of Monsanto by Bayer AG under Section 31(7) of the Competition Act, 2002, subject to modifications/remedies to address the anti-competitive effects resulting from the acquisition

On 7th August, 2017, the Commission received a notice from Bayer Aktiengesellschaft (Bayer) in relation to its proposed acquisition of Monsanto Company (Monsanto). Bayer, the acquirer, is a German stock corporation and is a life sciences company with competencies in the areas of health care and agriculture. The activities of Bayer are carried out in three main divisions viz. pharmaceuticals, consumer health, and crop sciences. Monsanto is a global supplier of agricultural products like seeds, biotechnology traits, and herbicides.

During assessment of the combination, the Commission sought information from certain third parties. Further, considering complexity, technical and global nature of the combination, the Commission engaged in cooperation with other jurisdictions.

Based on materials available on record, the Commission was of the prima facie opinion that the combination is likely to cause appreciable adverse effect on competition in below mentioned markets in India:

i. market for non-selective herbicides;
ii. market for licensing of herbicide tolerant trait for seeds in India;
iii. upstream and downstream market for Bt. Cotton seeds in India;
iv. market for licensing of parental lines or hybrids (including traits) for corn seeds in India;
v. market for commercialization of hybrid rice and hybrid millet seed in India; and
vi. market for various vegetable hybrid seeds in India i.e. cabbage, cucumber, bitter gourd, bottle gourd, okra, hot pepper, tomato, water melon, ridge gourd and onion.

Apart from above, the proposed combination was also likely to result in portfolio effects due to parties presence in closely related markets; and (b) reduce the rate of innovation at which new products are launched globally and in India and therefore, adversely affect the Indian markets. Accordingly, Parties were directed to show cause as to why investigation in respect of combination should not be conducted (“SCN”).

The Commission also invited comments/objections/suggestions, in terms of sub-section 3 of Section 29 of the Act.

The Commission, after considering responses received from third parties, response to SCN, and comments received from public, observed that adverse effect on competition in the above said markets can be addressed by way of modifications to the proposed combination. Accordingly, the Commission approved the proposed combination under Section 31(7) of the Act, subject to the following remedies to be implemented by the parties:

A. Divestment of the following businesses of Bayer to an independent entity, which meets the parameters prescribed in the order of the Commission:
   i. Glufosinate ammonium (a non-selective herbicide);
   ii. Crop traits of cotton and corn;
   iii. Hybrid seeds of vegetables

B. Divestment of the shareholding of Monsanto in Maharashtra Hybrid Seed Company Limited (26%), to an independent entity, which meets the parameters prescribed in the order of the Commission.

C. In addition to the above divestiture, Bayer is also bound by the following commitments for a period of 7 (seven) years from the closing of the Bayer/Monsanto transaction,

   i. The resultant entity of the combination (Combined Entity) would follow a policy of broad based, non-exclusive licensing of Genetically Modified (GM) as well as non-GM traits currently commercialized in India or to be introduced in India in the future, on fair, reasonable and non-discriminatory terms (FRAND Terms);
   ii. The Combined Entity would follow a policy of non-exclusive licensing of non-selective herbicides and/or their active ingredient(s) in case of launch of new GM/non-GM traits in India that restrict agricultural producers including farmers to use specific non-selective herbicide(s) being supplied only by the parties, on fair, reasonable and
non-discriminatory basis;

iii. Combined entity would allow Indian users / potential licensees to access the following on FRAND Terms: (a) existing Indian agro-climatic data owned and used by the Combined Entity for its digital applications commercialized in India; (b) commercialized digital farming platform(s) of the Combined Entity for supplying/selling agricultural inputs to agricultural producers in India; and (c) digital farming applications of the Combined Entity, commercialized in India, on subscription basis. This remedy shall operate for a period of 7 years from the commencement of commercialization of digital farming product(s) or digital farming platform(s), subject to a total period of 10 years from the closing of the combination.

iv. Combined Entity would also grant access to Indian agro-climatic data, free of charge to Government of India and its institution(s), to be used exclusively for creating a public good in India.

v. Combined Entity is barred from offering its clients, farmers, distribution channels and/or its commercial partners, two or more products as bundle which may potentially have the effect of exclusion of any competitor.

vi. Combined Entity is further barred from imposing, directly or indirectly, commercial dealings capable of causing exclusivity in the sales channel for supply of agricultural products.

The Commission further ensured in its order, that in case the Combined Entity offers better commercial terms to a new licensee for any of the above licenses, then it would be bound to offer, within 60 days, such similar terms to all existing licensees.

Bayer was also directed to disclose, on its Indian websites, all its contact details to facilitate the implementation of remedies ordered by the Commission.

The remedies ordered by the Commission will strengthen the agricultural input suppliers in India, by enabling innovation and launch of new products for the benefit of the farmers.

Acquisition of Electrosteel Steels Limited by Vedanta Limited

The Commission received a notice filed by Vedanta Limited (hereinafter referred to as ‘Vedanta/Acquirer’) in relation to acquisition of 90 percent of equity share capital of Electrosteel Steels Limited (ESL). The notice was filed under sub-section (2) of Section 6 read with sub-section (a) of Section 5 of the Act, pursuant to Resolution Plan dated 29th March, 2018, in terms of the Insolvency and Bankruptcy Code, 2016 (IBC) (hereinafter, Vedanta and ESL are collectively referred to as ‘Parties’).

Vedanta, a public limited company incorporated in India, is a subsidiary of Vedanta Resources Plc., an entity incorporated in United Kingdom. Vedanta, a natural resources company have operations inter alia, in aluminium, zinc, lead, silver, copper, iron ore and power. It has iron ore mines in Goa and Karnataka and a pig iron plant in Goa. ESL, a public company incorporated in India, and a part of Electrosteel Group is, inter alia, engaged in the business of iron and steel. It manufactures and sells products such as Pig Iron, Billets, TMT Bars and Wire Rods.

The Commission observed that both Vedanta and ESL are engaged in manufacture and sale of pig iron in India. Although, it was stated that currently there is no vertical relationship between Parties, it is noted that there exist a potential for vertical relationship between Vedanta and ESL, as Vedanta is present in mining of iron ore (Upstream Segment), which may be used as raw material in manufacturing of pig iron (Downstream Segment). However, the Commission left the exact delineation of the relevant market(s), as the proposed combination was not likely to cause appreciable adverse effect on competition in any of the possible alternative relevant markets that could be delineated.

The Commission observed that the combined market share of the Parties in the market for manufacture and sale of pig iron is not significant and there are other existing players in the market such as Neelachal Ispat, TATA Metaliks and Sona Alloys. Further, the Acquirer’s presence is insignificant in the market of iron ore i.e. Upstream Segment and there are other players such as NMDC, SAIL, Rungta Mines, TATA Steel and Seerajudin. Accordingly, the Commission approved the proposed acquisition under Section 31(1) of the Act.

Combinations under review

The Commission has received filings of some major combinations such as BCPE Max Dutch Bidc, Gist-Brocades International B.V. and DSM Sinochem Pharmaceuticals Pte Ltd.; Siemens Aktiengesellschaft and Alstom S.A; Northern TK Venture Pte. Ltd., Fortis Healthcare Limited and Fortis Malar Hospitals Limited; Schneider Electric India Private Limited, MacRitchie Investments Pte. Ltd. and Larsen & Toubro Limited etc., which are currently under review.
Whether Notice under Section 6(2) of the Act is to be given prior to consummation of a transaction

The Hon’ble Supreme Court vide its judgement in Civil Appeal 13578/2015 and 10678/2016 held that notice of Section 6(2) is to be given to the Commission prior to consummation of the acquisition, ex-post facto notice is not contemplated under the provisions of Section 6(2), and upheld the order passed by the Commission dismissing the appeal.

The Commission imposed a penalty of Rs. 1 crore under Section 43A of the Act on Thomas Cook as it had failed to notify CCI before executing certain transactions relating to market purchases. COMPAT held that since ‘market purchases’ fell within the ambit of exemption, there was no requirement of notifying the same under Section 6(2). Further, it also held that the notified transactions (deemer and amalgamation) and the non-notified transactions (Share Subscription Agreement, Share Purchase Agreement, Open Offer and the Market Purchases) could not be said to be interdependent on each other. An appeal against the COMPAT’s judgment was filed by the Commission before the Supreme Court.

In another matter the Commission imposed a penalty of Rs. 2 crore under Section 43A of the Act on SCM Soilfert for its failure to comply with notification requirements for acquisition of shares in Mangalore Fertilisers and Chemicals Limited. COMPAT dismissed the appeal vide order dated 30.08.2016 and affirmed the Commission’s order. Against the said dismissal, an appeal was filed by the SCM Soilfert Ltd.

The Supreme Court in its judgement dated 17th April, 2018 laid down that there is no requirement of mens rea under Section 43A or intentional breach as an essential element for levy of penalty. Mens rea assumes importance in case of criminal and quasi criminal liability. The Supreme Court held that when a series of transactions is envisaged to accomplish a combination, all the transactions have to be taken into consideration for notification under Section 6(2). Notification to the Commission should be ex-ante and not ex-post.

Whether the NCLAT is empowered to dismiss the appeal for non-compliance of its direction to deposit the amount of part penalty as a condition for grant of stay

The Hon’ble Supreme Court in its judgement dated 18th May, 2018 held that as per the statutory provisions, NCLAT has no jurisdiction to dismiss the appeal for non-compliance of its direction to deposit the amount of penalty as a condition for grant of stay.

In its final order penalty was imposed by the Commission on M/s. B. Himmatlal Agrawal for bid-rigging in four tenders floated by Western Coalfields Ltd. The order of the Commission was challenged by filing appeal under Section 53B of the Act before the NCLAT by M/s. B. Himmatlal Agrawal. Along with the said appeal, a stay application was also filed. Appeal was admitted. Insofar as stay was concerned, same was proposed to be granted subject to the condition that M/s. B. Himmatlal Agrawal had to deposit 10% of the amount of penalty imposed by the Commission. Said condition was however, not complied with by M/s. B. Himmatlal Agrawal, subsequent to which the appeal was dismissed by NCLAT.

Aggrieved by the same, M/s. B. Himmatlal Agrawal moved the Supreme Court wherein it was held by the Supreme Court that the condition of deposit was attached to the order of stay. In case of non-compliance of the said condition, the consequence would be that stay would cease to operate. However, non-compliance of the conditional order of stay would have no bearing insofar as the main appeal is concerned. Right to appeal is statutorily provided under Section 53B of the Act, which confers a right upon any of the aggrieved parties to prefer an appeal to the Appellate Tribunal. This statutory provision does not impose any condition of
pre-deposit for entertaining the appeal. Therefore, right to file the appeal and to have the said appeal decided on merits, if it is filed within the period of limitation, is conferred by the statute and cannot be taken away by imposing the condition of deposit of an amount leading to dismissal of the main appeal itself if the said condition is not satisfied. Position would have been different if the provision of appeal itself contained a condition of pre-deposit of certain amount, which is not provided so.

It was further held by the Apex Court that the Sub section (3) of Section 53B specifically casts a duty upon the Appellate Tribunal to pass order on appeal, as it thinks fit i.e. either confirming, modifying or setting aside the direction, decision or order appealed against. It is to be done after giving an opportunity of hearing to the parties to the appeal. The Appellate Tribunal, which is a creature of a statute, has to act within the domain prescribed by the statutory provision. Section 53(B) nowhere stipulates that the Appellate Tribunal has the power to direct the party in appeal, to deposit a certain amount as a condition precedent for hearing the appeal.

Whether pre-determination of ‘relevant market’ is mandatory while assessing the violation under Section 3 of the Act

The Hon'ble Supreme Court in its judgement dated 7th March, 2018 passed in Civil Appeal 6691/2014, while dealing with a matter related to alleged cartelisation under Section 3 of the Act observed that it is necessary for the Commission to first define the relevant market in which competition was “effected”, prior to making an assessment of AAEC under Section 3.

The Commission filed a clarification application before the Apex Court asking for clarification to the limited extent that the mandatory pre-determination of ‘Relevant Market’ is not applicable for making assessments for alleged violations under section 3 of the Act.

The Hon'ble Supreme Court in its clarification order dated 7th May, 2018 clarified that determination of ‘relevant market’ is not a mandatory pre-condition for making assessment of the alleged violation under Section 3 of the Act.

Whether persons summoned by the DG are entitled to be accompanied by their advocate

The Division Bench at Delhi High Court vide its judgement dated 24th May, 2018 upheld the right of a person to be accompanied or represented by an advocate during investigation proceedings.

In a suo moto case, summons were issued to Oriental Rubber Private Ltd. by the DG under Section 41(2) read with Section 36(2) of the Act, addressed to its officers, ordering them to appear before the DG.

A Writ petition was filed by Oriental Rubber Pvt. Ltd. before the Delhi High Court wherein it was alleged that the DG does not permit the parties being examined to be assisted by their advocate. Hon’ble Delhi Court held that officials summoned by the DG shall be entitled to be accompanied by the advocate(s).

An LPA was preferred by the Commission before the Delhi High Court on the ground as to “whether a person who has been summoned for investigation has the right to be represented by an advocate”. In its judgement dated 24th May, 2018, the Division Bench held that when the consequences of an enquiry or investigation are severe and drastic, the right of a person to be accompanied or represented by an advocate cannot be extinguished. Therefore, while the party is allowed his right to be accompanied by an advocate, the DG’s investigations are not unnecessarily hindered. However it was also noted that there should not be active participation of a counsel and the counsel should sit at a distance and the witness should be not able to consult her or him.
ECO WATCH

Cross-Border Data Flow and Implications

Data is the lifeblood of the modern global economy, wherein data is collected, stored, processed and analysed to create value. This value is further enhanced when data is allowed to move freely across national borders. However, free flow of data has given rise to a debate on the need for data protection versus benefits of cross-border data flow. Countries across the globe are enacting laws to ensure data protection and consumer privacy, and many of them are embracing ‘data localisation’ by implementing virtual barriers as a means to ensure data security. Some nations base their decisions to erect such barriers on cross-border data flow on the perceived rationale that such flow would impinge on privacy and lead to cybersecurity concerns; others do so for purely mercantilist reasons.

India is also on its way to devise a data protection framework. Justice Sri Krishna Committee, which is expected to soon come out with a data protection framework for India, is supposedly trying to build a consensus on the issue of data localisation. The Reserve Bank of India in its ‘Statement on Developmental and Regulatory Policies’ has already announced, “all payment system operators will ensure that data related to payment systems operated by them are stored only inside the country within a period of 6 months”°. Thus, RBI has already taken a stand for data localisation. However, given the growing digital economy of the country, any move on data localisation warrants careful assessment of its implications.

To create value out of data it is required that data is allowed to move freely. Creating barriers by restricting data flows can undermine a firm’s competitiveness and economic productivity. Though economic productivity is driven by how firms make use of data, but with a data localisation mechanism being in place, the productivity of firms might get compromised, as firms are likely to pay more for data-storage services, especially those in smaller countries (which are not home to a data centre). Such barriers may also prevent companies from transferring data that is needed for day-to-day activities, which means firms may have to pay for duplicate services. Likewise, firms may be compelled to spend more on compliance activities, such as hiring a data-protection officer, or putting in place software and systems to get individuals’ or the government’s approval to

Number of types of data flows localised

Source: www.itif.org

Number of countries having localised data - by type of data

<table>
<thead>
<tr>
<th>Types of Data Blocked</th>
<th>Number of countries blocking</th>
</tr>
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<tbody>
<tr>
<td>Accounting, Tax &amp; Financial</td>
<td>18</td>
</tr>
<tr>
<td>Emerging Digital Services</td>
<td>9</td>
</tr>
<tr>
<td>Government &amp; Public</td>
<td>10</td>
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<tr>
<td>Other</td>
<td>5</td>
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<tr>
<td>Personal</td>
<td>4</td>
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<tr>
<td>Telecommunications</td>
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Source: www.itif.org

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° Point No.4 available at https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/PR264270719E5CB28249D7BCE07C5B3196C904.PDF
transfer data. These additional costs, borne either by the customer or the firm, will undermine the firm’s competitiveness (especially for foreign firms who are at some disadvantage vis-a-vis domestic firms) by cutting into profit margins. This economic impact ripples throughout an economy as barriers to data flows affect data processing and internet services—or any service that depends on the use of data for delivery.7

Data localisation may also lead to reduced access to innovative services and innovation. As data flow brings with it exposure and benefits from the novel ideas, research, technologies, and best practices, data localization may make it more difficult and expensive for domestic firms to have access to them. It also prevents citizens from accessing innovative services. For example, barriers to the exchange of personal medical data, as implemented in Australia, Canada, China, and Russia, could prevent these countries’ citizens from accessing the latest technological advances. Moreover, it will add significant cost to digital infrastructure of the country.

No doubt, data protection law is essential for the country. But it has to be flexible enough to be consistent with India’s economic interests. Ensuring high levels of privacy and holding businesses accountable for ensuring that data is protected in accordance with India’s domestic privacy principles is the way to go. The law must not place undue restrictions on freedom of data movement which is at present very crucial for Indian industries to grow and add value by innovating and competing. The need of the hour is to have a data protection framework that accounts for the Indian specificities and is not a complete replica of the developed international templates.

KNOW YOUR COMPETITION LAW

Delineation of relevant market is not mandatory in cases related to anti-competitive agreements

According to Section 18 of the Act it shall be the duty of the Commission to eliminate practices having adverse effect on competition. In the Competition law regime, competition exists in a market place. The term ‘marketplace’ needs to be defined with even more precision, in terms of a ‘relevant market’, a market where the effect of competition takes place. The Competition Act defines “relevant market” as the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets.

There are two fundamental dimensions of market definition: (i) the product market, that is, which products to group together and (ii) the geographic market, that is, which geographic areas to group together.

The Supreme Court of India in Competition Commission of India v. Co-ordination Committee of Artists and the Technicians of W.B. Film and Television and Ors11 observed that while inquiring into any alleged contravention under Section 3 of the Act (anti-competitive agreements), the Commission needs to first delineate the relevant market and then examine as to whether there exist any anti-competitive agreement in the said relevant market. The Apex Court further observed that even while examining the conduct under Section 3 it is imperative to delineate the relevant market in which competition is affected.

Against the aforesaid observation of Hon’ble Supreme Court a clarificatory application was filed by the Commission. While deciding the said application, the Apex Court12 has clarified that the delineation of relevant market is not mandatory in terms of the statutory scheme of the Act, particularly having regard to the statutory presumption contained in Section 3 of the Act. It is now a settled position that while examining any conduct under Section 3 of the Act, the Commission need not necessarily delineate a relevant market.

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7 Nigel Cory, ‘Cross-Border Data Flows: Where Are the Barriers, and What Do They Cost?’ ITIF
8 Section 2(r)
9 Section 2(t) “relevant product market” means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.
10 Section 2(s) “relevant geographic market” means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.
11 Civil Appeal 6691/2014
12 M.A. in Civil Appeal 6691/2014 order dated 07.05.2018
ENGAGING WITH THE WORLD

Chairperson/Members of the Commission participated in various International Meetings/Conferences, some of which are as follows:

i. Mr Augustine Peter, Member participated in the 66th Annual Antitrust Spring Meeting of American Bar Association (ABA) during 11th-13th April, 2018 in Washington, DC, USA.

ii. Mr. U.C. Nahta, Member and Ms. Jyoti Jindgar, Adviser (Eco) participated in OECD Working Party and Competition Committee meeting during 4th - 8th June, 2018 in Paris, France.

CCI officials participated in various workshops/seminars/meetings, some of which are as follows:

i. Ms. Sayanti Chakrabarti, Joint Director (Economics) participated in ICN-OECD Competition Economics Workshop for Chief and Senior Economists during 2nd - 4th May, 2018 in Seoul, Korea.

ii. Mr. P. K. Singh, Adviser (Law) participated in the 8th St. Petersburg International Legal Forum during 15th-19th May, 2018 in St. Petersburg, Russia.

iii. Mr. Manish Mohan Govil, Adviser (Law) and Mr. Anuj Verma, Deputy Director (FA) participated in Global Antitrust Institute (GAI) Economics Institute for Competition Enforcement Officials 24th -29th June, 2018 in Santa Monica, California, USA.

iv. Ms. Sibani Swain, Advisor (Eco) participated in the 13th CRESSE Annual Conference during 29th June- 1st July, 2018 in Crete, Greece.

FORTHCOMING EVENTS

i. Participation in the inaugural session during ASSOCHAM 3rd Global Summit on Data Protection, Privacy & Security to be held on Friday, 24th August, 2018 at Mumbai.


iii. Participation of CCI officers as judges in the Moot Court Competition to be organised by Institute of Law, NIRM University, Ahmedabad on 2nd September, 2018.

DEVELOPMENTS IN OTHER JURISDICTIONS

KFTC sanctions bid rigging among offshore cable manufacturers in a bid placed by shipbuilding companies (June 15, 2018)

The Korea Fair Trade Commission (KFTC) imposed penalty surcharges of 22.7 billion Won and corrective orders on five offshore cable manufacturers and prosecuted two of them (LS Cable, TMC). As per the facts of the case, five companies including Kukdong Electronic Wire, LS Cable & System, JS Cable, Songhyun Holdings, and TMC were the winning bidders and they bid prices in advance for offshore cables placed by eight shipbuilders including Samsung Heavy Industries from November 2008 to February 2014 to prevent low-priced contracts. The agreed winning bidder decided the winning bid price and shared it with false bidders. The false bidders then carried out the agreement in a way that they made a bid at a higher price than the one made by the winning bidder. KFTC found that these five companies acted hand in gloves and therefore penalty of 22.78 billion Won along with corrective orders were imposed on the companies involved in bid rigging agreement.

Federal Trade Commission requires Generic Drug Marketers Amneal Pharmaceuticals LLC and Impax Laboratories Inc. to divest rights to 10 Generic Medications as condition of merger (April 27, 2018)

The Federal Trade Commission (FTC) has asked generic drug marketers Amneal Pharmaceuticals LLC and Impax Laboratories Inc. to divest their rights and assets for 10 products to other three companies, as a settlement for resolving charges that Amneal’s $1.45 billion acquisition of an equity share in Impax would
The European Commission (EC) made the measures submitted by Greece legally binding under EU antitrust rules to ensure fair access to lignite-fired power generation for the competitors of Public Power Corporation (PPC), the incumbent electricity operator.

In 2008, the EC found that Greece had infringed competition rules by giving the state-owned electricity incumbent, PPC, privileged access rights to lignite, and called on Greece to propose measures to correct the anti-competitive effects of that infringement because it granted and maintained privileged rights to PPC for the exploitation of lignite in Greece. This resulted in an inequality of opportunity between economic operators as regards access to primary fuels (i.e. lignite) for the production of electricity and enabled PPC to maintain or reinforce its dominant position on the Greek wholesale electricity market by excluding or hindering market entry by competitors.

The EC has concluded that the final version of the remedies submitted by Greece fully addresses the infringement identified by the EC. The remedies aim at removing the privileges created by the special access rights granted to PPC i.e. that PPC will divest the lignite-fired units of Meliti (including the licensed unit of Meliti 2) and Megalopoli 3 and 4. The divestiture will include also the necessary employees and lignite mines.

In order to increase competition in the Greek market, PPC’s competitors need to have access to base-load capacity, which in Greece is still significantly dependent on lignite, in particular during off-peak periods. More access to lignite-fired electricity generation capacity will help to increase the competitive pressure in the Greek wholesale market and to address the enduring distortions in favour of PPC.

At the same time, by divesting existing lignite-generation capacity and avoiding the further opening and exploitation of new lignite mines, the remedies also take into account Greece’s environmental policy and the EU’s 2020 objectives to reduce CO\textsubscript{2} emissions. On the basis of these proposed measures, PPC will launch a tender procedure for the divestment of the plants by May 2018.

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**European Commission approves Greek measures to ensure fair access to lignite-fired electricity generation for PPC’s competitors (April 17, 2018)**

The European Commission (EC) made the measures submitted by Greece legally binding under EU antitrust rules to ensure fair access to lignite-fired power generation for the competitors of Public Power Corporation (PPC), the incumbent electricity operator.

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**European Commission imposes binding obligations on Gazprom to enable free flow of gas at competitive prices in Central and Eastern European gas markets (May 24, 2018)**

EC has adopted a decision imposing on Gazprom a set of obligations that address the EC’s competition concerns and enable the free flow of gas at competitive prices in Central and Eastern European gas markets, to the benefit of European consumers and businesses.

Gazprom is the dominant gas supplier in a number of Central and Eastern European countries. The EC’s preliminary view was that the company breached EU antitrust rules by pursuing an overall strategy to partition gas markets along national borders in eight Member States (Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia) which enabled it to charge higher gas prices. The EC imposed on Gazprom a detailed set of rules that will significantly change the way Gazprom operates in Central and Eastern European gas markets particularly as it will ensure:
• No more contractual barriers to the free flow of gas
• Obligation to facilitate gas flows to and from isolated markets
• Structured process to ensure competitive gas prices
• No leveraging of dominance in gas supply;

These obligations address the EC's competition concerns and achieve its objectives of enabling the free flow of gas in Central and Eastern Europe at competitive prices.

Therefore, the EC has decided to make these obligations (so-called "commitments") legally binding on Gazprom, and on breach of which EC can impose a fine of up to 10% of the company's worldwide turnover, without having to prove an infringement of EU antitrust rules.

ADVOCACY INITIATIVES

Advocacy Initiatives with Central Government, State Governments and PSUs

i. Mr. Manoj Pandey, Adviser delivered lecture during Workshop on Governance and Integrity Issues in Public Procurement organised by World Bank at New Delhi on 3rd April, 2018.

ii. Mr. Manish Mohan Govil, Adviser delivered lecture in Training programme at National Academy of Audit and Accounts, Shimla on 5th April, 2016.


iv. Mr. Manish Mohan Govil, Adviser delivered lecture during Training on Public Procurement and bid rigging at National Academy of Customs, Indirect taxes and Narcotics (NACIN), Faridabad on 23rd April, 2018.

Advocacy Initiatives with Universities/Institutes

i. Dr. Bidyadhar Majhi, Director was judge for the finals and Mr. K.P. Anand, Dy Director & Mr. Yogesh Dubey, Dy Director were judges for semi-finals for Moot Court Competition organised by Rajiv Gandhi National University of Law (RGNUL), Patiala from 30th March to 1st April, 2018.

ii. Mr. Nandan Kumar, Joint Director delivered lecture on Competition Law & Policies during workshop organised by National Law University and Judicial Academy (NLUJA), Assam at Guwahati on 4th May, 2018.

iii. Ms. Sibani Swain, Adviser and Mr. Nandan Kumar, Joint Director, CCI visited National Academy of Legal Studies and Research (NALSAR) University of Law, Hyderabad on 23rd June, 2018 for discussion on the draft study material for administrative and judicial academies.

Internship Initiatives

27 students interned during the months of April-June, 2018.
i. CCI organized lecture by Shri Junaid Kamal Ahmad, India Country Director, The World Bank on the topic ‘Service Delivery in India’s Federal System’ under the Distinguished Visitor Knowledge Sharing Series (DVKS) on 6th April 2018 at CCI.

ii. Chairperson, CCI delivered keynote address during a seminar on ‘Interplay of Competition Law and Intellectual Property Law’ organized by Public Affairs Forum of India (PAFI) with knowledge partners J. Sagar & Associates and K & S Partners on 20th April 2018 at India Habitat Centre, Delhi.

iii. 1-day In-house Induction Training Programme (1st of 2018-19) conducted by Capacity Building Division (CBD) on 23rd April 2018 for thirteen (13) newly recruited officers/ RAs of the Commission.

iv. CBD organized a Peer to Peer session on the recent order passed by CCI against ‘Google’ by Dr. K. D. Singh, Joint Director (Law) and Smt. Sayanti Chakrabarti, Joint Director (Eco) on 8th May 2018 at CCI.

v. Chairperson, CCI participated as Chief Guest and delivered speech during Inaugural Session of the National Summit on ‘Data Protection, Privacy & Security in the World of Digital Economy’ organized by ASSOCHAM on 11th May 2018 at Hotel Le Meridien, New Delhi.

vi. CBD organized a Peer to Peer session on the topic ‘Digital Payment System in India’ by Sh. Shekhar, Joint Director (FA) on 1st June, 2018 at CCI.

vii. CCI in collaboration with Indian Institute of Corporate Affairs (IICA) conducted 12-day residential induction training programme for 17 newly joined officers from the 6th round of Direct Recruitment/ deputation during 18th-29th June, 2019 at IICA campus, Manesar.
MISCELLNEOUS

DO IT YOURSELF (DIY)

A notifiability check for Mergers & Acquisitions under the Competition Act, 2002

Supplementing the Government of India’s vision for e-governance and Digital India Programme, the Competition Commission of India has launched an online guidance system for determining the notifiability of mergers and acquisitions (combinations) in terms of the Competition Act, 2002. The guidance system has been named as “Do it yourself (DIY): A notifiability check for mergers & acquisitions under the Competition Act, 2002”.

The online guidance system has been launched as part of CCI’s outreach initiatives and measures to simplify compliance requirements regarding combinations. The interactive online application has been developed based on relevant provisions of the Competition Act, 2002, relevant regulations issued thereunder and exemption notifications issued by Ministry of Corporate Affairs.

Filing a notice for a combination which meets jurisdictional thresholds is mandatory under Section 6(2) of the Act. Failure to notify would attract a penalty, under Section 43A of the Act, which may extend to one per cent of the total turnover or assets of the combination, whichever is higher.

This application envisages a staged process to guide the stakeholders in determining whether a merger/acquisition is notifiable to CCI.

CCI’S NATIONAL ESSAY COMPETITION, 2017-18

The Competition Commission of India organised a National Level Essay Competition for students across India. The topics for the essay were:

a) Growth of digital economy – a challenge for competition regulators; or

b) Eight years of competition law enforcement in India

The entries were invited under the following two categories:

Category I: Students pursuing Under-Graduate courses – including students in first 3 years of an Integrated PG course including CA/CS/CMA;

Category II: Students pursuing Post-Graduate degrees including PG Diploma/M.Phil./Ph.D./CA/CS/CMA/ MBA.

Enthusiastic responses from students of various colleges, universities and institutes were received. Five best entries (first, second, third and 2 consolation prizes) from each category were awarded with cash prizes and certificates.

The following were the winners of the Essay Competition, 2017-2018

<table>
<thead>
<tr>
<th>S. N.</th>
<th>Ranking/ Prize</th>
<th>Category I</th>
<th>Category II</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>First</td>
<td>Sumit Singh Bhadoria</td>
<td>Akash Krishnan</td>
</tr>
<tr>
<td>2</td>
<td>Second</td>
<td>Fathima Parvin Siddiq</td>
<td>Torsha Sarkar</td>
</tr>
<tr>
<td>3</td>
<td>Third</td>
<td>Awadh Kishore</td>
<td>Rajat Srivastava and Ankur Nanda</td>
</tr>
<tr>
<td>4</td>
<td>Consolation</td>
<td>Shrvani Sakpal and Namrita Bipin Nayak</td>
<td>Mariyam Quadir</td>
</tr>
<tr>
<td>5</td>
<td>Consolation</td>
<td>Binit Agrawal</td>
<td>Abhishek Tripathi</td>
</tr>
</tbody>
</table>
Shri Rajiv Mehrishi, the Comptroller & Auditor General of India delivering the 9th Annual Day Lecture

Shri Injeti Srinivas, Secretary, Ministry of Corporate Affairs addressing the audience on the occasion of 9th Annual Day of Competition Commission of India

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Please visit www.cci.gov.in for more information about the Commission.
For any query/comment/suggestion, please write to advocacy@cci.gov.in

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