

Contents

Enforcement

High Courts

- Delhi High Court upholds CCI's investigation against WhatsApp and Facebook
- Karnataka High Court upholds CCI's investigation against Intel Corporation

National Company Law Appellate Tribunal

- NCLAT upholds CCI order dismissing case against home automation solution companies for alleged anti-competitive practices
- NCLAT upholds CCI order dismissing case against Whatsapp for alleged abuse of dominant position

Competition Commission of India

Enforcement

- CCI dismisses case against Asian Paints for indulging in alleged anti-competitive practices

Merger Control

- CCI imposes a penalty on Global Infrastructure Partners for *gun jumping*
- CCI approves acquisition of additional voting rights of ReNew by CPPIB
- CCI approves acquisition of minority shareholding of CitiusTech by Bain Capital group
- CCI approves acquisition of minority shareholding of Hitachi Construction Machinery by HCJI

Miscellaneous

- CCI releases findings in relation to its study on taxi and cab aggregator industry
- Competition (Amendment) Bill heads to Parliament

High Courts

Delhi High Court upholds CCI's investigation against WhatsApp and Facebook

The Delhi High Court dismissed the writ petitions filed by Whatsapp LLC and Facebook Inc. *inter alia* challenging the order passed by the Competition Commission of India (“**CCI**”), directing investigation against it for alleged abuse of dominant position. For a detailed analysis, please refer to the [JSA Prism of August 30, 2022](#)

(Source: DHC Judgment dated August 25, 2022)

Karnataka High Court upholds CCI's investigation against Intel Corporation

The Karnataka High Court (“**KHC**”) dismissed the writ petition (“**Writ Petition**”) filed by Intel Technology India Private Limited and Intel Corporation (together referred to as “**Intel**”) *inter alia* challenging the order passed by the CCI, directing investigation against it for alleged abuse of dominant position.

Brief Background

Matrix Info Systems Private Limited (“**Matrix**”)¹ filed a complaint before the CCI alleging that Intel *inter alia* abused its dominant position as Intel’s warranty policy mandated that it will only provide a warranty for those boxed micro-processors (“**Product**”) that are bought from its authorised Indian distributors, within India (“**Warranty Policy**”). Thus, a warranty was not available if the Product was purchased from any country other than India (such as from the importers like Matrix). On August 9, 2019, the CCI passed a [prima facie order](#) (“**Prima Facie Order**”) ordering investigation against Intel.

Aggrieved by the Prima Facie Order, Intel filed a writ petition challenging the Prima Facie Order before the KHC. Intel after placing reliance on the decision of the CCI in *Ashish Ahuja v Snapdeal*² and the decision of the Delhi High Court in *Kapil Wadhwa v Samsung Electronics Co. Limited*³ argued that, to protect brand image and goodwill of the manufacturer, it is justified if warranty is only provided if the products are sourced from the authorised distributors of the manufacturer, in India. Intel changed its Warranty Policy in consonance with the observations made by the authorities in the said cases. Accordingly, the Prima Facie Order is in derogation of these previous cases and violates the principles of ‘precedent and legal certainty’.

KHC Decision

The KHC dismissed the writ petition and *inter alia* held that: (a) Intel’s reliance on the previous cases is incorrect because of different facts. In the Ashish Ahuja case (*supra*), the products were sourced from unauthorized distributors whereas the Kapil Wadhwa case (*supra*) involved issues arising from the Trademarks Act, 1999; and (b) the CCI is a statutory expert body that takes institutional decisions, and courts exercising writ jurisdiction do not have expertise in matters like this and should not interfere in such investigations.

While dismissing the writ petition, the KHC also imposed a cost of INR 10,00,000 ⁴ (Indian Rupees ten lakhs) on Intel payable to the CCI for filing a frivolous writ petition and making an attempt to scuttle the CCI proceedings.

(Source: KHC Judgment dated August 23, 2022)

¹ It is engaged in the import and sale of information technology products from authorised sources of Intel abroad for sale in India.

² Case No. 17/2014

³ (2012) SCC Online DEL 5172

⁴ Approx. USD 12,513 (US Dollar twelve thousand five hundred thirteen) (USD 1 = INR 79.92)

National Company Law Appellate Tribunal

NCLAT upholds CCI order dismissing case against home automation solution companies for alleged anti- competitive practices

The National Company Law Appellate Tribunal (“NCLAT”) dismissed the appeal filed by Sun Electronics Private Limited (“Appellant”) against Electek Solutions Private Limited⁵, Miantic AV Distribution Private Limited⁶, RTI India Private Limited, and Remote Technologies Incorporate⁷ (collectively referred to as the “Respondents”), *inter alia* alleging anti-competitive practices by the Respondents, under Sections 3(3) and 4 of the Competition Act, 2002 (“Competition Act”).

Brief Background

The CCI received a complaint from the Appellant, alleging that the Respondents: (a) indulged in cartelisation, wherein they restricted the supply of home automation solutions to the Appellant; and (b) abused their dominant position in the market for supply and installation of home automation solutions, as they refused to provide the said services to the Appellant.

The CCI, *vide* order dated [April 22, 2019](#), dismissed the case *inter alia* noting that: (a) the Appellant failed to furnish any evidence which shows that there was a cartel agreement amongst the Respondents; and (b) Section 4 of the Competition Act does not envisage the concept of collective dominance. In any event, the Respondents are not dominant as multiple players are present in the market for supply and installation of home automation solutions in India (“CCI Order”).

NCLAT Observations:

Aggrieved, the Appellant challenged the CCI Order before the NCLAT. The NCLAT dismissed the appeal and held that the issues raised by the Appellant are consumer issues and therefore, not governed by the provisions of the Competition Act. Further, the CCI has rightly held that the Respondents are not dominant in the market for the supply and installation of home automation solutions in India.

(Source: *NCLAT judgment dated August 29, 2022*)

NCLAT upholds CCI order dismissing case against Whatsapp for alleged abuse of dominant position

The NCLAT dismissed the appeal against Whatsapp LLC (“WhatsApp”) *inter alia* alleging abuse of dominant position under Section 4 of the Competition Act.

Brief Background

The CCI received a complaint from the appellant⁸ against WhatsApp *inter alia* alleging that it abused its dominant position by introducing changes to its privacy policy which compels users of WhatsApp to share their account details and other information with its parent company, Facebook Inc. (“Facebook”).

The CCI *vide* its order dated [June 1, 2017](#), dismissed the case against WhatsApp noting that even though WhatsApp enjoyed a dominant position, it has not abused its dominant position since: (a) the privacy policy was updated to *inter alia* improve online advertisement and product experience available on users’ Facebook page and securing systems, fighting spam or

⁵ It is engaged in the business of manufacturing, installing, programming and commissioning of home automation solutions services.

⁶ It is the sole distributor and authorized dealer of RTI India Private Limited.

⁷ It is engaged in the business of supplying products manufactured by Electek Solutions Private Limited, in India.

⁸ Shri Vinod Kumar Gupta, a Chartered Accountant representing a society, named, ‘Fight for Transparency Society’

infringement activities; (b) all types of ‘WhatsApp’ communication (chats, calls, videos) are protected by way of encryption so that WhatsApp can neither read them nor share the same with Facebook; and (c) the users had an option to opt-out of this sharing arrangement within 30 (thirty) days of agreeing to the updated terms of service and privacy policy.

NCLAT Observations

The NCLAT agreed with the findings of the CCI and dismissed the appeal and *inter alia* held that it was not mandatory for the users to accept the updated terms and conditions of the privacy policy as they had an option to opt out of it. Further, WhatsApp has implemented a use control which gives the users the choice not to allow their account information to be used by Facebook without their consent.

(Source: *NCLAT Judgment dated August 10, 2022*)

Competition Commission of India

Enforcement

CCI dismisses case against Asian Paints for indulging in alleged anti-competitive practices

The CCI received 2 (two) separate complaints from JSW Paints Private Limited⁹ (“**JSW Paints**”) and Sri Balaji Traders¹⁰ against Asian Paints Limited¹¹ (“**Asian Paints**”) (collectively referred to as the ‘**Complainants**’) for indulging in alleged anti-competitive practices, in violation of Sections 3(4) and 4 of the Competition Act.

The Complainants *inter alia* alleged that Asian Paints abused its dominant position by restricting its dealers of decorative paints from stocking products of JSW Paints. If the dealers did not comply, Asian Paints threatened to stop supply or reduce their incentives or credit limit. As a result, many of these dealers stopped dealing with JSW Paints. Such practices are in the nature of exclusive supply arrangements and refusal to deal and cause an appreciable adverse effect on competition.

The CCI, after forming a *prima facie* view of contravention, directed the Director General (“**DG**”) to investigate the alleged conduct of Asian Paints. The DG noted that Asian Paints is dominant in the market for the manufacture and sale of decorative paints in the organised sector in India (“**Relevant Market**”) with a market share of approximately 39%, amongst other factors. The DG *inter alia* noted that Asian Paints: (a) did not abuse its dominant position as JSW Paints added more dealers to its network as compared to Asian Paints in 2019-2020 and 2020- 2021; (b) 15 (fifteen) out of 1378 (one thousand three hundred seventy eight) common dealers of JSW and Asian Paints who alleged that Asian Paints was not allowing them to stock JSW Paint’s products could not substantiate the allegations with evidence; (c) did not impose any restrictions on the dealers. In a few instances, the credit limit of a dealer was reduced on account of unpaid accumulated dues by a such dealer over a long period of time.

The CCI agreed with the findings of the DG and noted that Asian Paints did not abuse its dominant position as JSW Paints was able to add 1591 (one thousand five hundred ninety one) dealers as against 1217 (one thousand two hundred seventeen) dealers added by Asian Paints. Out of 1591 (one thousand five hundred ninety one) dealers, 1378 (one thousand three hundred seventy eight) dealers (i.e., 86.6%) also dealt with Asian Paints products.

⁹ It is a part of the JSW group of companies, which is engaged in several sectors, including steel, energy, cement, etc. JSW Paints was incorporated in the year 2016 and launched its decorative paints in May 2019 in Bengaluru and Hubli in Karnataka.

¹⁰ It is a dealer of decorative paints.

¹¹ It is a listed company and is primarily engaged in the manufacture and sale of decorative and industrial paints.

With respect to vertical restraints, the CCI noted that reduction in credit limit or stoppage of supplies to dealers by Asian Paints was not because of the said dealer dealing in the competitor's products but was based on the performance of the dealer. Accordingly, the CCI dismissed the case.

(Source: CCI order dated September 8, 2022)

Merger Control

CCI imposes a penalty on Global Infrastructure Partners for gun jumping

The CCI imposed a penalty of INR 30,00,000 (Indian Rupees thirty lakhs)¹² on Global Infrastructure Partners India Private Limited ("**GIP**") for failing to notify its acquisition of the India Infrastructure Fund and the India Infrastructure Fund II (collectively referred to as "**Target Funds**")¹³ of IDFC Alternatives Limited¹⁴ (referred to as the "**Transaction**").

On July 1, 2018, GIP consummated the Transaction without seeking CCI approval for the same. On December 29, 2021, the CCI issued a show cause notice to GIP asking it to explain why the Transaction was not notified for its approval. The CCI *inter alia* noted as follows:

1. GIP contended that at the time of the Transaction, the asset and turnover of the Target Funds did not breach the financial thresholds prescribed under Section 5 of the Competition Act ("**Section 5 Thresholds**"), and the *de minimis* exemption.¹⁵ The CCI rejected the contention and noted that as a result of the Transaction, GIP became the investment manager of the Target Funds and also acquired control over the portfolio companies where such funds have shareholding and/or contractual rights. Hence, for the purpose of computing thresholds, the value of assets and turnover of the controlled portfolio companies of the Target Funds will also need to be considered. In the instant case, the value of assets and turnover of some of the portfolio companies of the Target Funds exceeded the Section 5 Thresholds and *de minimis* exemption. Accordingly, the Transaction ought to have been notified to the CCI.
2. GIP contended that the CCI cannot look into the Transaction as it was closed almost 4 (four) years ago and the proviso to Section 20(1) of Competition Act¹⁶ provides that the CCI shall not initiate any inquiry into a combination after the expiry of 1 (one) year from the date on which such combination has closed. The CCI rejected the contention and noted that the proceedings against GIP were initiated not only under Section 20(1) but also under Section 43A of the Competition Act. The period of limitation under Section 20(1) is not applicable to proceedings under Section 43A of the Competition Act.

The CCI while computing the penalty took into consideration mitigating factors like the cooperation extended by GIP and admitting to the contravention. Accordingly, the CCI imposed a total penalty of INR 30,00,000 (Indian Rupees thirty lakhs)¹⁷.

(Source: CCI Order dated 30 August 2022)

¹² Approx. USD 37,663 (US Dollar thirty-seven thousand six hundred sixty-three)

¹³ Including the acquisition of: (a) the infrastructure fund management business involving rights to act as investment manager to the Target Funds; (b) certain identified assets and liabilities; and (c) the team associated with managing the abovementioned funds.

¹⁴ It was engaged in investment management. It offered portfolio and risk management, investment banking and advisory services

¹⁵ <https://www.cci.gov.in/search-filter-details/3880>

¹⁶ Section 20(1) of the Competition Act: *The Commission may, upon its own knowledge or information relating to acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of section 5 or merger or amalgamation referred to in clause (c) of that section, inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India: Provided that the Commission shall not initiate any inquiry under this subsection after the expiry of one year from the date on which such combination has taken effect.*

¹⁷ Approx. USD 37,663 (US Dollar thirty-seven thousand six hundred sixty-three)

CCI approves acquisition of additional voting rights of ReNew by CPPIB

The CCI approved the acquisition of additional voting rights of ReNew Energy Global plc (“**ReNew**”) by Canada Pension Plan Investment Board (“**CPPIB**”)¹⁸ (referred to as the “**Proposed Transaction**”).¹⁹

Presently, CPPIB holds less than 25% voting rights in ReNew. ReNew, will buy-back its shares from the open market (“**Buy-back**”), as a result of which, CPPIB’s voting rights in ReNew will increase to 25%-30%.

CPPIB contended that the Proposed Transaction is only being notified to the CCI by way of abundant caution as Buy-back does not require notification to the CCI unless it leads to an acquisition of control. However, the CCI rejected this contention and noted that acquisition of shares or voting rights exceeding 25% in ReNew will confer joint (negative) control to CPPIB since it will be able to block special resolutions of ReNew.

The CCI noted that there are horizontal overlaps between the activities of the parties²⁰ in the market for power generation and its sub-segments. However, given the low market shares of the parties with the presence of several significant players, the CCI noted that the Proposed Transaction is not likely to raise competition concerns.

Further, the CCI noted that there is a vertical relationship between the activities of the parties in the upstream market for power generation²¹ and the downstream market for transmission of power²², in India. However, given the insignificant volume of power procured by CPPIB from ReNew, the same is not likely to raise foreclosure concerns.

(Source: CCI order dated 15 July 2022)

CCI approves acquisition of minority shareholding of CitiusTech by Bain Capital group

The CCI approved the acquisition of 30% shareholding of CitiusTech Healthcare BV²³ (“**CitiusTech**”) by the Bain Capital group²⁴ (referred to as the “**Proposed Transaction**”).

The CCI noted that there are horizontal overlaps between the activities of the parties²⁵ in the: (a) broad market for provision of Information Technology (“**IT**”) and IT enabled Services; (b) narrow market for provision of IT implementation services in India; and (c) narrowest market for the IT implementation services to the healthcare segment in India. However, given the low market shares of the parties with the presence of several significant players in each of the relevant markets, the CCI noted that the Proposed Transaction is not likely to raise competition concerns.

(Source: CCI order dated July 15, 2022)

¹⁸ It is a professional investment management organization that invests the funds transferred to it by the Canada Pension Plan Fund. It has a stake in companies having a presence in India that are engaged in the generation of power through solar energy or transmission of power and procure power from subsidiary(ies) of ReNew.

¹⁹ It (including its subsidiaries and joint ventures) is engaged in the business of generating electricity through non-conventional and renewable energy sources. ReNew also provides certain ancillary/incidental services such as EPC services, intelligent energy solutions for public utilities, and commercial and industrial customers.

²⁰ CPPIB group (through its portfolio companies) and ReNew

²¹ Through ReNew

²² Through L&T Infrastructure Development Projects Limited

²³ It is solely controlled by funds managed or advised by Baring Private Equity Asia (“**BPEA**”) and is not engaged in any business activities.

²⁴ Through India RF Mauritius Investment 3 (“**InvestCo**”). InvestCo is an investment vehicle incorporated by Bain Capital group for the purpose of the Proposed Transaction.

²⁵ Portfolio companies of Bain Capital group and Citius Tech.

CCI approves acquisition of minority shareholding of Hitachi Construction Machinery by HCJI

The CCI approved the acquisition of 26% shareholding of Hitachi Construction Machinery Co., Limited (“**HCM**”)²⁶ by HCJI Holdings G.K. (“**HCJI**”)²⁷ (referred to as the “**Proposed Transaction**”).

The CCI noted that there is an existing vertical/complimentary overlap between the activities of the parties²⁸ in the upstream market for the import of construction machinery spare parts (i.e., control valves) for a specific original equipment manufacturer (“**OEM**”)²⁹ and the downstream market for manufacturing, sale and service of mining and construction machinery, transportation machinery, and other machines and devices in India.³⁰ However, given the insignificant revenue³¹ generated by the acquirer group³² from the supply of control valves, the same is not likely to raise foreclosure concerns.

(Source: CCI order dated May 30, 2022)

Miscellaneous

CCI releases findings in relation to its study on taxi and cab aggregator industry

On September 9, 2022, the CCI released its findings on a market study on competition and regulatory issues related to the taxi and cab aggregator industry (“**Report**”). The Report broadly focuses on: (a) personalised pricing; (b) surge pricing; and (c) transparency in relation to pricing structure and fare calculation. The key findings are as follows:

1. **Personalised Pricing:** When computing the base and total fare for a ride, the cab aggregators take into account several factors such as distance travelled, number of trips, type of ride, mode of payment, nature of mobile handset used, city *etc.* and also depend on market dynamics in terms of vehicle optics (fuel, maintenance, insurance, etc.), demand and supply situation and traffic situation (ride time fare). The CCI noted that personalised pricing may not lead to adverse impact on consumer welfare or raise any competition concerns.
2. **Surge Pricing:** The cab aggregators indulge in surge pricing, however there is ambiguity in terms of drivers’ knowledge of surge and the exact component of surge being shared with the drivers by the cab aggregators. The CCI noted that if there is transparency on the surge being charged, it may reduce the ambiguity and lead to better functioning of the markets and incentivise drivers to increase supply. The CCI also noted that dynamic pricing may be an intrinsic feature of such markets and not necessarily counter-productive, however it is necessary to address irregularities through regulation.
3. **Non-transparency:** There is a lack of transparency in the cab aggregator industry. The CCI noted that the Motor Vehicle Guidelines 2020 states that cab aggregators need to ensure transparency in their operations, however, since they are model guidelines the implementation of the same rests with the state governments. Additionally, it may be important to sensitize technology experts to be cautious while designing algorithms so that they are not prone to collusion, which is the approach international regulatory authorities are considering as well.

²⁶ It is a construction equipment company.

²⁷ It is a 50:50 joint venture between Citrus Investment LLC (“**Citrus**”) and HCJ Holdings 2 G.K. (“**HCJ II**”). Citrus is a wholly owned subsidiary of Itochu Corporation (“**Itochu**”). Itochu is involved in the import of construction machinery spare parts (i.e., control valves) to a certain OEM, as part of its trading company operations. HCJ II is a newly established Japanese special purpose company.

²⁸ HCJI group and HCM.

²⁹ Through Itochu, the holding company of Citrus.

³⁰ Through HCM.

³¹ Less than 0.01% of Itochu’s revenue for financial year 2020-21.

³² Through Itochu.

The CCI recommended that: (a) there should be transparency regarding the total fare and all of its components; (b) quantum of surge and sharing the same among drivers and cab aggregators; and (c) cab aggregators must convey their actual adopted business practice more clearly to passengers and drivers.

Based on the Report, the CCI has issued self-regulatory measures for cab aggregators as set out below:

1. **Calculation of fares:** (a) set out a general description of various components of total fare and reflect any changes in a timely manner on the website and mobile application of cab aggregator; (b) provide a break-up of total fare to appropriately reflect the surge component in the invoice sent to passengers and drivers; (c) set out a clear and transparent cancellation policy.
2. **Surge pricing:** (a) formulate clear and transparent policy on surge pricing, share the same with the passenger and driver, and reflect any change in a timely manner; and (ii) reflect the surge charged in the invoice.
3. **Collection, use and data sharing:** set out a clear and transparent policy on data that is collected on the platform, the sharing of such data (actual and potential) with third parties or related entities, the scope, extent and purpose for collecting the data and reflect any changes in a timely manner.
4. **Non-Discriminatory Allocation of rides:** cab aggregator platforms must not give preference to the vehicles owned (directly or indirectly) by the cab aggregator while allocating the rides among available cabs *via* the algorithm.

(Source: Report and Self-Regulatory Measures dated September 9, 2022)

Competition (Amendment) Bill heads to Parliament

In February 2020, the Ministry of Corporate Affairs released the draft Competition (Amendment) Bill 2020 inviting public comments on the proposed amendments to Competition Act. After 30 (thirty) months, on August 5, 2022, the [Competition Amendment Bill 2022](#) (“**Bill**”) was introduced in the Lower House (Lok Sabha) of the Parliament.

The Bill proposes far-reaching amendments to the Indian competition law including the introduction of: (a) ‘deal value’ criterion for mergers & acquisitions (“**M&A**”); (b) shortening of M&A review timelines; (c) settlement and commitment procedure for non-cartel cases; and (d) leniency plus. For a detailed analysis, please refer to the [JSA Prism of August 9, 2022](#).

(Source: Competition Amendment Bill 2022)

Competition Practice

Since the inception of the Indian competition regime, JSA has been a one-stop shop for all types of competition and anti-trust-related matters with its dedicated competition law practice group. The team's in-depth understanding of the competition law, coupled with its commercially focused litigation skills has been the cornerstone on which it deals with matters relating to cartelisation (including leniency), abuse of dominance, vertical agreements, and dawn raid before the Competition Commission of India and appellate courts. The team regularly advises clients on general competition law issues arising from day-to-day business strategies and conducts competition compliance training for clients. Given the team's continued involvement with the regulator, coupled with its balanced and practical approach to competition law, it has been instrumental in shaping the competition law jurisprudence in India.

Over the years, the team has developed a reputation of not only being well regarded by its peers but also for having developed a good working relationship with the regulatory authorities. As such our lawyers have been involved in drafting statutory regulations and have represented the Indian competition law fraternity at various competition law seminars, workshops, and advocacy & public awareness programs across the world. The team's expertise (including team members) has been widely recognised by various leading international rankings and publications including Chambers and Partners, Who's Who Legal, Global Competition Review, Benchmark Litigation, Asialaw, and the Legal 500.

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14 Practices and
23 Ranked Lawyers



15 Practices and
18 Ranked Lawyers



7 Practices and
2 Ranked Lawyers



11 Practices and
39 Ranked Partners
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